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Leading by Example: An Holistic Approach to Individual Disparate Treatment Law

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In *Reeves v. Sanderson Plumbing Products, Inc.*,[1] the Supreme Court overturned the Fifth Circuit's approach to the *McDonnell Douglas*[2] method of analyzing individual disparate treatment discrimination cases. *McDonnell Douglas* is a process of elimination in which circumstantial evidence is used progressively to eliminate possible explanations for the employer's action other than discrimination. Negating all those nondiscriminatory explanations as substantial reasons for the employer's action leaves a record devoid of any real reason other than discrimination. Based on the absence of any nondiscriminatory reason, the factfinder is asked to decide whether it is reasonable to draw the positive inference that it was the defendant's intent to discriminate that played a role in, and was the determinative influence in the defendant's decision.[3] The approach of the Fifth Circuit had instead been to progressively eliminate plaintiff's evidence by slicing and dicing it into discrete parts and then rejecting the probative value of each part because, by itself, that part did not prove intent to discriminate.[4] Having rejected the probative value of most of plaintiff's evidence, the court's "pretext-plus" rule, requiring additional evidence to prove discrimination, was simply another way of saying that plaintiff had not introduced sufficient evidence to prove discrimination. Thus, it was warranted to grant defendant's motion for summary judgment so the case would not go to the jury—or for judgment as a matter of law overturning a verdict for the plaintiff if the case had been sent to the jury.

Underpinning the lower court's pretext-plus rule, as well as its failure to evaluate all of plaintiff's evidence including evidence proving his prima facie case, evidence of age-related comments made by a manager involved in his discharge as well as other circumstantial evidence that supported drawing an inference of intent to discriminate—was the implicit rejection

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of the use of circumstantial evidence as a way to prove discrimination. This rejection was tantamount to overturning *McDonnell Douglas*.

Just as the Fifth Circuit implicitly rejected the idea that circumstantial evidence could be used to prove discrimination, so too the Supreme Court's rejection of that assumption was implicit in the approach it took to reviewing the evidence in the record in the case. Thus, the greater significance of the Supreme Court's decision lies in the way the Court reviewed the evidence in the record in a *McDonnell Douglas* case. The Supreme Court, by the example it set, has refocused *McDonnell Douglas* to the evidence in the record and away from the legal formulas that had come to dominate the way courts have looked at disparate treatment cases. If the lower courts follow the example set by the Supreme Court,[5] the law of individual disparate treatment discrimination will enter a new era in which the focus of litigation will shift to an holistic view of all the circumstantial evidence and drawing all reasonable inferences on it rather than the intricate legal formulas that some courts had been using.

Part I of this paper will discuss the approach of the Fifth Circuit that came close to eliminating the possibility of using the *McDonnell Douglas* method of analyzing individual disparate treatment cases. Part II will demonstrate how the Supreme Court's rejection of the Fifth Circuit's slicing and dicing approach to circumstantial evidence reinvigorates *McDonnell Douglas* by rejecting the lower court's formulaic approach that obscured the fact that circumstantial evidence can be key to prove the intent of the defendant to discriminate. Part III will discuss whether *Reeves* solves the problems that have plagued the *McDonnell Douglas* approach. My conclusion is that *Reeves* does go a long way to putting the law of individual disparate treatment back on track as a functional method to help remedy discrimination. If I am right, *Reeves* is an important step forward.

I. THE FIFTH CIRCUIT DECISION IN *REEVES*

The Fifth Circuit's decision in *Reeves v. Sanderson Plumbing Products, Inc.*[6] is a good example of how difficult it had become in some courts to prove discrimination using circumstantial evidence and relying on the *McDonnell Douglas* method of analysis. Looking at the whole case, it appeared a strong one for the plaintiff, yet the Fifth Circuit granted a motion for judgment as a matter of law, thereby overturning a jury verdict for the plaintiff. Plaintiff, age fifty-seven when he was discharged, had worked for the company for forty years and had for many years been the supervisor of the regular production line in the department that made hinges for toilet seats.[7] By the time of trial, the employer had tried without much success three different replacements, all much younger than plaintiff.[8] Based on that, the employer conceded that plaintiff had established a prima facie case of age discrimination because he was discharged, qualified, in the protected class, and replaced by someone outside the protected class.[9] Defendant claimed that the reason for plaintiff's discharge was his shoddy recordkeeping of the time

cards of the employees under his supervision.[10] Additionally, defendant introduced evidence that three managers were involved in the decision to discharge plaintiff, two of whom were at least age fifty, that many managers were over fifty and that, at the same time plaintiff was discharged, a thirty-five-year-old supervisor was also accused of inaccurate record-keeping.[11] To show that the employer's reason was not the real reason for his discharge, plaintiff introduced evidence that his record-keeping was not shoddy, and that the employer had changed its reason from the time he was discharged to the time of trial.[12] The defendant initially focused on alleged errors that allowed one particular employee in plaintiff's department to be overpaid, but, after plaintiff proved that he was not at work on the days in question so he could not have made the alleged errors, the employer changed its reason to the more general question of his recordkeeping.[13] Further, plaintiff introduced evidence that one of the three decisionmakers in plaintiff's termination, the person with the real power in the plant because of his marriage to the company president, had earlier described plaintiff as so old that he "must have come over on the Mayflower," and told him that he was "too damn old to do the job."[14]

The trial court sent the case to the jury relying on *McDonnell Douglas* and the jury found for plaintiff. On defendant's appeal of the trial court's denial of a judgment as a matter of law, the Fifth Circuit reversed: "Considering all the evidence in a light most favorable to Reeves, we nevertheless conclude that there was insufficient evidence for a jury to find that Sanderson discharged Reeves because of his age."[15] The reason there was insufficient evidence in the record as a whole to uphold the jury verdict for plaintiff was that after the slicing and dicing away of plaintiff's evidence, the only probative evidence left to support the verdict for plaintiff was his proof that defendant's asserted reason was not the true reason for plaintiff's discharge.

A simple review of the court's approach demonstrates the devastating effect to plaintiff's case of this slicing and dicing approach to circumstantial evidence. While defendant had conceded that plaintiff had established a prima facie case, the evidence supporting it was dropped from the record. The thrust of that evidence is to negate the most common, nondiscriminatory reasons an employer might have to explain the action it took.[16] Instead of drawing the inference that the usual, nondiscriminatory reasons for a discharge—plaintiff's lack of qualifications to do the job or that it ended—could not explain plaintiff's termination, the court instead excised the evidence supporting the prima facie case from the record. A premise underlying the Fifth Circuit's finding that "Reeves failed to offer evidence sufficient to prove . . . that age is what really triggered Reeve's discharge"[17] is the conclusion that the evidence establishing plaintiff's prima facie case loses all its probative force once the defendant introduces its rebuttal evidence. The justification for that approach is language from *Texas Department. of Community Affairs v. Burdine*[18] that the presumption of discrimination created when the plaintiff initially proved the prima facie case "drops out of the picture"[19] once the defendant meets its

burden of production by introducing evidence raising a factual question that its asserted reason, not discrimination, explained the adverse action plaintiff was challenging. The Fifth Circuit's approach is not only to find that the presumption based on the prima facie case is rebutted, but to use the "drops out of the picture" language to go further and drop out the probative value of the evidence supporting the prima facie case. Not allowing the factfinder to draw the negative inference that the most common, nondiscriminatory reasons do not explain why plaintiff was fired, means more evidence was necessary before plaintiff would be able to prove discrimination.

Another type of circumstantial evidence that would support drawing the inference of discrimination were the age-related comments of one of the decisionmakers. Characterizing the testimony as "stray remarks," the Fifth Circuit found that it could not be the basis for the jury to draw the inference of intent to discriminate.

> Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to that employment decision. Mere "stray remarks"—,i.e., comments which are "vague and remote in time"—however, are insufficient to establish discrimination.[20]

While it may be true that these "stray remarks" do not by themselves "establish discrimination," that is true of *all* circumstantial evidence. Simply because this testimony does not conclusively establish that the defendant discharged plaintiff because of his age, it still is evidence that, if believed, can support the jury in finding that defendant acted with an intent to discriminate when it fired plaintiff. These remarks do show that a decisionmaker had the age of plaintiff as a negative on his mind at some point in time, and that should support the jury in drawing the inference that he had age on his mind about plaintiff when he participated in the decisionmaking process that led to plaintiff's discharge.

By excluding the circumstantial evidence of the prima facie case and of the age-related comments of one of the decisionmakers, the Fifth Circuit left for review in the record only plaintiff's evidence that defendant's asserted explanation was a pretext. Plaintiff's evidence that the defendant's reason was not true, which the court conceded the jury could accept, was by itself insufficient to prove discrimination because it did not itself prove that plaintiff was fired because of his age. While, "a reasonable jury could have found Sanderson's explanation for its employment decision was pretextual,"[21] "Reeves failed to offer evidence sufficient to prove both that [the shoddy recordkeeping] reason is untrue and that age is what really triggered Reeve's discharge."[22] Notice that the court broke the pretext showing in two. While plaintiff introduced enough evidence to support drawing the inference that the defendant's reason was not the real reason for the

defendant's action, he had failed to prove the second part, that this false reason was used as a cover to hide its discrimination.

Using the circumstantial evidence approach to prove discrimination works by the process of elimination, that is, by negating the possible nondiscriminatory reasons for defendant's action. The evidence of the prima facie case operates to negate the inference that any of the most common, nondiscriminatory reasons explains defendant's action. Evidence that the defendant's asserted reason was not the real reason for defendant's action then negates that as a nondiscriminatory reason that could explain defendant's action. With all the nondiscriminatory reasons that are in the record eliminated, the factfinder is then empowered to decide whether it is reasonable to draw the positive inference that "age is what really triggered Reeve's discharge." Instead, the pretext-plus rule—that plaintiff needs something more to show that "age is what really triggered Reeve's discharge"—requires additional evidence before the jury has before it sufficient evidence to draw the inference that defendant acted with an intent to discriminate.[23] Given that the evidence supporting the prima facie case is dropped from the record and that the other circumstantial evidence, such as the "stray remarks" testimony, is not probative because by itself it does not prove discrimination, the question is: what sort of evidence will satisfy the Fifth Circuit? Since the circumstantial evidence plaintiff has elicited has been discounted, the answer is: some sort of evidence other than circumstantial evidence. In terms of the type of evidence recognized as used to prove individual disparate treatment discrimination, that other kind of evidence seems to be "direct" evidence of intent to discriminate as established in *Price Waterhouse v. Hopkins*.[24]

So, by slicing and dicing away plaintiff's evidence and imposing the requirement that plaintiff introduce additional evidence under the pretext-plus rule, the only probative evidence in the record as a whole supporting plaintiff's case consisted of his evidence that the defendant's asserted reason for the discharge—shoddy recordkeeping—was not the real reason for it. Even drawing every inference in favor of plaintiff on that little bit of evidence and faced with the evidence introduced by the defendant, the Fifth Circuit found that no jury reasonably could find for plaintiff.

> Despite the potentially damning nature of Chesnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination. In addition, Chesnut was just one of three individuals who recommended to Ms. Sanderson [the company president and wife of Chesnut] that Reeves be terminated, and there is no evidence to suggest that any of the other decision makers were motivated by age. In fact, the record shows that at least two of the decision makers were themselves over the age of 50 – Ms. Sanderson at 52, and Jester at 56. Furthermore, the fact remains that, as a result of the 1995 investigation, each of the three Hinge Room supervisors was accused of inaccurate record keeping, including not only Reeves and Caldwell, but 35 year old Oswalt as well. Finally, there is evidence that, at the time Reeves was dismissed, 20 of

> the company's management positions were filled by people over the age of 50, including several employees in their late 60's.[25]

What is stunning about the Fifth Circuit's use of this test is that it denies almost all of plaintiff's circumstantial evidence of its probative value in drawing the inference of intent to discriminate just because each bit by itself is not conclusive proof of the defendant's intent to discriminate. The proof of plaintiff's prima facie case should not be dropped from the case just because, by itself, it does not prove discrimination. Here the prima facie case was conceded so the jury should have been directed to find that the most common nondiscriminatory reasons for discharge—that plaintiff lacked the qualifications to do the job or the job had ceased to exist—could not be relied upon by the jury to explain plaintiff's discharge. Further, the evidence of age-related statements by a decision maker could have been believed and would support drawing the inference that one decisionmaker not only had age on his mind but also specifically had age on his mind *as a negative about plaintiff.* When all this evidence is added to the evidence that the reason defendant asserts was the reason for the action is not the real reason, no nondiscriminatory reason is left in the record. Thus, the jury should be empowered to draw the inference that the reason for the action was discrimination.

If all circumstantial evidence were reviewed for its relevance using the standard the Fifth Circuit uses for these age-related statements, very little circumstantial evidence would ever be probative, and summary judgment or judgment as a matter of law would be dictated in almost all *McDonnell Douglas* cases. Slicing and dicing away the evidence of a prima facie case of age-related statements made by a decisionmaker about the plaintiff and of the falseness of defendant's asserted reason because none of this evidence viewed by itself is conclusive proof of discriminatory intent undermines the possibility that circumstantial evidence can ever be the basis for a factfinder to conclude that the employer's act was motivated by an intent to discriminate. Such an approach ultimately denies that circumstantial evidence can be used to prove intent to discriminate and suggests that *McDonnell Douglas* is no longer a viable method of analyzing individual disparate treatment discrimination cases. Simply put, had the Supreme Court affirmed rather than reversed *Reeves, McDonnell Douglas* would be dead, presumably leaving only the *Price Waterhouse* "direct" evidence method of proving individual disparate treatment discrimination.

II. *REEVES* IN THE SUPREME COURT.

The Supreme Court granted certiorari and, in a unanimous decision, reversed the Fifth Circuit and decided that the jury verdict should be reinstated.[26] The Court first rejected the Fifth Circuit's pretext-plus rule as inconsistent with the Court's earlier decision in *Hicks.*[27] Second, the Court affirmed the Fifth Circuit rule that all the evidence

in the record is reviewed in deciding motions for summary judgment and judgment as a matter of law.[28] Third, by the way it reviewed all the record evidence in this case, the Supreme Court implicitly rejected the lower court's slicing and dicing approach of using a variety of rules to eliminate most of plaintiff's circumstantial evidence from the record before it was reviewed to decide motions for summary judgment and judgment as a matter of law in individual disparate treatment cases. Because the evidence supporting the prima facie case—rejecting the defendant's reason as false, showing age-related statements by a decision maker and other circumstantial evidence—is all probative to a finding of intent to discriminate, a reviewing court cannot disregard that evidence since it is favorable to the nonmoving party. Instead, the court must include all that evidence in the record and then draw all reasonable inferences in favor of the nonmoving party, typically the plaintiff.

The last major visit the Supreme Court made to individual disparate treatment law was in 1993 in *St. Mary's Honor Center v. Hicks*.[29] In *Hicks*, the Eighth Circuit held that, if the plaintiff proved a prima facie case and also proved that the defendant's asserted reason for the challenged action was not true, then plaintiff was *always* entitled to judgment as a matter of law.[30] In an opinion by Justice Scalia, the Court reversed and held that "the factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."[31] This is the pure circumstantial evidence approach: by negating the nondiscriminatory reasons put into evidence for defendant's action, the plaintiff has introduced sufficient evidence for the factfinder to draw the positive inference that discrimination was a determinative influence in defendant's decision.

His protestations to the contrary notwithstanding,[32] Justice Scalia then added dicta that some lower courts,[33] including the Fifth Circuit,[34] took to be an invitation to further narrow the law by suggesting that, to establish liability, the plaintiff had to adduce evidence over and above the evidence establishing the prima facie case and the falsity of the defendant's asserted reason for the action. He said, "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."[35] Breaking down what needs to be proved into two separate parts suggested that something more was required of plaintiffs beyond merely proving her prima facie case and the falsity of defendant's explanation. This additional requirement came to be known as the "pretext-plus" rule.

The unanimous Court in *Reeves* reaffirmed the actual holding in *Hicks* and, in rejecting the pretext-plus rule, rejected Justice Scalia's dicta. In an opinion by Justice O'Connor, the Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[36] Thus, the Court rejected

the Fifth Circuit's rule that a defendant is *always* entitled to judgment as a matter of law when "the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action."[37]

The reason for the rejection of the pretext-plus rule goes to the heart of why the whole approach of the Fifth Circuit to *McDonnell Douglas* cases was wrong: rejecting the idea that circumstantial evidence is inadequate to prove discrimination, the Court concluded that circumstantial evidence *can* be used to prove discrimination even though each individual piece of it does not, by itself, prove discrimination.[38] "[A]lthough the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production [*Hicks*] . . , the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual,' *Burdine*."[39]

Just as the circumstantial evidence supporting plaintiff's prima facie case continues to have probative value after the defendant puts on evidence of its reason, so does the evidence that plaintiff introduced that defendant's reason was false. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[40] Evoking pre-*Burdine* authority, Justice O'Connor concluded by restating the consequences for the employer of having its reason rejected by the factfinder. "[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[41]

In addition to the unchallenged evidence establishing a prima facie case and that defendant's reason was false, there was the evidence of the age-related comments of the one decisionmaker, Chesnut, and the evidence that he was the actual decisionmaker behind Reeve's firing.

> [W]hile acknowledging "the potentially damning nature"of Chesnut's age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeve's termination." And the court discredited petitioner's evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was "no evidence to suggest that any of the other decision makers were motivated by age."[42]

Moreover, by crediting defendant's evidence, the "court also failed to draw all reasonable inferences in favor of [Reeves]."[43]

> Moreover, the other evidence on which the court relied—that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive. . . In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.[44]

To drive home the point of how serious the Fifth Circuit had blundered in its approach, the Court found that no retrial was necessary but that the original verdict should be reinstated: "Given the evidence in the record supporting petitioner, we see no reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here."[45]

So, circumstantial evidence can be used to prove individual disparate treatment discrimination through the process of negating the possible nondiscriminatory reasons for the challenged action and then drawing the positive inference that intent to discriminate did motivate the employer. On the assumption that the employer had some reason for the action it took, the *McDonnell Douglas* method, as it stands after *Reeves,* allows for plaintiff to get to the factfinder and to win by showing that the possible nondiscriminatory reasons are not the real reasons for the decision plaintiff challenges. Proof of a prima facie case eliminates the most common nondiscriminatory reasons for the action; and proof that the reasons defendant articulated to explain the decision do not in fact do so leaves no basis in the evidence in the record that a nondiscriminatory reason could substantially explain the action. Without any nondiscriminatory reason to explain the action, it is generally permissible for the case to go to the factfinder and for the factfinder, based on the negative finding that no nondiscriminatory reason explains the action, to draw the positive inference that the real reason is discrimination.

The reaffirmed *Hicks* stands for the proposition that eliminating the nondiscriminatory reasons for the defendant's action does not mandate judgment for the plaintiff. *Reeves* rejects the proposition that judgment for the defendant is mandated when the evidence supporting the plaintiff is limited to evidence proving the prima facie case and that defendant's reason is not the real reason for the action.[46] The Court did not, however, go the final step and decide that a showing by the plaintiff of a prima facie case plus sufficient evidence to find the employer's reason is false will always get plaintiff to the factfinder or will "*always* be adequate to sustain a jury's finding of liability."[47] Sometimes, even with evidence of plaintiff's prima facie case and of the falsity of defendant's rebuttal explanation, "no rational factfinder could conclude that the action was discriminatory."[48] The factors that could lead a trial court to take a case from the factfinder include "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the

employer's case and that properly may be considered on a motion for judgment as a matter of law."[49]

Justice Ginsburg, in her concurring opinion, indicated that it should be "uncommon" for these cases to be taken from the jury.[50] That should happen only when it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, if follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence [of the prima facie case and that defendant's reason was false][51]

III. DOES *REEVES* SOLVE *MCDONNELL DOUGLAS'* PROBLEMS?

The *McDonnell Douglas* approach to the proof of individual disparate treatment has, especially since *Hicks,* been the subject of much criticism.[52] If *Reeves* merely reaffirms *Hicks,* then it is unlikely that the problems with *McDonnell Douglas* will be solved. After *Hicks,* Professor Deborah Malamud analyzed the *McDonnell Douglas* line of individual disparate treatment cases and concluded that a fundamental weakness in that approach was that "the Court's prior disparate treatment decisions . . . never succeeded in setting the prima facie case threshold high enough to permit the proven prima facie case to support a sufficiently strong inference of discrimination to mandate judgment for the plaintiff when combined only with disbelief of the employer's stated justification."[53] The *Reeves* Court did not hold that judgment for plaintiff is mandated but has found that the evidence supporting the prima facie case plus evidence that defendant's reason is false is sufficient to support a factfinder drawing the inference of intent to discriminate unless "no rational factfinder could conclude that the action was discriminatory."[54] Further, in reviewing that evidence plus the other circumstantial evidence for the purpose of deciding motions for summary judgment and judgment as a matter of law, the Court indicated that every inference must be drawn in favor of the nonmoving party, typically the plaintiff.[55]

The question is whether the loophole left by *Reeves* will continue to plague *McDonnell Douglas* as it had after *Hicks.* Professor Deborah Calloway has argued that *Hicks* should be overruled and replaced with the rule that a plaintiff is entitled to judgment as a matter of law when she proves her prima facie case and that defendant's asserted reason for its action is not the real reason.[56] Professor Calloway's justification is that the Supreme Court in *Hicks,* and the legal system generally, underestimate the rampant nature of discrimination.[57] Justice Scalia's opinion in *Hicks* exudes that skepticism about the continuing severity of discrimination and seems to suggest through his inclusion of a bizarre hypothetical that it is much worse if an innocent employer is found liable for discrimination than if a guilty one is exculpated from liability.[58]

Professor Catherine J. Lanctot, who before *Hicks* identified the emergence among the lower courts of the pretext-plus rule[59] and who still prefers the rule that would mandate judgment as a matter of law once a plaintiff proves the prima facie case and the defendant's reason was not the real reason,[60] criticizes *Reeves* because it merely restates *Hicks* which, she says, merely restated *Burdine.* Since she criticizes all three cases for not developing a true rule of law, she thinks history will repeat itself, a forecast that initially seems to be true.[61] Though it adds a burden to plaintiffs, Lanctot proposes turning *Reeves* into a proper rule of law, which she calls a "pretext-always" rule that would entitle plaintiff to judgment as a matter of law if she can prove a prima facie case, prove defendant's reason was not the real reason and then, additionally, prove "that any other reason that may be inferred from the evidence was not the real reason for the employment action."[62] This rule is designed to close the loophole left in Justice O'Connor's opinion in *Reeves* because it forecloses the possibility that the record "conclusively revealed some other, nondiscriminatory reason for the employer's decision," or "abundant and uncontroverted independent evidence that no discrimination had occurred."[63] In essence, Professor Lanctot is proposing that the final step of *Reeves*—that the factfinder make the affirmative finding that the defendant acted with an intent to discriminate—be replaced with plaintiff's added burden to disprove all reasons other than nondiscrimination that could be found by the factfinder as the real reason for the defendant's action.

The problem with this proposal is that it entails proving the nonexistence of an unknown. Plaintiff would seem to be required to imagine every reason that could be inferred from the evidence, even if there is no evidence in the record as to those reasons, and then prove that none of these reasons explained defendant's decision. The facts in *Hicks* show the difficulty of the problem. The trial judge, as factfinder, did not draw the inference of discrimination because it seemed to him that the real reason plaintiff was discharged was a personality conflict between plaintiff and his new supervisor. The problem under Professor Lanctot's proposed rule is that plaintiff would be expected to imagine and then disprove that the real reason was this personality conflict despite the fact that the only evidence in the record about that was the denial by the supervisor that he had such a conflict with plaintiff. Instructing a jury about how this works would be challenging.[64]

The aim of this article is to show that *Reeves* does more than reaffirm *Hicks.* Instead of the quarrelsome tone and the skepticism of *Hicks,* Justice O'Connor appears to be much more accepting of the use of approaches normal to the trial process of civil cases generally. By refocusing *McDonnell Douglas* circumstantial evidence cases on that evidence and on the inferences that can be drawn from it, the Court has moved in the direction recommended by many critics of *McDonnell Douglas.*[65] Thus, David N. Rosen and Jonathan M. Freiman argue that the problem of unarticulated reasons floating in the

background of the trial of an individual disparate treatment case can be contained in discovery and in the use of trial memoranda:

> [P]laintiffs should ask defendants in depositions and interrogatories to identify all the reasons that may have played any part in the adverse employment decision at issue. Those discovery requests should be followed with requests for admission [pursuant to Federal Rule 36] asking the defendant to admit that there are no reasons for its action other than those that have been identified. A trial memorandum . . . can further specify and limit the potential explanations for a defendant's decision that the jury is entitled to consider.[66]

While that careful trial preparation still may not foreclose the factfinder from failing to be convinced that the defendant did act with an intent to discriminate, Professor Michael Selmi proposes that plaintiff's introduce broader testimony as to the nature of discrimination and how our cognitive functions may blind us to its reality.[67]

Ultimately, the focus on the evidence in the record in *Reeves* seems to adopt the approach suggested by federal Judge Denny Chin for the proper way for courts to decide motions for summary judgment and for judgment as a matter of law.

> The best approach is perhaps the most basic one: first, evaluating plaintiff's proof, direct or otherwise, of discrimination; second, evaluating defendant's proof that it did not discriminate, including evidence of defendant's explanation for its employment decision; and third, evaluating the evidence as a whole. Courts should focus on the "ultimate issue" of whether the plaintiff has proven that it is more likely than not that the employer's decision was motivated at least in part by an impermissible or discriminatory reason. In a summary judgment context or on a motion for judgment as a matter of law following a verdict for the plaintiff, the court must evaluate the evidence as a whole resolving all conflicts in the proof and drawing all reasonable inferences in favor of the plaintiff.[68]

Relying on these standard civil trial techniques, *Reeves* may not lead to all cases going to the factfinder when plaintiff has introduced evidence sufficient to support a finding that the prima facie case has been established and that defendant's asserted reason is not the real reason but it should lead to most individual disparate treatment cases surviving a motion for summary judgment and going to the factfinder and many fewer judgments as a matter of law being granted overturning jury verdicts for plaintiffs.

III. CONCLUSION

By going through the exercise of including all of plaintiff's evidence in the record when deciding defendant's motions for summary judgment and for judgment as a matter of law and of reviewing that evidence carefully to draw out of it all inferences that favor the plaintiff, the Court in *Reeves* is leading by good example. By rejecting the pretext-plus rule which implicitly rejects the use of circumstantial evidence and by rejecting the slicing

and dicing away of that circumstantial evidence, Justice O'Connor has taken important steps to redirect the focus of individual disparate treatment law away for formulaic approaches – such as the slicing and dicing approach of the Fifth Circuit in *Reeves* – that give enormous discretion to courts in their exercise of the power to grant summary judgment or judgment as a matter of law. Instead, the new direction she suggests by her careful scrutiny of the evidence in the record that courts should move toward the approach used in civil litigation outside employment discrimination law. Her holistic approach to individual disparate treatment law bodes well for the future if the lower courts follow her good example.

Notes

1. 530 U.S. 133 (2000).
2. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), was the first of what has become a long line of individual disparate treatment cases, culminating in *Reeves,* that focus on analyzing circumstantial evidence of discrimination.
3. My thanks to Professor John V. White at LSU for this description. *See* John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. s 1985(3)'s Equality Right,* 69 TEMP. L. REV. 145, 204 (1996).
4. *See* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law,* 61 LA. L. REV. (forthcoming 2001) (hereinafter Zimmer, *Slicing & Dicing*).
5. The early returns are not so far encouraging, *see, id.*
6. 197 F.3d 688 (5th Cir. 1999), *rev'd,* 530 U.S. 133 (2000). The decision was originally issued without published opinion, 180 F.3d 263 (5th Cir. 1999). Unpublished decisions, pursuant to the rules of the Fifth Circuit, are not precedent, *see* U.S.C.S. Ct App 5th Cir § 47.5.4 (2000). The fact that the original decision was not precedent was not argued by the employer as a basis for denying the grant of certiorari. By deciding to publish the decision once certiorari was granted, the Fifth Circuit made the decision precedent. The Eighth Circuit recently decided that its rule denying precedent status to unpublished opinions is unconstitutional, though that decision was vacated as moot. *Anastasoff v. United States,* 2000 U.S. App. LEXIS 21179, *vacated as moot,* 2000 U. S. App. LEXIS 32055 (8th Cir. 2000).
7. *See Reeves,* 197 F.3d at 690.
8. *See id.* at 691.
9. The *McDonnell Douglas* test that has been modified for age discrimination discharge cases in the Fifth Circuit comes from *Bedenheimer v. PPG Indus., Inc.,* 5 F.3d 955, 957 (5th Cir. 1993). There are four elements to a prima facie case of discriminatory discharge under the ADEA, including proof that the plaintiff was (1) discharged; (2) qualified for the position; (3) within the protected class at the time of the discharge; and (4) either i) replaced by someone outside the protected class, ii) replaced by someone in the protected class but younger than the plaintiff, or iii) otherwise discharged because of his age.
10. *See Reeves,* 197 F.3d at 692.
11. *See id.* at 690.
12. *See id.* at 692-93.

13. *See id.* at 693.
14. *See id.* at 691. These age-related comments did not satisfy the Fifth Circuit's strict view of what constitutes "direct" evidence for the purpose of applying the "direct" evidence method of analyzing individual disparate treatment cases based on *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). In *Brown v. East Mississippi Electric Power Assn.,* 989 F.2d 858, 861 (5th Cir. 1993), the court defined "direct" evidence according to the classic evidence notion of, "evidence which, if believed, proves the fact without inference or presumption." Under that narrow definition, only something like an admission by a decision maker that "Reeves, you are fired because you are too old" would be "direct" enough to trigger the application of the *Price Waterhouse* approach.
15. 197 F.3d at 693. The Fifth Circuit rule on motions for judgment as a matter of law is to review all the evidence in the record but to draw all reasonable inferences in favor of the nonmoving party, here the plaintiff. *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc) In *Reeves,* the court further elaborated its standard of review on appeal.
A motion for judgment as a matter of law . . . in an action tried by a jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." We review the denial of such motions *de novo,* applying the same standard as the district court. A JML is appropriate if the "facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded" as the jury did. Applying this standard to the instant case, the district court's judgment should be reversed only if "there is no legally sufficient evidentiary basis for a reasonable jury to find" that Sanderson discharged Reeves because of his age. *Id.* at 691.
16. In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 n.44 (1977), the Court explained why proof of a prima facie case in *McDonnell Douglas* supported the inference of discrimination: "the alleged discriminatee demonstrated at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lace of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one."
17. 197 F.3d at 692.
18. 450 U.S. 248 (1981).
19. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). .
20. 197 F.3d at 692 (quoting *Brown v. CSC Logic, Inc.,* 82 F.3d 651, 655 (5th Cir.1996)). While somewhat broader than the classic definition of "direct" evidence that the Fifth Circuit uses as the threshold to the application of *Price Waterhouse,* this definition of when evidence of age-related comments is circumstantial evidence supporting a finding of intent to discriminate is the definition several other circuits use to describe evidence that is sufficiently "direct" to trigger the application of *Price Waterhouse.* See *Ostrowski v. Atlantic Mutual Insurance Cos.,* 968 F.2d 171 (2d Cir. 1992); *Griffiths v. CIGNA Corp.,* 988 F.2d 457, 470 (3d Cir. 1993) (following *Ostrowski*), overruled on other grounds, *Miller v. CIGNA Corp.,* 47 F.3d 586 (1995) (en banc).
21. *Reeves,* 197 F.3d at 693.
22. *Id.* at 692.
23. Kline v. Tennessee Valley Auth., 128 F.3d 337, 343 (6th Cir. 1997) (the court described the "pretext-plus" rule this way: "The plaintiff must not only demonstrate that the employer's asserted reasons were pretextual, but the plaintiff also must introduce additional evidence of discrimination.").

24. 490 U.S. 228 (1989). The Fifth Circuit rule as to what constitutes "direct" evidence of discrimination for purposes of applying the *Price Waterhouse* method of analyzing individual disparate treatment is the narrow notion of "evidence which, if believed, proves the facts without inference or presumption." Brown v. East Mississippi Elec. Power Ass'n., 989 F.2d 858, 861 (5th Cir. 1993). For a discussion of this narrow test of what is "direct" evidence, *see* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation,* 30 GA. L. REV. 563, 611-16 (1996) [hereinafter, Zimmer, *The Emerging Uniform Structure*]. While the Supreme Court has not defined what is direct evidence, the lower courts have developed a number of different approaches. For a discussion of these approaches, *see* Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA,* 51 Mercer L. Rev. 693 (2000).
25. 197 F.3d at 693-694.
26. Certiorari was granted on three questions:
    1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law?
    2. In determining whether to grant judgment as a matter of law under FED. R. CIV. P. 50, should a district judge weigh all of the evidence or consider only the evidence favoring the nonmoving party?
    3. Is the standard for granting judgment as a matter of law under FED. R. CIV. P. 56 the same as the standard for granting judgment as a matter of law under FED. R. CIV. P. 50?

    Answering the first question "no," the Court found the answer to the second question to be an easy "yes." Describing the conflict among the circuits as "more semantic than real," the Court concluded that "in entertaining a judgment as a matter of law, the court should review all of the evidence in the record." 530 U.S. at 150. Thus, the Fifth Circuit rule on what evidence is to be reviewed in deciding a judgment as a matter of law was affirmed. The third question was not answered directly; instead the Court relied on the authority under Rule 56, "that the court must review the record 'taken as a whole,'" to support its conclusion that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law. . . ." *Id.* The main thrust, then, of the procedural section of the opinion focused on the way in which the Fifth Circuit had in this particular case erroneously applied its rule that all the evidence in the record is reviewed in deciding a judgment as a matter of law.
27. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000).
28. *See id.* at 150.
29. 509 U.S. at 502. That same year the Court also decided *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), which narrowed the circumstantial evidence upon which the inference of discrimination can be drawn while expanding the reasons that defendant may assert to sustain its rebuttal burden. *See* Zimmer, *Emerging Uniform Structure, supra* note 24, at 570-72.
30. *See Hicks*, 509 U.S. at 511.
31. *Id.*
32. *See Hicks*, 509 U.S. at 512 n.4. In a footnote, Justice Scalia said that "there is nothing whatever inconsistent between this statement [of the holding] and our later statements that (1) the plaintiff must show '*both* that the reason was false, *and* that discrimination was the real reason,' and (2) 'it is not enough . . . to *dis* believe the employer.' Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*"

33. *See* Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997)(en banc); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996); Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995); Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994).
34. Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (en banc).
35. *Hicks*, 509 U.S. at 515.
36. *Reeves*, 530 U.S. at 148. Justice O'Connor explained *Hicks* as holding "that the rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff [but] it is *permissible* for the trier of fact to infer the ultimate fact of discrimination for the falsity of the employer's explanation." *Id.* at 147.
37. *Id.* at 137.
38. *See id.* at 147.
39. *Id.* at 143.
40. *Id.* at 147.
41. *Id.* at 146 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration"). *Id.*
42. *Id.* at 152-53.
43. *Id.* at 152.
44. *Id.* at 152, quoting decision of the Fifth Circuit (emphasis added).
45. *Id.* at 153.
46. *See* Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. (forthcoming 2001).
47. *Reeves*, 530 U.S. at 148. This holding merely aligns discrimination law with how litigation in general is treated. Thus, Justice O'Connor said,
    To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not "'treat discrimination differently from other ultimate questions of fact.'" *Id.*
48. *Id.*
49. *Id.* Justice O'Connor describes several scenarios where judgment as a matter of law would be appropriate.
    For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. *Id.* Surprisingly, Justice O'Connor appeared to leave one type of evidence off the list, evidence supporting drawing the inference of discrimination even though it does not either prove the elements of plaintiff's barebones prima facie case as set forth in *McDonnell Douglas* or prove that defendant's reason is false. She may, however, be using the term "prima facie case"in the more general sense of the ultimate burden the plaintiff has to prove that she was a victim of defendant's discrimination. As she said earlier in her opinion, "[t]he ultimate question is whether the employer intentionally discriminated." *Id.* at 146. That interpretation is bolstered by the next section of the opinion which looks at all the evidence supporting plaintiff's case.
50. *See id.* at 154.
51. *Id.* at 154-55. She did "note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence

beyond these categories in order to survive a motion for judgment as a matter of law." *Id.* at 154.

52. *See,* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse,* 18 BERKELEY J. EMPLOYMENT & LAB. L. 183 (1997); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison* McDonnell Douglas, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 361 (1998); Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green: *The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases,* 21 PEPP. L. REV. 385 (1994); Ruth Gana Okediji, *Status Rules: Doctrine as Discrimination in a Post-*Hicks *Environment,* 26 FLA. ST. U. L. REV. 49 (1998); Stephen Plass, *Truth: The Lost Virtue in Title VII Litigation,*29 SETON HALL L. REV. 599 (1998); Sherie L. Coons, *Proving Disparate Treatment After* St. Mary's Honor Center v. Hicks: *Is Anything Left After* McDonnell Douglas?, 19 J. CORP. L. 379 (1994); Robert Brookins, Hicks, *Lies, and Ideology: The Wages of Sin is Now Exculpation,* 28 CREIGHTON L. REV. 939 (1995).
53. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2236-37 (1995).
54. 530 U.S. at 148.
55. For criticism of the way courts have been deciding summary judgment motions, *see* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases,* 34 B.C. L. REV. 203 (1993); Kenneth R. Davis, *The Stumbling, Three-Step Burden-Shifting Approach in Employment Discrimination Cases,* 61 BROOK. L. REV. 703 (1995).
56. *See* Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption,* 26 CONN. L. REV. 997 (1994).
57. *See id. See also,* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?* 61 LA. L. REV. (forthcoming 2001).
58. The hypothetical involves an employer who fires the manager whose decision plaintiff challenges so that the employer cannot come up with testimony of the real reason for the manager's decision since he would now be a witness hostile to the employer.
59. Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases,* 43 HASTINGS L. J. 57 (1991).
60. Lanctot, *supra* note 46.
61. Zimmer, *Slicing & Dicing, supra* note 4.
62. Lanctot, *supra* note 46. The full statement of her proposed rule is as follows:

    A plaintiff in an individual disparate treatment case is entitled to judgment, as a matter of law, if that plaintiff, by a preponderance of the evidence:

    1. Proves all the elements of the prima facie case, as set forth in *McDonnell Douglas* and its progeny; and

    2. Proves that the reason offered by the defendant was not the real reason for the employment action; and

    3. Proves that any other reason that may be inferred from the evidence was not the real reason for the employment action.
63. *Id.*
64. Telling a jury that plaintiff had to disprove any nondiscriminatory reason that was not in the record as a reason but that could be inferred from the evidence in the record is, at a minimum, dense. It may suggest a standard of proof approaching the beyond reasonable doubt standard applicable in criminal cases.

65. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Davis, *supra* note 55; Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and Its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1 (1998).
66. David N. Rosen & Jonathan M. Freiman, *Remodeling* McDonnell Douglas: Fisher v. Vassar College *and the Structure of Employment Discrimination Law*, 17 QUINNIPIAC L. REV. 725, 776 (1998).
67. Selmi, *Employment Discrimination Cases*, *supra* note 57.
68. Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas: *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 672 (1998).