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Slicing & Dicing Individual Disparate Treatment Law

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This article discusses the decision of the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*[1] This case may be an even more important individual disparate treatment case than the Supreme Court's 1993 decisions in *Hazen Paper Co. v. Biggins*,[2] and *St. Mary's Honor Center v. Hicks*.[3] After *Hicks*, Professor Deborah Malamud analyzed all of the so-called *McDonnell Douglas Corp. v. Green*[4] 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."[5] The Court has not yet resolved that question. The evidence supporting the prima facie case plus evidence that defendant's reason is false does support a fact finder drawing the inference of intent to discriminate. 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.[6] Still, judgment for plaintiff is not mandated.

Alternatively, *Reeves* may be important but more limited. In that view, *Reeves* overturns the pretext-plus rule that had narrowed the *McDonnell Douglas* analysis even further than had *Hazen Paper* and *Hicks*, but it otherwise leaves intact the common practice of courts in slicing and dicing the evidence supporting plaintiff's case in order to grant motions for summary judgment and judgment as a matter of law. The basis for this more limited reading of *Reeves* is that the Supreme Court spent much of its opinion applying the rules as to motions for summary judgment and judgment as a matter of law to the facts of this particular case rather than announcing any new rules about how this should work. Lower courts may feel less

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1. 530 U.S. 133, 120 S. Ct. 2097 (2000).
2. 507 U.S. 604, 113 S. Ct. 1701 (1993).
3. 509 U.S. 502, 113 S. Ct. 2742 (1993).
4. 411 U.S. 792, 93 S. Ct. 1817 (1973).
5. Deborah C. Malamud *The Last Minuet: Disparate Treatment After* Hicks, 93 Mich L. Rev. 2229, 2236 (1995).
6. 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); Malamud, *supra* note 5; Kenneth R. Davis, *The Stumbling Three Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 Brook. L. Rev. 703 (1995).

compelled to follow the example of the Supreme Court than they might otherwise be if the Court had announced new legal rules.

Only the future will tell which path the lower courts will take the law as a result of *Reeves*. It is the goal of this article to develop the expansive path, the path that will aid immeasurably in implementing our antidiscrimination laws. To demonstrate that potential path, Section I of this article will set forth the conventional structure of individual disparate treatment law as contemplated by Supreme Court precedent. Section II will show, from a global perspective, how the Fifth Circuit decision in *Reeves* misused that structure to circumscribe individual disparate treatment law almost completely. Section III then discusses both the substantive and the procedural issues decided by the Supreme Court decision in *Reeves*. Having looked at the two issues, the section sets forth how the effect of *Reeves* is greater than the individual import of the two issues decided; in other words the whole is greater than the sum of the parts. Section IV looks at the early returns of how the lower courts have applied *Reeves*, and the final section will look at why *Reeves* is yet to be followed.

I. THE CONVENTIONAL STRUCTURE OF INDIVIDUAL DISPARATE TREATMENT CASES

The analyses of individual disparate treatment cases, at least as viewed from Supreme Court precedent, is to first decide whether the "direct" evidence approach, created in *Price Waterhouse v. Hopkins*[7] (as modified by the Civil Rights Act of 1991 amendments to Title VII) applies.[8] Absent evidence that is sufficiently "direct," the "circumstantial"[9] evidence approach established in *McDonnell Douglas*[10] is the default method of analysis. That makes the boundary between the two methods, the presence of "direct" versus "circumstantial" evidence, a boundary that the Supreme Court has left undefined.

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7. 490 U.S. 228, 109 S. Ct. 1775 (1989).

8. "Direct" evidence has been defined several different ways. The classic, but now rejected, definition in the law of evidence is evidence that proves the fact at issue without the need to draw an inference. For a discussion of this classic test, see Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga. L. Rev. 563, 611-16 (1996) [hereinafter, Zimmer, *Uniform Structure*]. An example of that may be an admission by the employer to the employee that, "I am discharging you because you are too old." While the Supreme Court has not defined what is direct evidence, the lower courts have developed a number of different approaches. There are other, broader definitions that some courts have come to use in discrimination cases. 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) [hereinafter, Zimmer, *Chaos or Coherence*].

9. "Circumstantial" evidence is evidence that can be used to support drawing an inference of the fact at issue. In individual disparate treatment cases, the key fact at issue is the intent of the employer to discriminate. Where an employee shows that she is within a group protected against discrimination and that she has been doing a good job but then is fired and replaced by another person not in her protected group, there is circumstantial evidence to support drawing the inference on the fact at issue, whether the employer discharged her because of an intent to discriminate.

10. 411 U.S. 792, 93 S. Ct. 1817 (1973).

For a case to go to the fact finder under *Price Waterhouse*, the plaintiff must introduce direct evidence (typically with additional circumstantial evidence) sufficient under the preponderance of evidence standard to support a reasonable fact finder concluding that the impermissible characteristic, such as race or gender, was "a motivating factor" for the employer's decision that plaintiff challenges.[11] "A motivating factor" is a low threshold of liability since it is met if race or gender is found to play any role at all in the employer's decision. If the fact finder does find that the impermissible characteristic was "a motivating factor," that raises the question whether the employer has introduced evidence sufficient to support the fact finder drawing an inference that it nevertheless "would have taken the same action in the absence of the impermissible motivating factor."[12] If the fact finder finds that the employer has carried its burden of persuasion on this so-called "same decision" defense, then the defendant is still held liable for having discriminated but plaintiff is entitled only to limited remedies.[13]

If the court finds that the threshold for applying *Price Waterhouse* is not met because plaintiff has not introduced evidence that the court is willing to characterize as sufficiently "direct," then *McDonnell Douglas* applies. To go to the fact finder under *McDonnell Douglas*, plaintiff must introduce evidence sufficient under the preponderance of evidence test to support an inference that the plaintiff's treatment by the employer was not the result of the most common reasons that would explain the employer's decision as nondiscriminatory.[14] That inference creates in favor of the plaintiff a presumption that the reason for the employer's action was discriminatory.[15] That presumption puts the burden on the defendant to produce evidence that it acted for a nondiscriminatory reason.[16] Ultimately, if a material

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11. Section 703(m), added to Title VII in the 1991 amendments, sets the "motivating factor" level of showing necessary to establish liability. Since the Civil Rights Act of 1991 amended Title VII but not the ADEA in setting the "motivating factor" threshold, it is not clear that this threshold applies in age discrimination cases. While the ADEA was not amended in this provision, the 1991 Act does nothing to foreclose courts from looking to Title VII in establishing the federal common law definition of "discrimination" for age discrimination cases brought under the ADEA.

12. Section 706(g)(2)(B) (2000).

13. If the provisions of the 1991 Act are not used by analogy in ADEA actions to establish the federal common law meaning of the term "discrimination," then presumably the original holding of *Price Waterhouse* applies in age discrimination cases, so the proof of the same decision defense is a complete bar to defendant's liability.

14. In *McDonnell Douglas*, a hiring case, plaintiff established a prima facie case by showing (i) that he belonged to a racial minority group; (ii) that he applied and was qualified for a job for which employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants. By showing this, plaintiff eliminated two nondiscriminatory reasons for not hiring him—that he wasn't qualified and that no job was open. 411 U.S. 792, 802, 93 S. Ct. 1817, 1826 (1973).

15. The presumption means defendant loses if it does nothing. What is problematic here can be most easily understood in the context of "reverse" discrimination cases. Does a showing by a white male that he was not hired despite being qualified for a job that was open, the facts of *McDonnell*, support an inference that he was discriminated against because of his race? By itself, the answer is no.

16. The burden on the defendant is a burden of production only. The employer need not carry the burden of persuasion that the nondiscriminatory reason it asserts actually was the basis of the action

issue of fact still exists, then the case goes to the fact finder, with the plaintiff carrying the burden of proving the ultimate question of whether the defendant acted with an intent to discriminate. This third step of analysis is sometimes called the "pretext" step because the issue is typically framed as a question of whether defendant's asserted reason for its action was not actually the reason for its action but instead was a pretext, a cover, to hide discrimination. *Hicks* made clear that plaintiff's proof of her prima facie case and proof that the defendant's reason was false did not justify summary judgment for plaintiff because the fact finder had to find the ultimate fact, that is, that defendant acted with an intent to discriminate. To do that, plaintiff must convince the fact finder that the preponderance of evidence supports an inference that the impermissible characteristic, such as race, sex or age, was the determinative influence in the employer's decision. To put that another way, but for discrimination, the employer would not have taken the challenged action against plaintiff. If the jury finds the employer acted with the intent to discriminate, plaintiff wins and is entitled to full remedies.

The same decision defense that is available in *Price Waterhouse* cases is not applicable in *McDonnell Douglas* cases because a finding that the determinative influence in the decision was an impermissible characteristic forecloses the possibility that the employer could have made the same decision if it had not considered plaintiff's race, gender or age. Stated differently, if the plaintiff has proved the employer would not have taken the action but for plaintiff's race, gender or age, that necessarily means that the employer would *not* have taken the action in the absence of that impermissible factor.

In brief comparison of the two methods of analyzing individual disparate treatment cases, the *Price Waterhouse* approach has the lower threshold showing—that the impermissible characteristic was "a motivating factor," but the defendant has a chance to limit plaintiff's full remedies by proving, nevertheless, that it would have made the same decision even "in the absence of the impermissible motivating factor." In contrast, *McDonnell Douglas* presents a higher threshold to plaintiff, the determinative factor test, but such a showing precludes defendant's use of the affirmative, same decision defense.[17]

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plaintiff challenges. According to United States District Judge Denny Chin, no defendant in any reported case has failed to come forward with evidence that it acted from a nondiscriminatory reason. *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas: *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L. Rev. 659 (1998) [hereinafter, Chin, *Moving Beyond* McDonnell Douglas].

17. Since the Supreme Court has not defined what "direct" evidence is, the lower courts, in patrolling the boundary between the *Price Waterhouse* and *McDonnell Douglas* methods of analyzing individual disparate treatment cases, have adopted a variety of approaches as to what constitutes "direct" evidence sufficient to trigger the *Price Waterhouse* approach. The interaction between and within these competing analyses give the courts enormous discretion in their treatment of cases. There is little uniformity among the circuit courts of appeal. *See* Zimmer, *Chaos or Coherence*, *supra* note 8, at 3.

II. THE FIFTH CIRCUIT DECISION IN *REEVES*

The Fifth Circuit manipulated the conventional structure of individual disparate treatment law to limit very stringently the scope of the law against discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*,[18] an age discrimination case, is a good example of how that court applied individual disparate treatment law to virtually foreclose a successful individual disparate treatment case. Plaintiff, age fifty-seven when he was discharged, had worked for the company for forty years and had been the supervisor for many years of the regular production line in the department that made hinges for toilet seats. By the time of trial, the employer had successively employed three different replacements for the plaintiff. All were in their thirties; apparently none had worked out. Plaintiff also 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 several months prior described plaintiff as so old that he "must have come over on the Mayflower," and that he was "too damn old to do the job."

Looking at the evidence first as a *Price Waterhouse* case, these age-related comments did not satisfy the Fifth Circuit's strict view of what constitutes "direct" evidence for the purpose of applying *Price Waterhouse*. In *Brown v. East Mississippi Electric Power Ass'n*,[19] the court defined "direct" evidence according to the classic evidence notion of, "evidence which, if believed, proves the fact without inference or presumption." Under such a narrow definition, only something like an admission by a decisionmaker that "Reeves, you are fired because you are too old" would be "direct" enough to trigger the application of the *Price Waterhouse* approach.[20]

Since the age-related statements were not connected immediately to Reeves' discharge and, therefore, did not prove the employer's intent to discriminate without need to draw an inference, the default rules for *McDonnell Douglas* applied. The employer did not contest that plaintiff had established a prima facie case under the modified *McDonnell Douglas* approach that the Fifth Circuit takes to age discrimination discharge cases.[21] In rebuttal to plaintiff's prima facie case, the

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18. 197 F.3d 688 (5th Cir. 1999), *rev'd*, 530 U.S. 133, 120 S. Ct. 2097 (2000). The decision was originally issued without published opinion, 180 F.3d 263 (5th Cir. 1999), but it was published and therefore became precedent once the Supreme Court decided to hear the case. 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 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, 223 F.3d 898 (8th Cir.), *vacated as moot*, No. 99-3917EM, 2000 U.S. App. LEXIS 32055 (8th Cir. Dec. 18, 2000).

19. 989 F.2d 858, 861 (5th Cir. 1993).

20. This classic definition of "direct" evidence lives on in individual disparate treatment law, having long since been rejected by the law of evidence. *See* Zimmer, *Uniform Structure*, *supra* note 8, at 3.

21. The *McDonnell Douglas* test that has been modified for age discrimination discharge cases in the Fifth Circuit comes from *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993):

employer introduced evidence that its nondiscriminatory reason for firing plaintiff was his shoddy maintenance of the time cards of the employees under his supervision. In his case-in-chief, plaintiff introduced evidence that, between the time he was fired and the trial, the employer had changed its reason for discharging him and that, in any event, his record keeping was not shoddy. That meant the case, like all *McDonnell Douglas* cases, turned on plaintiff carrying his ultimate burden of proving intentional discrimination at the third stage—pretext stage. At this final stage of analysis, the fact finder must decide whether defendant acted with an intent to discriminate and that this intent was of determinative influence in the employer's decision.[22]

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 jury verdict and 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."[23] In support of that conclusion, the court said that "Reeves failed to offer evidence sufficient to prove *both* that [the shoddy record keeping] reason is untrue *and* that age is what really triggered Reeve's discharge."[24] But then the court said that "Reeves very well may be correct" and that a "reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual."[25] So what the court was saying finally is that the plaintiff introduced enough evidence to support drawing the inference that the defendant's reason was not the true reason for the defendant's action but had failed

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> In age discrimination cases, the plaintiff is required to make a prima facie case, wherein he must demonstrate that: (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age.

Defendant did not challenge that plaintiff was in fact (1) discharged, (2) was qualified, (3) was over age 40, and (4)(i) had been replaced by someone outside the protected class.

22. Given the determinative influence standard of proof, the fact finder can find that the defendant's reason, or some other reason, did play some role in its decision and can still find for plaintiff as long as it finds that the impermissible characteristic was the determinative or "but for" reason for the defendant's action. *See* Miller v. CIGNA Corp., 47 F.3d 586 (3d Cir. 1995) (en banc) (rejects rule that plaintiff must prove that discrimination was the sole cause of the defendant's action).

23. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 691 (5th Cir. 1999). The court further explicated its standard of review on appeal:

> A motion for judgment as a matter of law . . . in an action tried by 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.

24. *Id.* at 692.

25. *Id.* at 693.

to prove the second part, that this false reason was used as a cover to hide its discrimination. Under the pretext-plus rule, more evidence was necessary before the jury could, upon sufficient evidence, draw the inference that defendant acted with an intent to discriminate.

Assuming that the jury did find that the defendant's asserted reason for the discharge was not true, what other evidence was there "that age is what really triggered Reeve's discharge?" One kind of evidence in the record is the evidence that made up the prima facie case in the first instance. But a premise for the Fifth Circuit's finding that "Reeves failed to offer evidence sufficient to prove . . . that age is what really triggered Reeve's discharge"[26] was the conclusion that the evidence that established plaintiff's prima facie case lost its probative force once the defendant introduced its rebuttal evidence. Thus, the court required additional evidence, over and above the evidence that made out the prima facie case, to satisfy its "pretext-plus" rule.[27]

A second type of evidence is the age-related comments of one of the decisionmakers. The court characterized that evidence as "stray remarks," insufficient even as circumstantial evidence to support the jury in drawing the inference of intent to discriminate. According to the court:

> 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.[28]

What is stunning about the Fifth Circuit's use of this test is that it denies this circumstantial evidence of all its probative value in drawing the inference of intent to discriminate just because it was not conclusive proof of the defendant's state of mind. Evidence that, if believed, shows that the age of a worker was on the mind of a decisionmaker does not require a fact finder to draw the inference that that worker's discharge was because of his age, but it surely supports a fact finder drawing that inference. This is especially true when the plaintiff has produced evidence that the supposed nondiscriminatory reason was not true.

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26. *Id.* at 692.

27. In *Kline v. Tennessee Valley Authority*, 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."

28. *Reeves*, 197 F.3d at 692 (quoting Brown v. CSC Logic, Inc., 82 F.3d 651, 654 (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 Mut. Ins. 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).

If all circumstantial evidence were reviewed for its relevance using the standard that the Fifth Circuit uses for these age-related statements, very little circumstantial evidence would ever be considered probative,[29] and summary judgment or judgment as a matter of law would be dictated in almost all *McDonnell Douglas* cases.

Slicing and dicing from the record the evidence of a prima facie case as well as the evidence of age-related statements made by a decisionmaker about the plaintiff because neither is by itself conclusive undermines the possibility that any circumstantial evidence can ever be the basis for a fact finder 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.

That conclusion is supported by looking at the circumstantial evidence present in the case but which nevertheless the court said could not support drawing the inference of intent to discriminate. First, the proof of plaintiff's prima facie case was conceded so that 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—did not apply and so these reasons, the most common legitimate reasons for a discharge, could not explain plaintiff's discharge. Second, there was the evidence introduced by the employer that plaintiff was discharged for shoddy record keeping which the reviewing court admitted the jury could have found not to be true. Third, there was evidence of age related statements that a jury could have believed and that supported the inference that one of the decisionmakers in plaintiff's discharge not only had age on his mind but also specifically had age on his mind as a negative about plaintiff. There was also evidence that this particular manager made the important decisions in the plant.

It is true that the employer did introduce evidence in addition to its evidence that Reeves was discharged for shoddy record keeping. Given that the court rejected the probative value of all the evidence supporting plaintiff's case, the court had only defendant's evidence to review in deciding to set aside the jury verdict. According to the court:

> 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 decisionmakers were motivated by age. In fact, the record shows that at least two of the decisionmakers 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

29. The court does not say this but it may be that it thought that the jury should not have found that these age related statements even occurred. Plaintiff's testimony as to the time, place and circumstance of these statements by Chesnut were vague and Chesnut denied ever making them.

> 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, twenty of the company's management positions were filled by people over the age of 50, including several employees in their late 60s.[30]

Only by slicing and dicing away the probative value of the evidence of the prima facie case, of the falsity of defendant's explanation and of the age-related statements, was the Fifth Circuit able to conclude that there was insufficient evidence to support a jury in drawing the inference that defendant acted with an intent to discriminate. If used by courts generally, such slicing and dicing of all of plaintiff's evidence is the death knell for the *McDonnell Douglas* approach.

To put the Fifth Circuit's approach into the larger context of all of individual disparate treatment law, the scope of liability is quite narrow. If plaintiff cannot successfully argue that evidence in the record satisfies the very narrow direct evidence threshold required by the Fifth Circuit for use of the *Price Waterhouse* approach, then plaintiff is also not likely to satisfy the pretext-plus requirement that the court has imposed on the *McDonnell Douglas* approach. This is true even where the plaintiff is successful, as he was in *Reeves*, in proving his prima facie case and proving that the employer's reason for its action was false. Evidence of age-related comments that fail to satisfy the narrow direct evidence test for *Price Waterhouse* will only be probative to a finding of intent to discriminate based on the *McDonnell Douglas* approach if that evidence satisfies the Fifth Circuit's slightly broader "circumstantial-plus" definition of direct evidence, i.e., that "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."[31] This is close to saying that plaintiffs can only win an individual disparate treatment case under either *McDonnell Douglas* or *Price Waterhouse* by satisfying the stringent threshold of either classic "direct" or "circumstantial-plus" evidence for the use of the *Price Waterhouse* approach. In short, the only path to liability is that small subset of all individual disparate treatment cases where plaintiff has "direct evidence . . . which if believed, proves the fact of intent to discriminate without inference or presumption."[32] In sum, the Fifth Circuit had developed the law in a way to make it very difficult to ever prove individual disparate treatment discrimination.

III. *REEVES* IN THE SUPREME COURT

In *Reeves*, the Supreme Court granted the petition for certiorari on three issues and, in a unanimous decision, decided two issues of importance.[33] The Court first

30. *Reeves*, 197 F.3d at 693-94.
31. *Id.* at 692.
32. Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993).
33. Certiorari was granted on three questions:

rejected the Fifth Circuit's pretext-plus rule as inconsistent with the Court's earlier decision in *Hicks*. Second, the Supreme Court rejected that court's slicing and dicing approach to deciding 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 decisionmaker 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 and then draw all reasonable inferences in favor of the nonmoving party, typically the plaintiff. Putting the two parts of the opinion together, motions for summary judgment and judgment as a matter of law must be denied where, looking at all the evidence favorable to the plaintiff and drawing every inference in favor of the plaintiff, a reasonable fact finder could find for the plaintiff.

A. The Court Rejects Justice Scalia's Invitation in Hicks

In *St. Mary's Honor Center v. Hicks*,[34] the Court continued the contraction of the *McDonnell Douglas* strand of individual disparate treatment law which the Court began in *Texas Department of Community Affairs v. Burdine*.[35] In *Hicks*, the Court, in an opinion by Justice Scalia, rejected the grant of summary judgment to plaintiff who had proved her prima facie case as well as proving that the defendant's reason was false[36] and held that "the factfinder's disbelief of the reasons put forward

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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 motion for judgment as a matter of law, the court should review all of the evidence in the record." 530 U.S. 133, 150, 120 S. Ct. 2097, 2110 (2000). 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.

34. 509 U.S. 502, 113 S. Ct. 2742 (1993).

35. 450 U.S. 248, 101 S. Ct. 1089 (1981).

36. 509 U.S. at 512, 113 S. Ct. at 2746 (quoting the court of appeals decision, 970 F.2d 487 (8th Cir. 1992)). The language in *Burdine* supporting that interpretation was that, "placing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." 450 U.S. at 255-56, 101 S. Ct. at 1095.

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."[37]

His protestations to the contrary notwithstanding,[38] Justice Scalia then added dicta that some lower courts,[39] including the Fifth Circuit,[40] 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."[41] Breaking down what needs to be proved this way suggested that something more was required of plaintiffs beyond proving her prima facie case and the falsity of defendant's explanation. This something more came to be known as the "pretext-plus" rule.

The unanimous Court in *Reeves* reaffirmed the holding in *Hicks* and rejected the pretext-plus rule.[42] 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."[43]

The pretext-plus courts' justification of the rule was based on the language from *Hicks*, that the presumption of discrimination created when the plaintiff initially proved the prima facie case "drops out of the picture"[44] once the defendant meets its burden of production by introducing evidence raising a factual question that its asserted reason, not discrimination, explains the adverse action plaintiff was challenging. These courts extended this "drops out of the picture" language beyond dropping the presumption of discrimination created by the prima facie case to go

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37. 509 U.S. at 511, 113 S. Ct. at 2749.

38. In a footnote, he 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.*

509 U.S. 502, 511 n.4, 113 S. Ct. 2742, 2749 n.4 (1993).

39. *See* Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (en banc); Isenbergh v. Knight-Ridder Newpaper 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).

40. Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir.1996) (en banc).

41. 509 U.S. at 515, 113 S. Ct. at 2752.

42. Thus, reversing the Fifth Circuit's holding that a defendant is 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 of its action." 530 U.S. 133, 137, 120 S. Ct. 2097, 2103 (2000).

43. *Id.* at 148, 120 S. Ct. at 2109. 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 from the falsity of the employer's explanation." *Id.* at 146-47, 120 S. Ct. at 2108.

44. 509 U.S. at 511, 113 S. Ct. at 2749.

further and drop out the probative value of the evidence supporting the prima facie case. With that evidence gone, more evidence was necessary before plaintiff would be able to prove discrimination. Justice O'Connor rejected that extension stating, "although 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."[45]

Just as the 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 supporting the fact 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.[46]

Evoking pre-*Burdine* authority, Justice O'Connor concluded by restating the consequences for the employer of having its reason rejected by the fact finder. "[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."[47]

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* be adequate to sustain a jury's finding of liability."[48] 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." The factors that could lead a trial court to take a case from the fact finder 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]

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45. 530 U.S. at 143, 120 S. Ct. at 2106.

46. *Id.* at 147, 120 S. Ct. at 2108.

47. *Id.* at 147-48, 120 S. Ct. at 2108-09 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 2950 (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.").

48. *Id.* at 148, 120 S. Ct. at 2109. 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 questions of fact.'" *Id.* at 148, 120 S. Ct. at 2109.

49. *Id.* Justice O'Connor describes several scenarios where judgment as a matter of law would

Justice Ginsburg, in her concurring opinion, indicated that it should be "uncommon" for cases to be taken from the jury. 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].[50]

In sum, rejection of the pretext-plus rule should lead to many more individual disparate treatment cases surviving a motion for summary judgment and going to the fact finder and many fewer judgments as a matter of law being granted overturning jury verdicts.

B. Drawing All Favorable Inferences from All the Evidence in Favor of the Non-Moving Party

The Court quickly resolved the two related procedural questions presented by accepting the Fifth Circuit's rule that both for motions for summary judgment under Rule 56 and for judgment as a matter of law under Rule 50, "the court should review all of the evidence in the record."[51] Nevertheless, the Court found that the Fifth Circuit had misapplied the rule in two significant ways. First, "the court disregarded critical evidence favorable to [Reeves]—namely, the evidence supporting [Reeves's] prima facie case and undermining [defendant's] nondiscriminatory explanation."[52] Thus, based on its error concerning the pretext-plus rule, the Fifth Circuit had rejected the probative value of that evidence put in the record by the plaintiff and, therefore, in reviewing the record had erroneously not included that evidence as evidence in the record. In addition to the

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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 neither proves the elements of plaintiff's barebones prima facie case as set forth in *McDonnell Douglas* nor proves 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: "The ultimate question is whether the employer intentionally discriminated." *Id.* at 146, 120 S. Ct. at 2108. That interpretation is bolstered by the next section of the opinion which looks at all the evidence supporting plaintiff's case.

50. *Id.* at 154-55, 120 S. Ct. at 2112.

51. *Id.* at 150, 120 S. Ct. at 2110.

52. *Id.* at 152, 120 S. Ct. at 2111.

unchallenged evidence of a prima facie case, the evidence included the age-based comments of the one decisionmaker, Chesnut, and the evidence that Chesnut was the actual decisionmaker behind Reeves's firing. Second, the "court also failed to draw all reasonable inferences in favor of [Reeves]."[53]

> [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 Reeves'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 decisionmakers were motivated by age." 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.[54]

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.

C. Is the Whole Larger Than the Parts?

So, how important is *Reeves* and what about it is most important? The minimalist view would be to view *Reeves* as simply deciding two points. The first is the rejection of the pretext-plus view and the second is how to apply correctly the rule that, in deciding motions for summary judgment or judgment as a matter of law, the court is to look at all the evidence and draw every inference in favor of the nonmoving party.

As to the first point, *Reeves* simply reaffirms *Hicks* by rejecting further narrowing of the pretext-plus rule. Thus, *Reeves,* plus *O'Connor v. Consolidated Coin Caterers Corp,*[55] (the only other individual disparate treatment decision of the Court since it decided *Hicks* and *Hazen*[56] in 1993) stand for the proposition that the Court does not sanction further narrowing of the *McDonnell Douglas* wing of individual disparate treatment analysis. The structure of Justice O'Connor's opinion gives some support to that interpretation because it treats the pretext-plus as the core issue to be decided, with the procedural issues being of secondary

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53. *Id.*

54. *Id.* (quoting decision of the Fifth Circuit (citations omitted) (emphasis added)).

55. 517 U.S. 308, 116 S. Ct. 1307 (1996) (rejecting the Fourth Circuit's "safe harbor" rule foreclosing age discrimination discharge claim where employee replacing plaintiff is at least age 40).

56. Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701 (1993).

concern. Indeed, the opinion explains that the reason the Court took the case was to resolve the pretext-plus issue:

> We granted certiorari . . . to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas* . . .), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.[57]

As to the second point, the Court did not really focus on the Fifth Circuit's slicing and dicing approach to reviewing the record in determining motions for summary judgment or judgment as a matter of law. Instead, the focus was on the wrong application of the facts of the particular case to the rule that all the evidence is to be reviewed in deciding motions for judgment as a matter of law. The failure to focus on the general approach of the Fifth Circuit which had been to slice and dice away most of plaintiff's evidence as not probative before applying the standard of review for motions for judgment as a matter of law may be a consequence of the Court's finding the procedural questions presented to be so easily decided in favor of the Fifth Circuit's rule. That resulted in the bulk of the last part of the opinion being devoted to the correct application of that standard of review to the facts of this case. The application phase of any Supreme Court opinion may not be viewed as significant beyond its resolution of the particular case.[58]

For *Reeves* to be a truly significant case—a decision where the whole is greater than its two parts—it is necessary to look at the underlying and unifying rationale of both parts of the opinion. That rationale is that, despite the intricacies of the *McDonnell Douglas* analysis and its procedural operation to develop a record, it is necessary to consider all the evidence that is produced as a result of those procedures being followed. That evidence includes evidence supporting the prima facie case, evidence tending to prove the defendant's proffered reason to be false, and all other circumstantial evidence such as age-related comments of decisionmakers that supports plaintiff's case. Slicing and dicing away of plaintiff's evidence to leave only evidence supporting defendant's case is inconsistent with the true nature of the *McDonnell Douglas* method of analyzing individual disparate treatment cases. To say this another way, what the Fifth Circuit did wrong in

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57. 530 U.S. at 140, 120 S. Ct. at 2104.

58. Professor Henry H. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959), criticized the Court for hearing and deciding too many Federal Employers' Liability Act cases to apply correctly the rules to those individual cases. Spending so much time doing that diverted the Court from its broader role in the development of federal statutory law by the federal judiciary:

> It will be seen that what matters about Supreme Court opinions is not their quantity but their quality. And it will be seen that the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyer and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.

Id. at 96.

Reeves was to exclude from consideration almost all the probative evidence supporting plaintiff's case before it ever applied the Rule 50 test. It is a mistake to throw out most of plaintiff's evidence before reviewing the record for a motion for judgment as a matter of law. All the evidence in the record supporting plaintiff's case and every inference based on that evidence must be viewed in favor of the nonmoving plaintiff. The most significant lesson of the Supreme Court in *Reeves* is the necessity to include all the probative evidence in the record, without regard to which part of the *McDonnell Douglas* analysis it might be relevant, before deciding motions for summary judgment and judgment as a matter of law.[59]

IV. *REEVES* APPLIED IN THE LOWER COURTS

The early returns of decisions by the lower courts suggest that the lower courts have not changed their practices significantly despite the new approach ordered by the Court in *Reeves*. The courts still are slicing and dicing away plaintiff's evidence before reviewing the record for purposes of deciding motions for summary judgment and judgment as a matter of law. Further, at least one court has suggested a new way to narrow the application of the *McDonnell Douglas* wing of individual disparate treatment law to replace the now discredited "pretext-plus" rule by requiring direct evidence that the pretext was a lie, rather than merely requiring evidence that the employer's reason was false. Finally, at least one court has predicted that, as a consequence of *Reeves,* many more defendants will challenge, rather than concede, plaintiff's establishment of a prima facie case because *Reeves* now requires that evidence to be considered.

This section begins with a quick review of the response of the Fifth Circuit to the Supreme Court's repudiation of its approach in *Reeves* and then discusses the developments among the other courts of appeals. The first two of the three post-*Reeves* decisions of the Fifth Circuit appear to minimalize it; the third does seem to attempt to implement it. In *Vadie v. Mississippi State University,*[60] the court assumed that the decision of the panel that decided *Reeves* had been an aberration and that the true law of the circuit as established in *Rhodes v. Guiberson Oil*

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59. In essence, *Reeves* adopts the approach suggested by Judge Denny Chin:

> 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.

Chin & Golinsky, *Moving Beyond* McDonnell Douglas, *supra* note 16, at 673.

60. 218 F.3d 365, 373 (5th Cir. 2000) (overturning the denial of defendant's motion for judgment as a matter of law by district court after jury verdict for plaintiff because, other than proof of plaintiff's Iranian ancestry, "there is nothing probative anywhere in the record of the ultimate question of national origin discrimination.").

Tools,[61] was consistent with the Supreme Court's decision in *Reeves*: "*Rhodes* is consistent with *Reeves* and continues to be the governing standard in this circuit. This appeal falls within the exception noted by *Reeves* and *Rhodes*."[62]

In the second decision, *Rubenstein v. Administrators of the Tulane Educational Fund*,[63] the court, in the face of the Supreme Court's decision in *Reeves*, continued to apply the circuit's prior law that stray remarks were not probative of discrimination so as to withstand a motion for summary judgment.

> [T]he only evidence offered by Rubinstein in support of his claims of discriminatory intent relate to comments made by Professor Watts, a member of the relevant committees responsible for making promotion and pay-raise decisions, that Rubinstein was a "Russian Yankee" and that Jews are thrifty, as well as an isolated remark by Professor Bruce, also a member of the relevant committees, that if "the Russian Jew" could obtain tenure, then anyone could.[64]

Based on *Brown v. CSC Logic, Inc.*,[65] the court held that "these comments are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment."[66]

The third and most recent decision, *Russell v. McKinney Hospital Venture*,[67] is the first decision of the Fifth Circuit to take *Reeves* seriously. In reversing the trial court's grant of a judgment as a matter of law for defendant, the court disagreed with *Vadie* as to the effect of *Reeves* on *Rhodes*.

> We do not see much to be gained from dissecting *Rhodes* to divine [its central features that survive *Reeves*]. Rather, we simply comply with the Supreme Court's mandate in *Reeves* not to substitute our judgment for that of the jury and not to unduly restrict plaintiff's circumstantial case of discrimination. We therefore underscore that *Reeves* is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases. *Reeves* guides our decisions, and insofar as *Rhodes* is inconsistent with *Reeves*, we follow *Reeves*.[68]

The *Russell* court also held, unlike the panel in *Rubenstein*, that *Reeves* had changed the stray remarks jurisprudence of the circuit as it had been established in

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61. 75 F.3d 989 (5th Cir. 1996) (en banc).

62. 218 F.3d at 373 n.23. Similarly, the Second Circuit has so far concluded that *Reeves* is "wholly compatible and harmonious" with its pretext-plus decision. *See* Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (en banc); James v. New York Racing Ass'n & New York State Racing & Wagering Bd., 233 F.3d 149, 155 (2d Cir. 2000). *See also* Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000).

63. 218 F.3d 392 (5th Cir. 2000) (affirming summary judgment for defendant on plaintiff's discrimination claim).

64. *Id.* at 400.

65. 82 F.3d 651 (5th Cir. 1996).

66. 218 F.3d at 401.

67. 235 F.3d 219 (5th Cir. 2000).

68. *Id.* at 223 n.4.

Brown. "The Court in *Reeves* made clear that viewing remarks that a jury could find to evidence animus through the harsh lens employed by the *Reeves* panel (which, in turn, relied upon *Brown*) was unacceptable."[69]

In sum, if the more recent decision in *Russell* carries the day over the earlier decisions of *Vadie* and *Rubenstein*, the Fifth Circuit appears to be well on its way to implementing *Reeves* in the jurisprudence of the circuit. This prospect appears more favorable than does the application of *Reeves* in some of the other circuits.

Looking first at summary judgment decisions, in *Kulumani v. Blue Cross Blue Shield Association*,[70] the Seventh Circuit affirmed the district court's grant of summary judgment to the employer, holding that the plaintiff failed to adduce sufficient evidence that the employer's reason for his discharge was a pretext for discrimination. The plaintiff was an accountant for Blue Cross-Blue Shield who was discharged in a reduction in force. Kulumani sued, alleging national-origin discrimination because of his Indian heritage. To implement the reduction in force, the employer "required its managers to pare their staffs using performance and seniority as benchmarks, but without any mechanical rule."[71] Kulumani's supervisor evaluated the employees under his supervision and selected three for discharge. Kulumani was not among them, but the Director of Human Resources then overturned the supervisor's decision, deciding that Kulumani should be discharged instead of one of the three the supervisor had targeted, allegedly because the other employee was better qualified than plaintiff. Kulumani claimed that, absent discrimination, the person originally picked for discharge by his supervisor would have been discharged instead of him.

In analyzing whether plaintiff had adduced sufficient evidence to withstand defendant's motion for summary judgment, the court created a new, narrowing rule which it claimed was consistent with *Reeves's* rejection of the pretext-plus rule. The court also appeared to continue to use the slicing and dicing away of the evidence approach that had also been rejected in *Reeves*. Although the Human Resources Director's decision was unusual, the court said that did not make it suspicious. In order to show that the Director's "intervention was a pretext for discrimination [the plaintiff] needed to establish not that it was unusual but that the stated reason (quality control)" for the employment decision "means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks."[72] Moreover, the court then read *Reeves* as making "clear . . . that pretext means a dishonest explanation, a lie rather than an oddity or an error."[73] It was at this point that the court took a big leap to conclude that *Reeves* required what appears to be direct evidence that the Director lied about why he

69. *Id.* at 226. Applying *Reeves* to the record, the court held that "[t]he remarks at issue in this case [frequent references to plaintiff as "old bitch"] because of their content indicates age animus and the speaker (Ciulla) was primarily responsible for Russell's termination." *Id.*

70. 224 F.3d 681 (7th Cir. 2000).

71. *Id.* at 683.

72. *Id.* at 684 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48, 120 S. Ct. 2097, 2108-09 (2000)).

73. *Id.* at 685 (citing *Reeves*, 530 U.S. at 147, 120 S. Ct. at 2108).

picked Kulumani to be discharged instead of the person the supervisor had recommended. The evidence that the decision was unusual was found not to be probative of pretext and so Kulumani had adduced no evidence of deceit—"no statements by [the Director], no disparate impact from managerial interventions, nothing except the raw fact that [the Director] stepped in."

In contrast to the approach of the Seventh Circuit in *Kulumani,* the Court in *Reeves* described the evidence at issue about the defendant's proffered explanation as tending to show that it was false, not that it directly proved defendant's reason to be a lie. Thus, the Court said that plaintiff "made a substantial showing that respondent's explanation was false."[74] Based on evidence that the reason advanced by the employer was false, the fact finder can first draw the inference that the defendant is not telling the truth and then further draw the inference that the employer is lying to cover up its true reason, which is discrimination. "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."[75] Further, a finding that the reason defendant advances is in fact false plus a finding that plaintiff had proved his prima facie case means that there is no evidence of a nondiscriminatory explanation in the record for the action: Proof of the prima facie case excludes the most common legitimate reasons for the defendant's action, and proof of the falseness of the nondiscriminatory reason offered by defendant to explain its action means there is no evidence in the record of a nondiscriminatory reason for defendant's action. In the absence of evidence of any nondiscriminatory reason, it is appropriate, though as *Hicks* makes clear not necessary, for the fact finder to draw the inference that the real reason is discrimination. "[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."[76]

Second, in upholding summary judgment, the Seventh Circuit appears to be drawing inferences in favor of the moving, rather than the nonmoving party. The opinion reads more like the Fifth Circuit's, and not the Supreme Court's, decision in *Reeves.*[77] For example, Kulumani had adduced circumstantial evidence that he was more qualified than the employee whose job was saved by his discharge by showing that his performance ratings were better than those of the other employee. The court rejected the inference that that evidence supported plaintiff's claim that his discharge was not because he was not doing as good a job but was for discrimination by countering that claim with defendant's evidence that the employee

74. 530 U.S. at 144, 120 S. Ct. at 2107. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence. . . ." *Id.* at 147, 120 S. Ct. at 2108.

75. *Id.*

76. *Id.* at 147, 120 S. Ct. at 2108-09.

77. *Id.* at 150, 120 S. Ct at 2110. In *Reeves,* the Court described grants of summary judgment under Rule 56 as "analogous" to the grant of a judgment as a matter of law under Rule 50. Thus, the "standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Id.* (quoting Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250-51, 106 S. Ct. 2505, 2511-12 (1986)).

who was not discharged had more seniority, and thus could have been retained for that reason even though the defendant did not claim seniority was the basis of its decision to discharge plaintiff. Further, the court found that, even if seniority was not a factor, "a reasonable trier of fact could [not] conclude that [the Director] lied when she said that Kulumani and [the employee whose job was saved by plaintiff's discharge] were not tied in performance assessments."[78] In doing so, the court relied on the average ratings given by the employer to each employee which favored the retained employee, instead of their median ratings which favored plaintiff.

In sum, the interpretation the *Kulumani* court gave to *Reeves* was at best strained on both parts of that decision. The court certainly did not respond to the underlying rationale of *Reeves* that all plaintiff's evidence counts and must be considered in a motion for summary judgment or judgment as a matter of law. At worst, *Kulumani* may begin a new line of cases that again unduly restrict the application of the *McDonnell Douglas* approach in the way that the now discredited "pretext-plus" rule had narrowed that analysis. Requiring evidence not only that defendant's reason was false but that it was a lie sounds like a restatement of the pretext-plus rule. Further, the court sliced and diced its way through the evidence in the record in order to draw every inference in favor of the employer, who was the moving rather than the nonmoving party for the grant of summary judgment. Stated another way, the Seventh Circuit in *Kulumani* appeared either to turn *Reeves* on its head or to barely acknowledge its existence.

The First Circuit also failed to follow the lesson of *Reeves* by continuing to slice and dice the evidence in the record in order to draw inferences in favor of the employer, the party moving for summary judgment. In *Williams v. Raytheon Company*,[79] plaintiff, a fifty-oneyear old male, challenged his discharge from his job as Director of Internal Communications as discriminatory because of sex and age. Williams introduced evidence that his supervisor, a woman, upon being employed, "told members of her department that she thought" the Company "was run by 'old, white men,' that she intended to change the corporate culture, and that she would favor the hiring of women and younger people."[80] Plaintiff adduced evidence that her style was assertive and abrasive. For example, she forced a woman employee out of the company by assigning her computer tasks that she knew the employee could not perform. She also, by mistake, approved the premature publication of a press release announcing that a government contract had been awarded to Raytheon. In response to an investigation of that leak by the government, she allegedly ordered the plaintiff to prepare a false statement about the event, making him blame his secretary for the early release of the story rather than accepting responsibility herself. The plaintiff maintained that after he told the government investigators about this incident, the supervisor threatened his job. The plaintiff further alleged that the supervisor "conducted a campaign of harassment against him to prevent him

78. 224 F.3d 681, 684 (7th Cir. 2000).
79. 220 F.3d 16 (1st Cir. 2000).
80. *Id.* at 18.

from performing his job."[81] This harassment allegedly culminated in an altercation concerning a memorandum that the plaintiff wrote to his supervisor over changes she proposed in company publications, "the tone of which" the supervisor "considered hostile and sarcastic."[82] When the supervisor met with the plaintiff concerning that memorandum, plaintiff allegedly threatened her. Plaintiff was thereafter put on suspension for insubordination, and "was eventually replaced by a forty-eight year old white man."[83]

The First Circuit claimed to apply *Reeves* in reviewing plaintiff's case. Indicating that the employer in *Reeves* had accused plaintiff of "shoddy record keeping," but the plaintiff had shown that accusation was false because he presented evidence "that he had properly maintained attendance records and that he was not responsible for failure to discipline late and absent employees."[84] In so doing, Reeves had established that the employer's proffered reason was "false." Apparently assuming that pretext could only be proved by plaintiff's proof that the employer's reason was false, the court then found that Williams had "made no showing, much less a substantial showing, that the insubordination justification was false."[85] Further, the plaintiff and the supervisor "had an acrimonious working relationship," which deteriorated completely when the supervisor proposed changes for the company's publications.

The First Circuit missed an important step in *Reeves*: Once plaintiff introduces evidence that a reasonable fact finder could rely on to conclude that the reason the employer gave for his discharge was not the real reason for the defendant's action, that evidence, along with evidence supporting the prima facie case and all the other circumstantial evidence, would allow the fact finder to draw the inference that the employer gave a false reason in order to cover up its real reason, that it was discharging plaintiff because of his age. While the acrimonious working relationship between Williams and his supervisor was like the relationship between Reeves and Chesnut,[86] the fundamental issue is not whether that acrimonious relationship was factually true or false, but whether the supervisor provoked plaintiff and then used his response to justify terminating the plaintiff to hide her true reason—that he was fired because he was an older white male. So, the falseness that is relevant to the use of the *Reeves* analysis is whether the insubordination actually was the reason for the discharge or whether that incident was used as a pretext for discrimination. The First Circuit in *Williams* took a narrow, mechanical approach that fails to implement *McDonnell Douglas* as now

81. *Id.*

82. *Id.*

83. *Id.*

84. 220 F.3d at 19 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 144, 120 S. Ct. 2097, 2107 (2000)).

85. *Id.* (citing *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109).

86. The facts resemble those in *Hicks* where the bad blood between the supervisor and the plaintiff unquestionably existed, and the real issue was why the supervisor acted on that bad blood. The Court there upheld the fact finder's conclusion that plaintiff had not proved that the supervisor took the action because of race. 509 U.S. 502, 113 S. Ct. 2742 (1993).

understood in light of *Reeves*. An approach more sympathetic to the purposes of the laws against discrimination would have likely sent the case to the jury rather than uphold the granting of summary judgment.

Further, the First Circuit appeared to misapply Rule 56 by slicing and dicing through the record to draw inferences most favorable to the employer as the moving party. Regarding the "stray remarks" made by the plaintiff's supervisor that she wanted more women and young people, that she sought to change the company's "old, white men culture," that the supervisor had told the plaintiff "to give credit for a brochure he created to a female assistant," and that the when the plaintiff "accused her of wanting him out because he was an older man, she remained silent," the court rejected the probative value of all of this evidence and the inference of discrimination created by it because the supervisor had hired men, in one instance replacing an older woman with a young man. To say it again, the opinion in *Williams* reads more like the Fifth Circuit opinion in *Reeves* rather than the opinion of the Supreme Court. This is so because the court failed to heed the lesson underlying *Reeves* that all of plaintiff's evidence counts and that, in looking at all the evidence, the court must draw every reasonable inference if favor of the nonmoving plaintiff in deciding whether a case should be sent to the fact finder.

Despite *Reeves,* the courts also continue to overturn jury awards by granting motions for judgment as a matter of law by parsing the record looking for evidence favorable to the moving party, rather than drawing every inference in favor of the non-moving party. For example, in *Massey v. Blue Cross-Blue Shield of Illinois*,[87] the Seventh Circuit affirmed the district court's grant of judgment as a matter of law, setting aside a jury verdict in favor of the plaintiff. Plaintiff was an African-American woman who had been successful in one department and was later transferred to another department where her troubles began. Her supervisor in the new department was a white woman. Two other African-American women and one other white woman made up the department. From the time she began working in the new department, plaintiff's performance evaluations from her new supervisor were not positive, including an evaluation of her writing as "below average."[88] After being placed on probation, plaintiff was ultimately fired by her supervisor.

The employer relied upon the plaintiff's negative performance evaluations, specifically her alleged "poor writing, investigatory, and follow-up skills" as its legitimate, nondiscriminatory reason for firing her.[89] To demonstrate that this reason was pretextual, the plaintiff introduced evidence that her performance evaluations in her former department had been extremely positive, that, compared to the work of her peers in her new department, her performance was good, that her supervisor had called her stupid, and that her work had been redone even when she had modeled her work on work which previously had been deemed acceptable. The plaintiff maintained that her performance evaluations were negative because of her supervisor's racial stereotyping. In order to establish that stereotyping, the plaintiff

87. 226 F.3d 922 (7th Cir. 2000).
88. *Id.* at 924.
89. *Id.*

introduced evidence that her white co-worker "was given more assistance [by her supervisor] than she was, and that" her supervisor "had tried to separate the races through seating assignments" with all the African-American workers on one side of the office and the whites on the other.[90]

The Seventh Circuit interpreted *Reeves* as permitting the plaintiff to demonstrate that she was a victim of discrimination "by convincing the jury that Blue Cross's claim of firing her for poor writing, investigatory skills, and follow-through was actually a pretext for discrimination, or by other evidence from which it could find intentional discrimination."[91] In applying that standard, the court first noted that, as in *Reeves,* the plaintiff had introduced evidence that could allow the fact-finder to infer that Blue Cross's legitimate, nondiscriminatory reason was "not worthy of belief." Nevertheless, the court found that the plaintiff's evidence was not sufficient to show pretext because "earlier performance evaluations that relate to less demanding jobs are of little value in assessing an employee's present performance."[92] The court also found that the examples of her written work were insufficient to demonstrate pretext, even though the comments on her work were suspect. The court then rejected as insufficient evidence of pretext the testimony of the supervisor that "she could not explain why she had evidently criticized [the plaintiff] more than others."[93] The court also rejected the plaintiff's evidence of discriminatory intent as shown by the fact that she was replaced by a white woman and that another white woman had "received better treatment" than she had. Lastly, the court rejected the plaintiff's proffered evidence of "stray remarks"—the comment by her supervisor that she was "stupid"—and the fact that the office was racially segregated with all the African Americans assigned to desks along one side and the white workers along the other because the office was small. Thus, the court granted a judgment as a matter of law.

As in the cases dealing with summary judgment, this case, granting a judgment as a matter of law, applies *Reeves* in a mechanical way, failing to understand the role circumstantial evidence plays in the fact finding process. Further, as to the standard to be applied in deciding a motion for judgment as a matter of law, the opinion again reads like the Fifth Circuit's approach in *Reeves* and not the radically different approach the Supreme Court took in reversing the Fifth Circuit.

One final note on what may become an unintended consequence of *Reeves.* In *Smith v. Chicago Park District,*[94] the Seventh Circuit upheld granting summary judgment where the district court found that plaintiff failed to adduce sufficient evidence to establish a prima facie case. In so doing the court made clear that *Reeves* "may permit the trier of fact to conclude that the employer unlawfully discriminated. But *Reeves* adds nothing material to the analysis in the instant case,

90. *Id.*

91. *Id.* at 925 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-49, 120 S. Ct. 2097, 2108-09 (2000)) ("also emphasizing that the trier of fact is not required to find discrimination if it rejects the defendant's explanation").

92. *Id.*

93. *Id.* at 926.

94. No. 99-3629, 2000 U.S. App. LEXIS 16240 (7th Cir. July 11, 2000).

since Smith failed to meet his burdens of establishing either a prima facie case or pretext."[95] While not directly affecting what it takes to establish a prima facie case, *Reeves* may, nonetheless, cause defendants more frequently to challenge, rather than concede, plaintiff's proof of a prima facie case. The district judge in *Jordan v. Olsten Corporation*[96] made just such a point. In noting that the employer failed "to dispute whether [plaintiff] had established a prima facie claim of discrimination," the court noted that "[i]n the future, perhaps *Reeves* will cause all defense counsel to be more reluctant to concede for the purposes of argument that a plaintiff has established a prima facie case."[97] *Reeves* may cause such a strategic change since, before that decision, many courts viewed the evidence supporting a prima facie case as dropping from the case once the defendant carried its burden of introducing evidence of its nondiscriminatory reason, and defendants always carried that burden.[98] Now, however, *Reeves* has made it clear that the evidence supporting the establishment of the prima facie case continues to have probative value toward the ultimate question of whether the defendant acted with an intent to discriminate even after the defendant does come forward with evidence of a nondiscriminatory reason for its challenged action. The probative value of the evidence supporting the prima facie case does not drop from the case. Thus, if the defendant concedes that plaintiff has established a prima facie case, plaintiff might be expected to ask the judge to direct the jury that it must find that the most common legitimate, nondiscriminatory reasons for the employer's decision are in fact not the reasons for defendant's action. To avoid such an instruction, defendants may now more frequently fight over whether plaintiff has established a prima facie case.

In sum, the lower courts have yet to recognize the potential of *Reeves* and appear to be continuing business as usual in approaching individual disparate treatment cases relying on *McDonnell Douglas* analysis. The next section addresses some of the reasons for their failure to follow the lead of the Supreme Court.

V. WHY *REEVES* IS YET TO BE FOLLOWED

Having now rejected the slice and dice approach in the context of both summary judgments and judgments as a matter of law, the Supreme Court in *Reeves* has set the stage for a possible rejuvenation of individual disparate treatment law. What is puzzling is that, at least in the first round of the lower court interpretations of *Reeves,* these courts have not followed the lesson of the Supreme Court's decision and appear not to have understood the significance of its holding that all of plaintiff's evidence must count. There are several reasons why this may be true. First, it may simply be too early to expect that the effect of the *Reeves* decision

95. *Id.* at *6 n.1.

96. 111 F. Supp.2d 227 (W.D.N.Y. 2000).

97. *Id.*

98. In a law review article, Federal District Court Judge Denny Chin concluded that no reported case involves an employer having failed to come forward with a nondiscriminatory reason for its action. *See* Chin, *supra* note 16, at 665.

would be appreciated fully by the practicing bar and argued to the lower federal courts.

While that may be corrected over time, several aspects of the decision in *Reeves* may make that more difficult, or, at least, make it take longer for its full potential to be realized. The opinion of Justice O'Connor is structured as if its major thrust is only to the "pretext-plus" point. Indeed, it is on that point that she claims the Court granted certiorari. And, the section that deals with the rejection of the slicing and dicing approach to the review by courts for the purpose of deciding motions for summary judgment and judgments as a matter of law appears to be the simple follow-up to the procedural decision that the court so easily reached. The deeper meaning of *Reeves*—that all the plaintiff's evidence counts—may be lost if the decision is viewed as simply the exercise of the traditional judicial craft of applying facts to law.[99]

Second, it may be that the judges on the lower courts are not fully open to *Reeves* because it is at odds with their beliefs about how serious a problem discrimination actually presents. There is data suggesting that federal judges, without regard to their political background, have come to view discrimination as less of a problem than it once was and now only involving the idiosyncratic behavior of a few employers.[100] Take, for example, the skepticism of Judges Jacobs and Leval writing for six members of the Second Circuit en banc in *Fisher v. Vassar College*[101] and adopting the pretext-plus rule. As to the significance of plaintiff establishing a prima facie case based on *McDonnell Douglas,* the court described the effect of establishing a prima face case—of rejecting the most typical nondiscriminatory reasons for the employer's action—as minimally relevant to proof that the employer acted with an intent to discriminate:

> [T]he essential elements of this diminished, minimal prima facie case do not necessarily support a reasonable inference of illegal discrimination. In our diverse workplace, virtually any decision in which one employment applicant is chosen from a pool of qualified candidates will support a slew of prima facie cases of discrimination. The rejected candidates are likely

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99. Professor Cass R. Sunstein advocates judicial minimalism as a preferred approach for the Court. *See* Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999). Minimalism is in tension with the leadership role of the Supreme Court in developing federal statutory law. Hart, *supra* note 58, at 96, articulated that leadership role. He states that:

> [the] test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.

100. Professor Deborah A. Calloway has demonstrated that the *Hicks* decision is based on the underlying assumption by federal judges that discrimination is much less of a problem than it was when *McDonnell Douglas* was first decided. Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption,* 26 Conn. L. Rev. 997 (1994). *See also* Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretation of Sex-Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument,* 103 Harv. L. Rev. 1749 (1990).

101. 114 F.3d 1332 (2d Cir. 1997) (en banc).

> to be older, or to differ in race, religion, sex, and national origin from the chosen candidate. Each of these differences will support a prima facie case of discrimination, even though a review of the full circumstances may conclusively show that illegal discrimination played no part whatever in the selection.[102]

Similarly, the effect of proving that the defendant's reason was false was also minimized:

> To the extent that an actor in defendant's position is unlikely to have proffered a false explanation except to conceal a discriminatory motive, then the false explanation will be powerful evidence of discrimination. On the other hand, if the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent. And if, on examination of the circumstances, there are many possible reasons for the false explanation, stated or unstated, and illegal discrimination is no more likely than others, then the pretext gives minimal support to plaintiff's claim of discrimination.[103]

While all this discussion is appropriate for the jury in finding the facts and applying the law, the Second Circuit used it to prevent cases from getting to the jury in the first instance through the grant of motions for summary judgment or by overturning verdicts of the jury by grant of motions for judgment as a matter of law.

Third, if those attitudes are prevalent among federal judges at the circuit and district court levels, the question is whether the failure to implement *Reeves* can realistically be corrected by the Supreme Court. Hopefully not, but *Reeves* may be an example of the limited power that the Supreme Court actually has to shape federal statutory law as enforced in the lower federal courts.[104] In the 1999 term of the Supreme Court, it considered 2070 petitions on its Appellate Docket, 5269 on its Miscellaneous Docket, granted review in 92, and issued full opinions in 74.[105] Given the wide array of constitutional and federal statutory issues that can come to the Court, it is not surprising that, since the Rehnquist Court set what it saw as the structure of individual disparate treatment law with *Price Waterhouse* in 1989 and

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102. *Id.* at 1337.

103. *Id.* at 1338.

104. In arguing for the creation of a new national court of appeals, Professor Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 Univ. of Pitt. L. Rev 673, 679-80 (1990), characterized the structure of review wherein the Supreme Court exercised the only national review by certiorari of all of the decisions of the lower federal courts as well as of the state courts deciding federal questions as a system that did not work.

> This is not a sensible system. It is a system that is jammed at the top. It is a system that breeds uncertainty, instability, and contradiction. And of course uncertainty and instability and contradiction feed on themselves. The more uncertainty and contradiction there is in the law, the greater there is incentive to litigate, and the more new cases there will be in the future. Thus, the jamming can only get worse.

105. *The Supreme Court, 1999 Term, The Statistics*, 114 Harv. L. Rev. 397, Table II (B) & (C) (2000).

Hicks and *Hazen Paper* in 1993, the Court has only revisited this area of the law in *O'Connor v. Consolidated Coin Caterers Corp.* in 1996 and in *Reeves* in 2000. Both of these decisions reined in lower courts that were narrowing the *McDonnell Douglas* wing of individual disparate treatment law even further than the Court had in *Hicks* and *Hazen*. It may be too much to expect that the Supreme Court has the capacity to make sure that its deeper vision of individual disparate treatment law will be fully implemented by the lower courts.[106]

If it is too early to know whether the full potential of *Reeves* will be realized, it is also too early to give up hope. Through symposia such as this and other academic writing, as well as assertive action by parties to individual disparate treatment case, the legal culture of the law can develop and should change for the better.

106. Having attended the oral arguments in *Reeves*, it seemed clear to me that the Court would use the traditional judicial craft approach of deciding the case narrowly, making no more general statements than necessary to decide the case at hand. A review of the briefs of the parties and the amici suggests that the Court was not asked by anyone to do more. It may be that the deeper meaning of *Reeves* is less the result of conscious choice of Justice O'Connor in drafting her opinion and more a consequence of her recognition of the faulty basis for the pretext-plus rule as well as her need to resolve the particular case through her careful application of Rule 50 as to judgments as a matter of law.