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St. Mary's Honor Center v. Hicks: The Title VII Shifting Burden Stays Put

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Note

St. Mary's Honor Center v. Hicks: The Title VII Shifting Burden Stays Put

[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.1

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against any individual on the basis of "race, color, religion, sex or national origin."2 Since the passage of Title VII, courts have struggled to develop judicial standards by which to evaluate allegations of intentional employment discrimination. In 1973, in McDonnell Douglas Corp. v. Green,3 the Supreme Court established the order and allocation of proof for Title VII intentional employment discrimination cases.4

Under the McDonnell Douglas framework, once the plaintiff employee establishes a prima facie case of discrimination, the defendant employer assumes a burden of introducing evidence of some legitimate, nondiscriminatory reason for the adverse employment practice.5 If the defendant introduces such evidence, the plaintiff must then prove that the defendant's proffered reason is merely a "pretext."6

4. McDonnell Douglas, 411 U.S. at 800. The Court also refers to these cases as disparate treatment cases. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
5. McDonnell Douglas, 411 U.S. at 802. Although the Court described the defendant's burden as a burden of proof, the Court would later hold that the defendant's burden is one of production. See infra notes 60-67 and accompanying text.
6. In the context of Title VII intentional employment discrimination cases, "pretext"
Application of the *McDonnell Douglas* framework led to confusion in the lower courts. Consequently, in 1981\(^8\) and again in 1983,\(^9\) the Supreme Court attempted to clarify the nature of the defendant's burden in Title VII intentional employment discrimination cases. Despite the Court's efforts, a split in the circuits developed over the following issue: Whether a plaintiff is entitled to judgment as a matter of law if the trier of fact rejects as false the employer's proffered nondiscriminatory reason for the adverse employment action.\(^10\) Attempting to resolve this split, the Supreme Court held in *St. Mary's Honor Center v. Hicks*\(^11\) that a plaintiff is not entitled to judgment as a matter of law even if the trier of fact rejects the employer's reasons as a mere pretext.\(^12\) Rather, the plaintiff must prove that the employer intentionally discriminated against the plaintiff.\(^13\)

This Note critically analyzes the *St. Mary's* decision. The Note first outlines the legislative history of Title VII.\(^14\) It then reviews the shifting burden framework the Supreme Court established in *McDonnell Douglas* and the Court's subsequent attempts to clarify that framework.\(^15\) Next, the Note examines the split which developed in the federal circuits over the application of the *McDonnell Douglas* framework\(^16\) and the role in Title VII cases of Rule 301 of the Federal Rules of Evidence, the rule that governs presumptions in federal civil proceedings.\(^17\) It then discusses the facts and opinions in *St. Mary's*.\(^18\)

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10. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2750 (1993) (listing decisions showing the contrary positions of the federal circuit courts).
11. *Id.* at 2742.
12. *Id.* at 2749.
13. *Id.*
14. *See* infra part II.A.
15. *See* infra part II.B.
16. *See* infra part II.C.
17. *See* infra part II.D.
18. *See* infra part III.
and analyzes the *St. Mary's* decision and its probable impact. Finally, this Note concludes that the Supreme Court's latest pronouncement on the *McDonnell Douglas* framework will cause little change in Title VII jurisprudence.

II. BACKGROUND

A. The Civil Rights Act of 1964

The cause of action in *St. Mary's* was created by the Civil Rights Act of 1964 ("Civil Rights Act" or "the Act"). The Civil Rights Act was conceived to protect the civil rights of citizens and to provide relief when they are violated. Congress passed the Act primarily out of concern over race-based discrimination. During the drafting of the Act, the House Judiciary Committee noted that although a number of constitutional provisions guarantee equal treatment for all citizens, true equality was far from being realized. Consequently, Congress enacted legislation to address what it considered the most troublesome areas, one of which was employment discrimination.

Under Title VII of the Civil Rights Act, it is an unlawful employment practice for an employer to intentionally discriminate on the basis of "race, color, religion, sex or national origin." Congress created the Equal Employment Opportunity Commission ("EEOC") to eliminate unlawful employment practices through informal and formal means. Congress vested the Commission with primary responsibil-

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19. See infra part IV.
20. See infra part V.
21. See infra part VI.
22. *St. Mary's*, 113 S. Ct. at 2746.
24. *Id.* at 2393.
25. *Id.*
26. *Id.* at 2393-94.
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.
ity for preventing and eliminating employment practices that violate Title VII.\textsuperscript{29}

Although Title VII was meant to eradicate discriminatory employment practices, it did not provide the EEOC or the courts with standards for evaluating and adjudicating allegedly discriminatory practices.\textsuperscript{30} This lack of guidance caused members of the House Judiciary Committee minority to warn that if Title VII were enacted, employers charged with discrimination would bear the burden of demonstrating that they did not intentionally discriminate against plaintiff employees.\textsuperscript{31} The minority members interpreted Title VII as requiring employers to actually prove their innocence.\textsuperscript{32}

B. The Shifting Burden: The Supreme Court Attempts to Determine Who Must Prove What

Apparently confirming the fears of the committee minority, in \textit{McDonnell Douglas Corp. v. Green}\textsuperscript{33} the Supreme Court adopted a shifting burden framework for intentional employment discrimination cases that seemed to impose upon Title VII defendants the burden of justifying their employment practices.\textsuperscript{34} However, since \textit{McDonnell Douglas}, the Court has consistently refused to require the employer to ultimately prove its innocence, holding instead that the plaintiff bears the ultimate burden of proving that the employer intentionally discriminated against the plaintiff.\textsuperscript{35} What remained unclear from \textit{McDonnell Douglas}...
Douglas and its progeny, however, was precisely how the plaintiff could meet his or her ultimate burden of persuasion. 36

The McDonnell Douglas Court held that once a Title VII plaintiff establishes a prima facie case of intentional discrimination, the employer assumes a burden to proffer a "legitimate, nondiscriminatory reason" for the adverse employment action. 37 If the employer meets that burden, the plaintiff is then allowed an opportunity to establish that the employer's proffered reason was a mere pretext for discrimination. 38 In creating this burden shifting framework, the McDonnell Douglas Court stated that the burden assumed by the defendant upon establishment of the plaintiff's prima facie case was a "burden of proof." 39 The Court later interpreted the defendant's burden as a burden of production. 40

In McDonnell Douglas, Percy Green, an African-American, was laid off by McDonnell Douglas as part of a general work-force reduction. 41 Green, who was an activist in the civil rights movement, believed the lay-off was racially motivated. 42 To protest the lay-off, Green and other civil rights activists stalled their cars on the main roads to a McDonnell Douglas plant, intentionally hampering the morning shift change. 43 Further, approximately one year later, Green allegedly participated in a "lock-in," during which he and other activists purportedly chained and padlocked the front door of a McDonnell Douglas building in downtown St. Louis to prevent employees from leaving. 44

Shortly after the lock-in, McDonnell Douglas advertised for employees in Green's trade, and Green applied for re-employment. 45 McDonnell Douglas rejected Green's application, asserting that it did
so because of Green's participation in the stall-in and lock-in.\textsuperscript{46}

Claiming violations of Title VII, Green filed a complaint with the EEOC alleging that McDonnell Douglas had refused to rehire him because of his race and his participation in the civil rights movement.\textsuperscript{47}

After investigating Green's allegations, the EEOC determined that there was reasonable cause to believe that McDonnell Douglas had violated Title VII.\textsuperscript{48} The EEOC then notified Green of his right to sue.\textsuperscript{49}

Green exercised that right within the statutory period.\textsuperscript{50}

On review, the main issue before the Court was the order and allocation of proof in Title VII suits.\textsuperscript{51} The Court concluded that the plaintiff has the initial burden of establishing a prima facie case of discrimination, which the plaintiff could accomplish by showing the following: (1) the plaintiff was a member of a class protected by Title VII; (2) the employer sought applicants for a position for which the plaintiff was qualified, and the plaintiff applied for that position; (3) the employer rejected the plaintiff, despite his qualifications; and (4) after rejecting the plaintiff, the employer continued to seek applications from persons with the plaintiff's qualifications.\textsuperscript{52} The Court also concluded that Green had made this showing.\textsuperscript{53}

Once the plaintiff establishes a prima facie case, the Court held, the

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 797. Specifically, the EEOC found sufficient evidence that McDonnell Douglas violated 42 U.S.C. § 2000e-3. Id.
\textsuperscript{49} McDonnell Douglas, 411 U.S. at 797. Congress delegated to the EEOC the power and the responsibility to preclude any person from engaging in unlawful employment practices as defined in sections 2000e-2 and 2000e-3. 42 U.S.C. § 2000e-4 to § 2000e-5 (1988 & Supp. III 1991). Upon receipt of a charge of discrimination, the EEOC must issue a notice of the charge to the employer within ten days and investigate the same. Id. at § 2000e-5(b). If the EEOC determines that there is reasonable cause to believe the charge, the EEOC must attempt to resolve the conflict. Id. If attempts at resolution are not successful, the EEOC shall, depending on the circumstances of the case, institute a civil action itself, refer the matter to the Attorney General for the institution of a civil action, or allow the complaining party to intervene, id. at § 2000e-5(f), which action is commonly referred to as the issuance of a right to sue letter. See McDonnell Douglas, 411 U.S. at 797.
\textsuperscript{50} McDonnell Douglas, 411 U.S. at 797.
\textsuperscript{51} Id. at 800. Addressing the allocation of proof issue, the Court balanced the congressional goal of eradicating discriminatory employment practices that disadvantage minorities against the reality that Congress did not intend Title VII to guarantee a job to every person without regard to qualifications. Id. at 800-01 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971)).
\textsuperscript{52} Id. at 802. In effect, as noted in later cases, establishment of the prima facie case creates a presumption of discrimination. Burdine, 450 U.S. at 254. If unrebutted, this presumption entitles the plaintiff to judgment as a matter of law. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993).
\textsuperscript{53} McDonnell Douglas, 411 U.S. at 802.
employer assumes a burden of "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection."\(^5^4\) The Court found that McDonnell Douglas had met this burden and thereby rebutted Green's prima facie case by showing that it refused to rehire Green because of his unlawful activity.\(^5^5\) Still, the Court did not reject Green's claim.\(^5^6\) Instead, it held that once a defendant offers legitimate, nondiscriminatory reasons for its actions, the plaintiff must be allowed to prove that the defendant's proffered reason was a pretext for intentional discrimination.\(^5^7\) If the plaintiff proves intentional discrimination, the plaintiff is entitled to judgment.\(^5^8\) Accordingly, the Court remanded the case for the district court to determine whether Green could show that McDonnell Douglas's proffered reason for not re-hiring Green was a pretext for intentional discrimination.\(^5^9\)

**McDonnell Douglas** left unclear precisely how a defendant could meet its burden of producing a legitimate, nondiscriminatory reason

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\(^5^4\) *Id.* Although the Court was precise in defining the plaintiff's initial burden as establishing a prima facie case, it was imprecise in defining the nature of the defendant's burden and the nature of the plaintiff's ultimate burden. *See id.* at 802-03; *see also supra* note 39 and accompanying text (discussing the McDonnell Douglas Court's failure to precisely define the defendant's burden). All that is clear from McDonnell Douglas is that some type of burden shifts to the defendant once the plaintiff establishes the prima facie case. The Court commented on the nature of this burden in Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978), explaining that the "burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Id.* at 577. The *Furnco* Court also explained that if the factfinder rejects the defendant's proffered reasons, the court can infer that the challenged employment action was "more likely than not" based on illegal discrimination. *Id.*

\(^5^5\) *McDonnell Douglas*, 411 U.S. at 803-804.

\(^5^6\) *Id.* at 804.

\(^5^7\) *Id.*

\(^5^8\) *Id.* at 807. The Court stated:

> On retrial, respondent [Green] must be afforded a fair opportunity to demonstrate that . . . [McDonnell Douglas's] assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

*McDonnell Douglas*, 411 U.S. at 807 (emphasis added). It should be noted that the Court allowed the district court to enter judgment in favor of the plaintiff upon a finding that the proffered reason was a pretext or that the employment practice was discriminatory in its application. *Id.* This is the precise holding in *St. Mary's*, 113 S. Ct. at 2749; *see also infra* note 181 and accompanying text (discussing the *St. Mary's* holding).

\(^5^9\) *McDonnell Douglas*, 411 U.S. at 807. On remand, the district court held that McDonnell Douglas's "stated reasons were not mere pretext" and that those "reasons are adequate under the law for [McDonnell Douglas] not to rehire [Green]." *Green v. McDonnell Douglas Corp.*, 390 F. Supp. 501, 503 (E.D. Mo. 1975), *aff'd* 528 F.2d 1102 (8th Cir. 1976).
Consequently, the Supreme Court addressed that issue in *Texas Department of Community Affairs v. Burdine.* In *Burdine,* the Court held that the plaintiff's establishment of a prima facie case raises a rebuttable presumption that the defendant intentionally discriminated against the plaintiff. Citing *McDonnell Douglas,* the *Burdine* Court also held that the defendant's burden of proffering a legitimate, nondiscriminatory reason is merely a burden of production and that the plaintiff retains the burden of persuasion throughout the case. Under *Burdine,* the defendant need not prove that it was actually motivated by the proffered reasons, for the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Still, the defendant must clearly articulate legally sufficient reasons for the adverse employment action in order to frame the factual issue such that the plaintiff has a sufficient opportunity to prove pretext.

*Burdine* dictates that once the defendant meets its burden of producing a legitimate, nondiscriminatory reason for its action, the plaintiff's burden to show the reason was a pretext merges with the plaintiff's ultimate burden of convincing the court that he or she was a victim of intentional discrimination. The plaintiff can meet the ultimate burden in one of two ways: Either directly, by persuading the court that a

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60. *See id.* at 802-03. The Court did not clearly articulate the nature of the defendant's burden in *McDonnell Douglas* because the Court found it clear that McDonnell Douglas's proffered reason, unlawful conduct by Green, clearly justified its decision not to rehire Green. *Id.* However, in dicta the Court stated that McDonnell Douglas's proffered reason "suffic[ed] to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination." *Id.* at 803. The Court's reference to the defendant's burden as a burden of proof ultimately confused the circuit courts and required the Court to revisit the issue in *Burdine.* *See Burdine,* 450 U.S. at 254; *see also infra* notes 61-69 and accompanying text (discussing the *Burdine* holding).


62. *Id.* at 254.

63. *Id.* at 254-56. *Compare* International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977) (noting that "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof") (emphasis added) *with Burdine,* 450 U.S. at 255 (explaining that the defendant's burden is one of production). *See also infra* part II.D. (discussing the role of FED. R. EVID. 301 in the use of presumptions).

64. *Burdine,* 450 U.S. at 253-54.

65. Proffered reasons are legally sufficient if they would allow a court to find in favor of the defendant. *Id.* at 254-55.

66. *Id.* at 255. In explaining how the defendant must meet its burden, the Court stated that an employer's answer to the complaint or argument will not suffice; the reason must be admitted into evidence. *Id.* at 255 n.9.


68. *Id.* at 256.
discriminatory reason more likely than not motivated the employer's adverse action, or indirectly, by showing that the employer's proffered reason is not credible. 69

Two years after Burdine, the Court again attempted to clarify the allocation of proof in Title VII cases. In United States Postal Service Board of Governors v. Aikens, 70 the Court held that once the defendant responds to the plaintiff's prima facie case by offering evidence of legitimate, nondiscriminatory reasons for the adverse employment action, the McDonnell Douglas/Burdine presumption "drops from the case," and the factfinder must then decide whether the defendant intentionally discriminated against the plaintiff. 71 Under Aikens, once the presumption dissolves, the plaintiff may meet his or her ultimate burden of persuasion in one of two ways: (1) by directly persuading the court that the adverse employment action was more likely than not motivated by intentional discrimination; or (2) by showing that the proffered reason was not the real reason for the adverse employment action. 72

The Aikens Court explained that the factfinder must necessarily decide which party it believes in order to determine whether "the defendant intentionally discriminated against the plaintiff." 73 In this respect, the Aikens court concluded, Title VII cases are identical to other cases in which a factfinder must decide ultimate questions of fact through an inquiry that examines both parties' states of mind. 74 Such an inquiry allows the trier of fact to find in favor of a Title VII plaintiff even without "direct evidence of discriminatory intent." 75

Until St. Mary's, then, the three stages of burden shifting in Title VII cases were as follows: First, the plaintiff had to establish a prima facie case of discrimination, which then raised a rebuttable presumption that the defendant's actions constituted intentional discrimination proscribed by Title VII. Next, the employer assumed a burden to pro-

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69. Id. (citing McDonnell Douglas, 411 U.S. at 804-05). Although the Burdine court cites McDonnell Douglas, there is no textual support in McDonnell Douglas for this proposition. See infra note 203 and accompanying text.


71. Id. at 715 (quoting Burdine, 450 U.S. at 255 n.10) (citations omitted).

72. Aikens, 460 U.S. at 716 (quoting Burdine, 450 U.S. at 256).

73. Aikens, 460 U.S. at 715-16 (quoting Burdine, 450 U.S. at 253).

74. Aikens, 460 U.S. at 716. The Aikens Court remanded the case because it found that the district court incorrectly required Aikens to submit direct evidence of intentional discrimination. Id. at 717. The Aikens Court noted that as in any other cause of action, the plaintiff in a Title VII intentional employment discrimination case could prove his case by direct or circumstantial evidence. Id. at 714 n.3.

75. Id. at 717.
duce legitimate, nondiscriminatory reasons for its action and thereby rebut the presumption created by the plaintiff's prima facie case. Finally, to prevail, the plaintiff had to satisfy his or her ultimate burden of proving intentional discrimination, by either direct or indirect evidence of the defendant's discriminatory intent.

C. The Circuits' Attempt to Apply the "Clarified" McDonnell Douglas Framework

Even though the Supreme Court attempted in Burdine and Aikens to clarify and refine the McDonnell Douglas framework,\footnote{76. See supra part II.B.} the federal circuits remained split on the precise manner in which a Title VII plaintiff discharges his or her ultimate burden of persuasion.\footnote{77. See infra notes 78-92 and accompanying text.} Prior to the St. Mary's decision, some circuits took the view that upon proving that the defendant's proffered reasons are a pretext, the plaintiff is entitled to judgment as a matter of law.\footnote{78. See infra notes 79-85 and accompanying text.} The critical aspect of this, the so-called "pretext" approach, is that it does not require the plaintiff to actually prove that the defendant intentionally discriminated against the plaintiff. Instead, it merely requires that the factfinder disbelieve the defendant's proffered reasons for the adverse employment action. For example, in King v. Palmer,\footnote{79. 778 F.2d 878 (D.C. Cir. 1985).} the District of Columbia Circuit held that once the plaintiff establishes a prima facie case of discrimination and discredits the defendant's proffered reasons for its action, the plaintiff prevails as a matter of law.\footnote{80. Id. at 881.} The Second,\footnote{81. Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir.), cert. denied, 112 S. Ct. 228 (1991) (holding that the plaintiff need not directly prove discrimination and requiring only that the plaintiff prove that the defendant's articulated reasons were not the true reasons for the adverse employment action).} Third,\footnote{82. Carden v. Westinghouse Electric Corp., 850 F.2d 996, 1000 (3d Cir. 1988) (holding that although the plaintiff has the ultimate burden of proving that the defendant intentionally discriminated against him, proof that defendant's proffered reason was pretextual is equivalent to a finding of intentional discrimination).} Fifth,\footnote{83. Thornbrough v. Columbus and Greenville R.R., 760 F.2d 633, 639-40 (5th Cir. 1985). As the Thornbrough court explained: By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, we presume that the employer was motivated by discriminatory reasons . . . [U]nlike Humpty-Dumpty, the employee's prima facie case can be put back together again, through proof that the employer's proffered reasons are pretextual. Id.}
Eighth, and Eleventh Circuits also adopted the pretext approach. Other circuits concluded that proof that the defendant's proffered reasons are a pretext, by itself, is insufficient to entitle a plaintiff to judgment. Rather, these courts adopted the so-called "pretext-plus" approach, under which a plaintiff can prevail only upon a factual finding that the employer intentionally discriminated against the plaintiff. For example, in *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*, the Seventh Circuit explained that the plaintiff may prevail only by proving both that the defendant's proffered reasons were a pretext and that but for intentional discrimination, the defendant would not have taken the adverse employment action. The First, Fourth, Sixth, and Tenth Circuits adopted similar approaches.

**D. Federal Rule 301: Presumptions in Federal Civil Proceedings**

Rule 301 of the Federal Rules of Evidence governs the use of pre-
Assumptions in federal civil proceedings not otherwise exempted by Congress.\footnote{93}{FED. R. EVID. 301. An effect of the Civil Rights Act of 1991 was to remove Title VII disparate impact claims from the coverage of Rule 301. See, Kingsley R. Brown, The Civil Rights Act of 1991: A "Quota Bill," A Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?, 43 CASE W. RES. L. REV., 287, 291 (1993) (discussing the effect of the 1991 Act on defendants' burdens of production and persuasion in disparate impact cases).} Under the McKinell Douglas framework, a plaintiff's establishment of a prima facie case creates a rebuttable presumption that the adverse employment action was more likely than not based on intentional discrimination prohibited by Title VII.\footnote{94}{Burridge, 450 U.S. at 252-53.} Accordingly, Rule 301 is integral to Title VII intentional employment discrimination cases.\footnote{95}{St. Mary's, 113 S. Ct. at 2749.} Rule 301 dictates that the party against whom a presumption is raised assumes a burden of producing evidence to rebut the presumption.\footnote{96}{FED. R. EVID. 301. The rule provides that: In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.}

The Court decided several Title VII cases involving burden shifting issues without reference to Rule 301, which became effective in 1975,
nearly two years after the *McDonnell Douglas* decision. In retrospect, the Court's use of presumptions in the post-1975 cases was inconsistent with the dictates of the then nascent Rule 301. For example, in *Franks v. Bowman Transportation Co.*, the Court held that the Title VII defendant's burden was to *prove* that plaintiffs were not victims of hiring discrimination. The Court later explained its *Franks* holding as consistent with the way in which presumptions are generally raised, noting that presumptions shifting the burden of proof often reflect judicial evaluations of probabilities and a given party's superior access to proof.

By 1978, the Court was attempting to clarify the confusion which had come to surround presumptions in Title VII cases. In *Furnco Construction Corp. v. Waters*, the Court described the employer's burden as requiring proof that the adverse employment action was based on something other than race. Quoting *McDonnell Douglas*, the Court characterized this burden as merely requiring that the defendant articulate a legitimate, nondiscriminatory reason for the adverse action.

It was not until *Burdine* in 1981 that the Court first applied Rule 301 to a Title VII case. In *Burdine*, the Court announced that the Title VII defendant's burden is one of production and not proof, while also noting that Rule 301 governs the role of presumptions in Title VII intentional employment discrimination cases. The Court would

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> In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

PROP. FED. RULE EVID. 301, 56 F.R.D. 183, 208 (1972) (emphasis added). Congress rejected the Supreme Court's suggestion in favor of the version currently in force.

98. 424 U.S. 747 (1976). *Franks* is a disparate impact case. *Id.* at 772.

99. *Id.* at 772 (emphasis added).

100. International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977). Although the explanation is clearly inconsistent with the version of Rule 301 that Congress adopted, it is consistent with the Supreme Court's proposed rule, which was submitted to but rejected by Congress. *See supra* note 97 and accompanying text.


102. *Id.* at 577.

103. *Id.* at 578 (quoting *McDonnell Douglas*, 411 U.S. at 802). By explaining that the burden of "proof" only required that the defendant articulate some legitimate reason for its action, the Court was able to comply with the principles of *stare decisis* as well as statutory rules of construction.

104. *Burdine*, 450 U.S. at 255 n.8. "If the defendant carries this burden of produc-
revisit these points again in *St. Mary's*, nearly two decades after Rule 301 was originally adopted.105

III. DISCUSSION

Due to the aforementioned split in the circuits,106 the Supreme Court granted certiorari in *St. Mary's Honor Center v. Hicks* to decide whether the factfinder's rejection of a Title VII defendant's proffered reasons for its adverse employment action "mandates a finding for the plaintiff."107 In a five-to-four decision, the Court ruled that an employee is not entitled to judgment as a matter of law even if the factfinder does not believe the defendant's proffered reasons are genuine.108 Instead, the Court held, the plaintiff must prove that the proffered reasons are not credible and that the defendant based the adverse action on discrimination prohibited by Title VII.109 The *St. Mary's* dissent argued that this "clarification" of the *McDonnell Douglas* framework makes the requirements of proof of discrimination under Title VII "unfair and unworkable."110

A. *St. Mary's Honor Center v. Hicks: The Facts And Opinions Below*

*St. Mary's Honor Center* ("*St. Mary's*") is a Missouri Department of Corrections and Human Resources ("MDCHR") minimum security correctional facility.111 *St. Mary's* hired Melvin Hicks as a correctional officer in 1978 and promoted him to shift commander in 1980.112 Acting upon complaints about the conditions at *St. Mary's* and resulting investigations, MDCHR made numerous supervisory changes at *St. Mary's* in January 1984.113 *St. Mary's* retained Hicks

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105. *See St. Mary's*, 113 S. Ct. at 2749.
106. *See supra* part II.C.
108. *Id.* at 2749.
109. *Id.*
110. *Id.* at 2757 (Souter, J., dissenting).
111. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1245 (E.D. Mo. 1991), rev'd, 970 F.2d 487 (9th Cir. 1992), rev'd, 113 S. Ct. 2742 (1993). The Supreme Court refers to St. Mary's as a halfway house. *St. Mary's*, 113 S. Ct. at 2746. For purposes of clarity in the footnote text, the short citation form *Hicks* will be used when referring to the district court's opinion and the short citation form *St. Mary's* will be used when referring to the Supreme Court's opinion.
113. *Hicks*, 756 F. Supp. at 1246 nn.1-3. An MDCHR assistant director had
but replaced his immediate supervisor with John Powell and replaced the superintendent of St. Mary's with Steve Long. \(^{114}\) Hicks is an African-American and both Powell and Long are white. \(^{115}\)

Prior to the personnel changes at St. Mary's, Hicks's employment record was satisfactory, but following the changes, Hicks was subjected to numerous and increasingly severe disciplinary actions. \(^{116}\) The actions included: a five day suspension for violation of institutional rules by Hicks's subordinates; \(^{117}\) a letter of reprimand for alleged failure to adequately investigate an inmate brawl; \(^{118}\) and a demotion from shift commander to correctional officer because Hicks's subordinates failed to document their use of an official vehicle. \(^{119}\) MDCHR eventually fired Hicks for threatening Powell in June

\(^{114}\) Id. at 1246. Based on the complaints received, MDCHR initiated an undercover investigation at St. Mary's and made a series of unannounced inspections at the facility. \(^{115}\) Id. As a result of the investigations and the subsequent failure of several employees to take effective corrective actions, St. Mary's made the following personnel changes: St. Mary's replaced superintendent Arthur Schulte (white) with Steve Long (white); John Powell (white), who was Hicks's immediate supervisor, replaced Gilbert Greenlee (African-American) as chief of custody; J.R. Wilson (white) replaced Carl McAvoy (African-American) as a shift supervisor; and Carl McAvoy (African-American) replaced Charles Woodard (African-American). \(^{116}\) Id. at 1246 nn.1-3.

\(^{117}\) Hicks, 756 F. Supp. at 1246-47. The violations arose on March 3, 1984, while Hicks was on duty as a shift commander. \(^{118}\) Id. at 1246. When two St. Mary's transportation officers arrived to pick up inmates who were scheduled for outside work, the officers noticed that the front-door officer was absent from his assigned post and that the lights were off on the first floor. \(^{119}\) Id. One of the two officers filed an incident report with Hicks's supervisor, John Powell. \(^{114}\) Id. A four-person disciplinary review committee, consisting of two whites and two African-Americans, recommended a five day suspension for Hicks, which the Director of MDCHR ultimately approved in accordance with the department's procedural requirements. \(^{115}\) Id. at 1246-47.

\(^{118}\) Hicks, 756 F. Supp. at 1247. Powell gave Hicks a letter of reprimand on March 29, 1984, for failure to take appropriate action on the following events: On March 21, 1984, two inmates were involved in a fight and one received medical treatment. \(^{119}\) Id. On the way to the hospital, the injured inmate told the correctional officer accompanying him that he was injured in a fight, rather than by lifting weights as he first claimed. \(^{114}\) Id. The officer reported the altercation to Hicks, and Hicks directed the officer to file a report. \(^{115}\) Id. On March 24, 1984, Powell submitted a report to Long, superintendent of St. Mary's, charging Hicks with failure to investigate the report. \(^{118}\) Id.

\(^{119}\) Hicks, 756 F. Supp. at 1247. On April 19, 1984, St. Mary's notified Hicks that it demoted him for the following conduct: On March 19, 1984, Hicks ordered a correctional officer to use a St. Mary's automobile to follow another correctional officer to a friend's home in order to return a borrowed private automobile. \(^{118}\) Id. Neither officer had logged use of the St. Mary's vehicle as required by institutional rules. \(^{119}\) Id. Powell recommended disciplinary action, and the disciplinary review committee, again composed of two whites and two African-Americans, recommended demotion of Hicks. \(^{118}\) Id.
From January 1984 to June 1984, Hicks had reported to Powell numerous violations of St. Mary's rules by some of his white co-workers and subordinates. Powell took no action, however, because he believed that shift commanders and subordinates should resolve their disagreements without involving him.

Following his termination, Hicks sued St. Mary's in federal court on three counts: (I) that St. Mary's discriminated against him because of his race in violation of Title VII; (II) that St. Mary's and Long violated 42 U.S.C. § 1981; and (III) that Long violated 42 U.S.C. § 1983 by demoting and subsequently firing him because of his race.

The district court entered summary judgment in favor of St. Mary's on Count I. After a three-day trial, the court found in favor of St. Mary's on Counts I and III. In reaching that decision, the court noted that Hicks had established a prima facie case under Title VII, and that St. Mary's had met its burden of proffering a legitimate reason

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120. *Hicks*, 756 F. Supp. at 1247-48. St. Mary's terminated Hicks on June 7, 1984 for threatening Powell. In a meeting between Steve Long, Vincent Banks, and John Powell, Hicks was notified of his demotion, resulting from his failure to log use of a St. Mary's vehicle. *Id.* at 1247. Hicks requested the remainder of the day off because he was very upset. *Id.* Long granted the request and as Hicks attempted to leave, Powell followed him and demanded his shift commander's manual. *Id.* The two men argued and Hicks stated that he would "step outside" with Powell. *Hicks*, 756 F. Supp. at 1247. Powell warned that those words could constitute a threat. *Id.* The two men did not fight but Powell reported the incident. *Id.* On May 9, 1984, a four person disciplinary board, consisting of at least two African-Americans, voted to suspend Hicks for three days. *Id.* Long disregarded the board's vote and recommended that Hicks be terminated, based on the severity and accumulation of Hicks's violations. *Id.* at 1248.

121. *Hicks*, 756 F. Supp. at 1248. The most serious violation occurred when one of Hicks's subordinates, Edward Ratliff, a white male, entered St. Mary's with his brother, a deputy marshal. *Id.* In direct violation of Hicks's instructions, Ratliff told his brother that he need not check his firearm prior to entering St. Mary's. *Id.* Hicks reported the incident to Powell who refused to take action. *Id.*

122. *Id.*

123. *Hicks*, 756 F. Supp. at 1245.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Hicks*, 756 F. Supp. at 1253. The elements are the same for both Title VII and § 1983 claims when a plaintiff brings them together. *Id.*

128. *Id.* at 1249-50. The court decided that Hicks had established a prima facie case by proving: (1) that he was African-American, and therefore, a member of a protected class under Title VII; (2) that he was qualified for the job because he had maintained a satisfactory record until Powell became his supervisor; (3) that he was adversely affected by the demotion and subsequent termination; and (4) that St. Mary's filled his position with a white male. *Id.*
for the adverse employment action. The court determined, however, that even though Hicks proved that St. Mary's proferred reasons were a pretext, he failed to prove, either directly or indirectly, that St. Mary's had discriminated against him because of his race.

The Eighth Circuit reversed the district court's decision on the Title VII and section 1983 claims because it rejected the district court's conclusion that St. Mary's actions were personally motivated rather than discriminatory.

129. *Hicks*, 756 F. Supp. at 1250. St. Mary's claimed to have terminated Hicks because of the violations set forth *supra* in notes 117-120.

130. *Id.* at 1250-51. Hicks proved that St. Mary's proferred reason was a pretext by showing that he was the only person disciplined for violations that his subordinates committed. *Id.* at 1250. The district court recognized that "much more serious violations, when committed by plaintiff's co-workers, were either disregarded or treated much more leniently." *Hicks*, 756 F. Supp. at 1251. The most striking example of the disparate treatment involved an inmate escape that occurred on the shift of acting shift commander Michael Doss, a white male. *Id.* Doss admitted that his negligence caused the escape. *Id.* Although Doss's violation was more serious than failing to document use of an official vehicle, Doss only received a letter of reprimand. *Id.*

131. *Hicks*, 756 F. Supp. at 1252. In sum, the court noted that "although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Id.* The court explained that Powell, aided by Ratliff and Long, put Hicks on the "express track to termination." *Id.* at 1251. The court rejected Hicks's evidence of disproportionate firing of African-Americans, however, because, even though approximately twelve African-Americans and one white were fired, there were 30 African-Americans employed at St. Mary's in January 1984 and 29 in December 1984. *Hicks*, 756 F. Supp. at 1252. In addition, St. Mary's hired 13 African-Americans during that period. *Id.* Thus, the court reasoned that the personnel changes did not create an inference of racial discrimination. *Id.*

Similarly, the court rejected Hicks's argument that the following personnel changes constituted racial discrimination: prior to Long's tenure there were five African-American supervisors and one white supervisor; after Long's personnel changes there were two African-American supervisors and four white supervisors. *Hicks*, 756 F. Supp. at 1252. The court found no discrimination under these circumstances for three reasons. First, MDCHR directed the personnel changes because the institution was poorly run. *Id.* Second, St. Mary's filled one supervisory position with a white male only after an African-American male declined the position; had the African-American accepted the position, the ratio of African-Americans to whites would have been three to three. *Id.* Finally the disciplinary review board that recommended Hick's demotion was comprised of two African-Americans and two whites. *Id.* The district court did not give any weight to the fact that Long recommended termination even though the board voted only to suspend Hicks. *Id.* at 1247-48.

132. *Hicks* v. St. Mary's Honor Ctr., 970 F.2d 487, 492-93 (8th Cir. 1992), rev'd, 113 S. Ct. 2742 (1993) [hereinafter "Hicks II"]). The court remanded for further findings consistent with its opinion. *Id.* at 493.

133. *Id.* at 492. The Eighth Circuit went on to question whether personal motivation would ever be sufficiently legitimate to not amount to discrimination under similar circumstances. *Id.* Nonetheless, the circuit court refused to address that issue because St. Mary's never asserted that personal animosity was one of its legitimate reasons for firing Hicks. *Id.*
B. The Opinion of the Supreme Court

On review, the United States Supreme Court reversed, holding that although the factfinder's disbelief of an employer's proffered reasons may permit a finding of intentional discrimination, such disbelief does not compel judgment for the plaintiff as a matter of law. Writing for the majority, Justice Scalia began by tracing the Court's Title VII decisions. He first explained that in McDonnell Douglas, the Court established the allocation of burden and order of proof in Title VII intentional employment discrimination cases. He then reiterated the Burdine holding that a plaintiff's establishment of a prima facie case of discrimination creates a rebuttable presumption that the employer's motivation for the adverse employment action was impermissible discrimination. Justice Scalia stressed that the burden then assumed by the defendant to articulate a legitimate reason for the adverse practice is one of production, not proof, and that the ultimate burden of persuading the trier of fact remains at all times with the plaintiff.

Justice Scalia rejected as dictum the Burdine statement that the plaintiff may prevail either directly, through proof of discrimination, or indirectly, by showing that the defendant's proffered reason is unworthy of belief. In addition, Justice Scalia explained that Aikens made

134. St. Mary's, 113 S. Ct. at 2756. The Court remanded the case to the Eighth Circuit to determine whether the district court's conclusion that race was not the real reason for the adverse employment action was clearly erroneous. Id.
135. Id. at 2749.
136. St. Mary's, 113 S. Ct. at 2746. Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Id. at 2745.
137. 411 U.S. 792 (1973); see supra notes 33-59 and accompanying text (discussing McDonnell Douglas).
138. St. Mary's, 113 S. Ct. at 2745.
139. See supra notes 62-64 and accompanying text.
140. St. Mary's, 113 S. Ct. at 2747. For the first time, the Court carefully explained the nature of the defendant's burden and the precise effect that the presumption has in Title VII cases:

To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case—i.e., the burden of "producing evidence."

Id. (quoting I David W. Louisell & Christopher B. Mueller, Federal Evidence § 67, at 536 (1977)).
141. St. Mary's, 113 S. Ct. at 2747-48. The Court explained that Rule 301 of the Federal Rules of Evidence governs this presumption. Id. at 2747.
142. St. Mary's, 113 S. Ct. at 2752-53. Justice Scalia pointed out, however, that although Burdine cites McDonnell Douglas for this proposition, McDonnell Douglas
clear that once the defendant responds to the plaintiff's prima facie case, the factfinder's ultimate task is not merely to decide whether that response is credible, but rather to decide whether the adverse employment action constituted intentional discrimination proscribed by Title VII. Thus, Justice Scalia concluded, once a defendant introduces a legitimate, nondiscriminatory reason for the adverse action, the presumption of discrimination raised by the plaintiff's prima facie case drops from the case. The plaintiff must then, through his or her case-in-chief and cross-examinations, be allowed a "full and fair opportunity" to prove that the defendant's proffered reasons were not the real reasons for the adverse action, but that instead, discrimination prohibited by Title VII prompted the action.

Applying this analysis to the specifics of St. Mary's, Justice Scalia rejected the Eighth Circuit's conclusion that once the plaintiff persuades the factfinder to disbelieve the defendant's proffered reasons, the defendant is left in the same position as if it had remained silent. Instead, Justice Scalia reasoned, once the defendant introduces evidence of nondiscriminatory reasons for its action, the presumption of discrimination drops from the case, whether or not those reasons are ultimately persuasive. Thus, at the close of the defendant's case-in-chief, judgment for the plaintiff is proper if a rational person would conclude: (1) that the facts establish a prima facie case; and (2) that the defendant has failed to articulate a nondiscriminatory reason for his conduct. If the defendant does articulate a nondiscriminatory reason for its action, Justice Scalia observed, the McDonnell Douglas/Burdine presumption drops from the case, and consequently, the factfinder must then decide whether the plaintiff has proved intentional discrimination. Although a determination by the factfinder that the proffered

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143. Id. at 2753. Justice Scalia explained that Aikens clearly states that "the ultimate question [is] discrimination vel non." Id. (quoting United States Postal Service Bd. v. Aikens, 460 U.S. 711, 714 (1983)).

144. St. Mary's, 113 S. Ct. at 2747.

145. Id. (quoting Texas Dept' of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

146. St. Mary's, 113 S. Ct. at 2748.

147. Id. at 2748-49. As Justice Scalia pointed out, this reading is entirely consistent with the requirement of Federal Rule of Evidence Rule 301, which governs presumptions in civil proceedings. Id. at 2747; see supra part II.D.

148. St. Mary's, 113 S. Ct. at 2748.

149. Id. at 2749.
reasons are not believable will permit the factfinder to infer intentional discrimination, Justice Scalia concluded, disbelieving the reasons alone does not compel judgment for the plaintiff.\footnote{\textit{Id.}}

\section*{C. The Dissenting Opinion}

Writing for the dissent, Justice Souter rejected the majority opinion because he believed it abandoned the \textit{McDonnell Douglas} framework for a "scheme of proof . . . that promises to be unfair and unworkable."\footnote{\textit{Id.}} Specifically, Justice Souter charged that the majority ignored language in \textit{McDonnell Douglas} that mandates judgment for the plaintiff once he or she proves pretext\footnote{\textit{St. Mary's}, 113 S. Ct. at 2759 (Souter, J., dissenting).} and that the majority flatly misread \textit{Burdine}.\footnote{\textit{Id.}} Consequently, Justice Souter maintained, Title VII plaintiffs without direct evidence of discrimination will now find it much more difficult to prove their cases.\footnote{\textit{Id.}}

According to Justice Souter, the Court adopted the \textit{McDonnell Douglas} framework to allow factfinders to effectively resolve intentional employment discrimination claims, which often can be proven only through circumstantial evidence.\footnote{\textit{St. Mary's}, 113 S. Ct. at 2761 (Souter, J., dissenting). See \textit{St. Mary's}, 113 S. Ct. at 2758 (Souter, J., dissenting).} By requiring the defendant to introduce into evidence one or more reasons for the adverse employment action, Justice Souter opined, the framework fairly accommodates the competing interests and unequal access to proof held by plaintiffs and defendants.\footnote{\textit{Id.}} Although Justice Souter agreed with the majority that the presumption of discrimination drops from the case once the defendant introduces legitimate, nondiscriminatory reasons

\footnote{\textit{Id.} (Souter, J., dissenting) (citations omitted).
\textit{Id.} at 2763 (Souter, J., dissenting).
\textit{Id.} (Souter, J., dissenting). Justice Souter pointed out that the majority repeated "the truism that the plaintiff has the 'ultimate burden' of proving discrimination without ever facing the practical question of how the plaintiff without such direct evidence can meet this burden." \textit{Id.} (Souter, J., dissenting) (citations omitted).
\textit{Id.} (Souter, J., dissenting). Justice Souter explained the defendant's interest as coming forward with evidence to rebut the plaintiff's prima facie case. \textit{Id.} (Souter, J., dissenting). The plaintiff's interest, on the other hand, is to not be saddled with "the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision." \textit{Id.} (Souter, J., dissenting).}
for its action, he pointed out that the majority neglected to include the corresponding requirement that the proffered reasons "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." This requirement, Justice Souter urged, narrows the question to whether the defendant's proffered reasons are pretextual and necessarily confines the factfinder's inquiry to only those proffered reasons. The plaintiff can then prevail either directly, by showing that discrimination was more likely than not at the root of the adverse employment practice, or indirectly, by proving that the defendant's proffered reasons were not the real reasons.

After arguing that the majority abandoned the McDonnell Douglas framework, Justice Souter emphasized that retaining the framework is necessary to implement Title VII in a manner consistent with the congressional purpose of eliminating discriminatory employment practices. The McDonnell Douglas framework, Justice Souter
urged, allows the factfinder to efficiently resolve the elusive question of whether an employer intended to discriminate against a plaintiff.\textsuperscript{162} Justice Souter concluded that the majority holding allows "the factfinder . . . to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove."\textsuperscript{163}

To demonstrate his point, Justice Souter noted that Hicks had been denied the opportunity to demonstrate that the supposedly race-neutral motivation proffered as a reason for his termination—the personal animosity of his supervisor—was not credible.\textsuperscript{164} In fact, Justice Souter noted, as had the Eighth Circuit,\textsuperscript{165} that the district court did not find that personal animosity was the real reason for firing Hicks—it merely deduced that animosity could have been the real reason.\textsuperscript{166} Thus, explained Justice Souter, although the majority remanded the case to determine whether the district court's conclusion that Hicks was not fired because of his race was clearly erroneous,\textsuperscript{167} the majority precluded any opportunity for Hicks to show that personal animosity was a pretext for discriminatory treatment.\textsuperscript{168} In conclusion, Justice Souter noted that whether Hicks ultimately wins or loses, "many plaintiffs in a like position will surely lose under the scheme adopted by the Court today, unless they possess both prescience and resources beyond what this Court has previously required Title VII litigants to employ."\textsuperscript{169}

**IV. ANALYSIS**

The Court's decision in *St. Mary's* rejected both the pretext and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{162} *Id.* at 2763 (Souter, J., dissenting).
\item \textsuperscript{163} *Id.* at 2766 (Souter, J., dissenting) (quoting Burdine, 450 U.S. at 255 n.8).
\item \textsuperscript{164} *Id.* at 2766 (Souter, J., dissenting).
\item \textsuperscript{165} *Id.* at 2766 (Souter, J., dissenting).
\item \textsuperscript{166} *Id.* at 2766 (Souter, J., dissenting).
\item \textsuperscript{167} *Id.* at 2757, (Souter, J., dissenting).
\item \textsuperscript{168} *Id.* at 2766 (Souter, J., dissenting).
\item \textsuperscript{169} *Id.*
\item \textsuperscript{167} *See St. Mary's*, 113 S. Ct. at 2756. The district court held that although Hicks proved that the violations that ultimately led to his demotion and discharge were a pretext, he did not prove either directly or indirectly that the real reason for his treatment was race. *Hicks*, 756 F. Supp. at 1252.
\item \textsuperscript{168} *St. Mary's*, 113 S. Ct. at 2766 (Souter, J. dissenting). \textit{But see} Hicks v. St. Mary's Honor Ctr., 2 F.3d 265, 267 (8th Cir. 1993) [hereinafter "Hicks III"] (holding, on remand from the Supreme Court, that because neither party had presented evidence on the question of personal animosity it was necessary to remand the case for consideration of that issue; the court also went so far as to note that "the district court may decide to hold an evidentiary hearing" on the matter).
\item \textsuperscript{169} *St. Mary's*, 113 S. Ct. at 2766 (Souter, J., dissenting).
\end{enumerate}
\end{footnotesize}
pretext-plus approaches. The Court rejected the pretext approach\textsuperscript{170} by holding that a Title VII intentional employment discrimination plaintiff is not entitled to judgment upon the factfinder's rejection of the defendant's proffered reasons.\textsuperscript{171} The Court rejected the pretext-plus approach\textsuperscript{172} by allowing that plaintiffs may prevail upon an ultimate finding of intentional discrimination that is based on disbelief of the defendant's proffered reasons.\textsuperscript{173} The Court has thus created a hybrid approach, which, unlike either the pretext or pretext-plus approaches, permits but does not mandate a finding of intentional discrimination upon disbelief of the defendant's reasons.\textsuperscript{174}

Although the Court was sharply divided on the outcome of \textit{St. Mary's}, the majority and dissent agreed on the following four points: (1) once the plaintiff establishes a prima facie case, the defendant must articulate nondiscriminatory reasons for the adverse employment action;\textsuperscript{175} (2) if the defendant does not meet this burden of production, the plaintiff is entitled to judgment as a matter of law;\textsuperscript{176} (3) once the defendant produces legitimate, nondiscriminatory reasons for the adverse employment action, the presumption of discrimination drops from the case;\textsuperscript{177} and (4) once the presumption drops, the plaintiff must meet the ultimate burden of proving intentional discrimination.\textsuperscript{178}

The majority and dissent parted company on the issue of whether the plaintiff can prevail by disproving the defendant's proffered nondiscriminatory reasons for its actions.\textsuperscript{179} The majority concluded that although a plaintiff is not entitled to judgment as a matter of law upon the factfinder's rejection of the proffered reasons,\textsuperscript{180} the factfinder may \textit{infer} the ultimate fact of intentional discrimination from that rejection.\textsuperscript{181} In contrast, the dissent would omit the requirement of

\begin{itemize}
\item \textsuperscript{170} See supra notes 78-85 and accompanying text.
\item \textsuperscript{171} \textit{St. Mary's}, 113 S. Ct. at 2749.
\item \textsuperscript{172} See supra notes 87-92 and accompanying text.
\item \textsuperscript{173} \textit{St. Mary's}, 113 S. Ct. at 2749.
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{St. Mary's}, 113 S. Ct. at 2747; \textit{id.} at 2758-59 (Souter, J., dissenting).
\item \textsuperscript{176} \textit{St. Mary's}, 113 S. Ct. at 2747; \textit{id.} at 2758 (Souter, J., dissenting).
\item \textsuperscript{177} \textit{St. Mary's}, 113 S. Ct. at 2749; \textit{id.} at 2759 (Souter, J., dissenting).
\item \textsuperscript{178} \textit{St. Mary's}, 113 S. Ct. at 2747-48; \textit{id.} at 2760 (Souter, J., dissenting). The plaintiff's burden at this final stage is the burden of proof. \textit{St. Mary's}, 113 S. Ct. at 2747; \textit{id.} at 2760 (Souter, J., dissenting).
\item \textsuperscript{179} \textit{St. Mary's}, 113 S. Ct. at 2747-48; \textit{id.} at 2760 (Souter, J., dissenting).
\item \textsuperscript{180} \textit{St. Mary's}, 113 S. Ct. at 2749.
\item \textsuperscript{181} \textit{Id.} The Court stated:
\begin{quote}
The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional
\end{quote}
an actual finding of intentional discrimination and would instead mandate judgment as a matter of law whenever the plaintiff disproves the defendant's proffered reasons.\textsuperscript{182}

It is on this point, the dissent argued, that \textit{St. Mary's} is inconsistent with two decades of precedent.\textsuperscript{183} Justice Scalia responded that "[o]nly one unfamiliar with our case-law will be upset by the dissent's alarum that we are today setting aside 'settled precedent.'"\textsuperscript{184} Due to the depth of the disagreement between the dissent and majority over the correct interpretation of the "settled precedent," this section will analyze seriatim \textit{McDonnell Douglas}, \textit{Burdine}, and \textit{Aikens}, and reliance thereon by the majority and dissent.\textsuperscript{185} This section concludes by examining the federal rule on presumptions,\textsuperscript{186} upon which the \textit{St. Mary's} majority relied but which the dissent ignored.

A. \textit{McDonnell Douglas} v. \textit{Green}: \textit{Which Interpretation is Correct?}

The \textit{St. Mary's} majority opinion is consistent with \textit{McDonnell Douglas}, which, like \textit{St. Mary's}, permits, but does not compel the factfinder to infer intentional discrimination upon rejection of the defendant's proffered reasons.\textsuperscript{187} As the \textit{McDonnell Douglas} Court...
explained, once the defendant has responded to the plaintiff's prima facie case, Title VII does not compel relief for the plaintiff unless the plaintiff proves that the defendant's reasons were a pretext for discrimination prohibited by Title VII. 188

The McDonnell Douglas Court set forth several ways in which a plaintiff might prove that the defendant's purportedly legitimate reasons were actually a pretext for discrimination. 189 Each suggested method of proof required that the plaintiff prove, through either direct or circumstantial evidence, that the defendant intentionally discriminated against the plaintiff because of race. 190 Further, at four separate points the McDonnell Douglas Court described exactly how a plaintiff should be afforded the opportunity to prove that the defendant's proffered reasons were actually a pretext for discrimination. 191 When describing this process of discrediting the defendant's reasons, as Justice Souter pointed out in St. Mary's, 192 the McDonnell Douglas Court did not always expressly state that by "pretext" it was referring exclusively to "pretext for discrimination." 193 Nevertheless, examining the relevant language in context reveals that when the McDonnell Douglas Court used "pretext," it meant pretext for intentional discrimination. 194

188. Id. at 804.
189. Id. at 804-05. The Court identified the following as relevant to whether McDonnell Douglas's reasons were a pretext: differences in treatment of white and African-American employees; McDonnell Douglas's view of Green's lawful civil rights activities; and statistical evidence which tended to show that McDonnell Douglas's refusal to rehire Green "conformed to a general pattern of discrimination against blacks." Id.
191. See id. at 804-07.
192. St. Mary's, 113 S. Ct. at 2759 n.5 (Souter, J., dissenting).
194. Compare McDonnell Douglas, 411 U.S. at 804, stating that:
   While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.
   with id. at 805 stating that:
   In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.
   with id. at 805 n.18, noting that:
   We do, however, insist that respondent under § 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.
Justice Scalia made this very point in *St. Mary's* when he explained
that the *McDonnell Douglas* holding requires that the plaintiff prove
that the adverse action was a pretext for discrimination, and that in
*McDonnell Douglas*, "'pretext' means the pretext required earlier in the
[McDonnell Douglas] opinion, viz., 'pretext for the sort of discrimina-
tion prohibited by [Title VII].""195 Justice Souter, on the other hand,
contended that *McDonnell Douglas* made it clear that once the Title VII
plaintiff proves pretext, the plaintiff is entitled to judgment as a matter
of law.196 Although passages from *McDonnell Douglas*, when read in
isolation, support Justice Souter's view, Justice Scalia more accurately
identified the true holding of *McDonnell Douglas*.

Indeed, although Justice Souter accused the majority of rewriting
*McDonnell Douglas*,197 a careful comparison of the *McDonnell
Douglas* Court's own summary of its holding with Justice Souter's
interpretation reveals that Justice Souter actually rewrote *McDonnell
Douglas* to accommodate his reasoning.198 In sum, despite Justice
Souter's protestations, *St. Mary's* is consistent with *McDonnell
Douglas*.

B. Burdine: Dicta Cited by Dissent is Inconsistent
with McDonnell Douglas

The *Burdine* decision also supports the *St. Mary's* result. In
*Burdine*, the Court stated that the plaintiff bears the ultimate burden of
persuading the factfinder that he or she has been a victim of intentional

195. *St. Mary's*, 113 S. Ct. at 2752 n.6 (quoting *McDonnell Douglas*, 411 U.S. at
804) (citations omitted) (second alteration original).
196. *St. Mary's*, 113 S. Ct. at 2759 (Souter, J., dissenting). Justice Souter argued
that *McDonnell Douglas* reconciled the competing interests of the plaintiff and the
defendant by requiring that the defendant introduce one or more reasons for the adverse
employment action. *Id.* (Souter, J., dissenting). He later argued that the defendant's
choice of proffered reasons binds the plaintiff and the court and precludes consideration
of other evidence by the factfinder. *Id.* (Souter, J., dissenting).
197. *Id.* at 2759 n.5 (Souter, J., dissenting).
198. Compare *St. Mary's*, 113 S. Ct. at 2759 (Souter, J., dissenting) (interpreting
the *McDonnell Douglas* summary as holding that once the plaintiff shows pretext he is
entitled to a prompt remedy) with *McDonnell Douglas*, 411 U.S. at 807 (holding that if
the factfinder finds that the Title VII plaintiff demonstrates pretext, the plaintiff is enti-
tled to judgment; absent such a finding, the defendant prevails). Note again that when
the *McDonnell Douglas* Court used the term "pretext," it meant pretext for discrimina-
tion. See supra note 194 and accompanying text.
Citing *McDonnell Douglas*, the *Burdine* court also stated that the plaintiff can discharge this burden either through direct proof of discrimination or through indirect proof that the proffered reason was not the true reason for the adverse action. Although Justices Scalia and Souter agreed that this statement can mean nothing less than that the plaintiff is entitled to judgment upon disproof of the defendant’s proffered reasons, Justice Scalia characterized the statement as dictum, pointing out that it is not supported by *McDonnell Douglas*.

Justice Scalia also found the *Burdine* Court’s statement inconsistent with other passages in *Burdine* that require a finding of intentional discrimination. A plain reading of *Burdine* shows Justice Scalia to be correct. The *Burdine* Court stated that the plaintiff bears the “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.” In yet another passage, the *Burdine* Court reiterated:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the

199. *Burdine*, 450 U.S. at 256.
200. Id.
201. *St. Mary’s*, 113 S. Ct. at 2752.
202. Id. at 2752-53. Justice Scalia concluded that the dictum at issue must be regarded as an “inadvertence, to the extent that it describes disproof of the defendant’s reason as a totally independent, rather than an auxiliary, means of proving unlawful intent.” Id. at 2753.
203. Id. at 2753; see supra note 69. Justice Scalia pointed out that the cited pages of *McDonnell Douglas* do not support the inference drawn in *Burdine*. The only passage in *McDonnell Douglas* that even vaguely support’s the *Burdine* Court’s statement is the following: “In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.” *McDonnell Douglas*, 411 U.S. at 805. Yet in summarizing its opinion, the *McDonnell Douglas* Court stated:

On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner’s assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner’s refusal to rehire must stand.

Id. at 807. Thus, it seems that both the *Burdine* Court and Justice Souter fell into a similar trap: failing to carefully read the *McDonnell Douglas* Court’s summary of its holding, and relying instead on dicta.

204. *St. Mary’s*, 113 S. Ct. at 2753.
205. See *Burdine*, 450 U.S. at 253-58. The *Burdine* Court summarized its decision by stating: “We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.” Id. at 258.
206. Id. at 253.
court that she has been the victim of intentional discrimina-
tion.207 For his part, Justice Souter misinterpreted Burdine because he relied primarily on dicta.208 Furthermore, he incorrectly argued that Burdine limits the factfinder's inquiry to the defendant's proffered reasons.209 Once the defendant proffers its reasons, according to Justice Souter, the factfinder's inquiry is limited to only those reasons.210

To the contrary, Burdine mandates that upon establishment of the plaintiff's prima facie case, the defendant must set forth legitimate reasons for the adverse employment action.211 This frames the factual issues so that the plaintiff has "a full and fair opportunity to demonstrate pretext."212 The plaintiff's burden then merges with the plaintiff's ultimate burden of proving that he or she was the target of intentional discrimination.213

In sum, then, because Justice Souter incorrectly relied on Burdine dicta, the St. Mary's majority opinion contains the better reading of Burdine. Moreover, the majority opinion is entirely consistent with Burdine to the extent that Burdine is consistent with McDonnell Douglas.

C. Aikens: The Correct Interpretation Becomes Clear

That the St. Mary's majority was correct is further revealed by careful examination of United States Postal Service Bd. of Governors v. Aikens.214 The Aikens Court stated that the ultimate question in a Title VII discrimination case is "discrimination vel non."215 After explain-

207. Id. at 256. The Court went on to explain that the plaintiff can meet this burden by disproving the defendant's proffered explanation. Id. As previously noted, however, in advancing this proposition, the Burdine Court cited McDonnell Douglas—yet McDonnell Douglas "does not say, at the cited pages or elsewhere, that all the plaintiff need do is disprove the employer's asserted reason." St. Mary's, 113 S. Ct. at 2753.
208. St. Mary's, 113 S. Ct. at 2762 (Souter, J., dissenting). Justice Scalia concluded that "the dissent's interpretation causes many portions of the opinion to be incomprehensible or deceptive." St. Mary's, 113 S. Ct. at 2753.
209. St. Mary's, 113 S. Ct. at 2759 (Souter, J., dissenting). Justice Souter contended that requiring the defendant to clearly frame the factual issues necessarily means that the employer "choose[s] the scope of the factual issues to be resolved by the factfinder." Id. (Souter, J., dissenting).
210. Id. (Souter, J., dissenting).
211. Burdine, 450 U.S. at 253 (quoting McDonnell Douglas, 411 U.S. at 802).
212. Id. at 255-56.
213. Id. at 256.
215. Id. at 714. Vel non literally means "or not." BLACK'S LAW DICTIONARY 1555 (6th ed. 1990). The Court explained in a footnote that the "trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." Aikens, 460 U.S.
ing that the factual inquiry becomes more specific after the defendant proffers its reasons and the presumption of discrimination drops from the case, the *Aikens* Court explained that the factfinder must ultimately decide who to believe in determining whether the defendant intentionally discriminated against the plaintiff.\(^{216}\)

As Justice Scalia correctly observed,\(^{218}\) in *St. Mary's* Justice Souter improperly relied on the concurring opinions in *Aikens* rather than the majority opinion.\(^{219}\) Although the *Aikens* ruling was unanimous, Justice Blackmun, joined by Justice Brennan, wrote a concurring opinion and Justice Marshall concurred in the judgment only.\(^{220}\) Justice Blackmun wrote to explain that in his view, the Court's opinion reaffirmed *McDonnell Douglas* and also made it clear that the plaintiff necessarily prevails upon demonstrating that the defendant's proffered reasons are false.\(^{221}\) Yet this view did not win a majority of the *Aikens* Court. Instead, the *Aikens* majority held that for the plaintiff to prevail, the factfinder must determine that the adverse action resulted from discrimination prohibited under Title VII.\(^{222}\)

### D. Rule 301: Legislative History Provides a Basis for the Court's Reasoning

The plain language of Rule 301 of the Federal Rules of Evidence, and its legislative history, mandate the ruling in *St. Mary's*. Rule 301 provides that the party against whom a presumption is raised assumes a burden to produce evidence to meet or rebut the presumption.\(^{223}\) Yet that party does not also assume the burden of persuasion.\(^{224}\) As the Judiciary Conference Committee explained, if the party opposing the

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\(^{216}\) *Aikens*, 460 U.S. at 716. Although the *Aikens* Court noted the difficulty in ascertaining subjective intent, it recognized that nevertheless, factfinders must often do so. *Id.*

\(^{217}\) *Id.* at 715 (quoting *Burdine*, 450 U.S. at 253).

\(^{218}\) *St. Mary's*, 113 S. Ct. at 2754.

\(^{219}\) *Id.* at 2762 (Souter, J., dissenting).

\(^{220}\) *Aikens*, 460 U.S. at 717 (Blackmun, J., concurring).

\(^{221}\) *Id.* at 717-18 (Blackmun, J., concurring). Ironically, Justices Blackmun and Brennan cited the language previously analyzed in this Note in which the *Burdine* court cited pages of *McDonnell Douglas* which do not support this proposition. *See supra* notes 69 and 203.

\(^{222}\) *Aikens*, 460 U.S. at 715 (Blackmun, J., concurring). The Court, stating that the factfinder must decide which party it believes in reaching its decision, remanded the case to the district court to determine whether Aikens was the victim of unlawful discrimination. *Id.* at 716-17 (Blackmun, J., concurring).

\(^{223}\) FED. R. EVID. 301.

\(^{224}\) *Id.*
presumption offers evidence contradicting the presumption, "the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts."²²⁵

What follows is that once a Title VII intentional employment discrimination defendant proffers a legitimate, nondiscriminatory reason for its action, the factfinder is not required to find the existence of intentional discrimination (the presumed fact) based solely on the prima facie case and disbelief of the defendant's proffered reasons (the basic facts). The factfinder is permitted, however, to infer the existence of intentional discrimination based solely on the prima facie case and disbelief of the defendant's proffered reasons. This inference, if drawn, is sufficient to support a finding that the defendant intentionally discriminated against the plaintiff. This is the precise holding of St. Mary's.²²⁶ In sum, the St. Mary's majority both correctly interpreted existing precedent and properly followed the Federal Rule of Evidence that governs presumptions in civil proceedings.

V. IMPACT

Although Justice Souter predicted that the Court's decision in St. Mary's will lead to unfairness to Title VII plaintiffs,²²⁷ the only "change" that St. Mary's will cause is that it can no longer be questioned that under the Title VII shifting burden framework, first set forth in McDonnell Douglas, plaintiffs can prevail only if the factfinder makes a specific finding of intentional discrimination.²²⁸ This "change" will likely favor plaintiffs rather than defendants.

Indeed, as lower federal courts have begun to apply St. Mary's, Justice Souter's prediction of dire consequences has quickly proved inaccurate. The Second Circuit has emphasized that contrary to Justice Souter's warning, St. Mary's will not cause "[p]anic . . . [to] break out among the courts of appeals."²²⁹ Rather, the Second Circuit concluded that St. Mary's reaffirms the long-standing rule that the ultimate

²²⁶. St. Mary's, 113 S. Ct. at 2749. Justice Scalia concluded that the "Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof." Id.
²²⁷. Id. at 2757 (Souter, J., dissenting).
²²⁹. Id. at 141-42 (alteration in original) (quoting St. Mary's 113 S. Ct. at 2750).
burden of proof rests solely with the plaintiff.\textsuperscript{230}

Although \textit{St. Mary's} held that the plaintiff is not entitled to a finding of intentional discrimination upon disproof of the defendant's proffered reasons, it still allows the factfinder to infer the ultimate fact of intentional discrimination from the rejection of the defendant's justifications. Because the \textit{St. Mary's} Court eradicated any confusion surrounding the propriety of such inferences, plaintiffs may now be more likely to win judgment as a matter of law upon disproof of the defendant's reasons. This has already been the case in the First,\textsuperscript{231} Third,\textsuperscript{232} Fifth,\textsuperscript{233} and Eighth Circuits.\textsuperscript{234}

Raising another advantage for plaintiffs, the Ninth Circuit has read \textit{St. Mary's} as making it more difficult for defendants to win at the summary judgment or directed verdict stages.\textsuperscript{235} That court held that "[i]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is

\textsuperscript{230} Id. at 142.

\textsuperscript{231} Biggins v. Hazen Paper Co., Nos. 91-1591, 91-1614, 1993 WL 406515 (1st Cir. Oct. 18, 1993). The \textit{Biggins} court recognized that to prevail, the plaintiff must not only show that the proffered reasons are false, but also that discrimination was the real reason for the adverse employment action. \textit{Id.} at *4. Nevertheless, citing the \textit{St. Mary's} holding that permits the factfinder to infer intentional discrimination from its rejection of the defendant's proffered reasons, the \textit{Biggins} court ruled that the "jury must have found that Hazen Paper's explanation . . . was 'unworthy of credence.'" \textit{Id.} Prior to \textit{St. Mary's}, the First Circuit followed the pretext-plus approach. \textit{See supra} note 89 and accompanying text.

\textsuperscript{232} See Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 329 n.4 (3d Cir. 1993) (noting in dicta that "[s]howing pretext is not necessarily sufficient to meet the plaintiff's burden of proof") (emphasis added).

\textsuperscript{233} See Moham v. Steego Corp., 3 F.3d 873, 876 (5th Cir. 1993). The Fifth Circuit explained that rejection of the defendant's proffered reasons is not, by itself, a finding of discrimination. However, noting that the factfinder found that the defendant's testimony was "unconvincing" and that the plaintiff's testimony was "credible," the Fifth Circuit held that the factfinder had made the requisite finding of intentional employment discrimination. \textit{Id.}

\textsuperscript{234} Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 707 (8th Cir. 1993) (interpreting \textit{St. Mary's} as "holding that once an employer articulates a non-discriminatory purpose for termination, the three-part analysis drops from the case, and the district court must only decide whether the employer intentionally discriminated or retaliated against the employee").

\textsuperscript{235} See Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993). In Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 921, (11th Cir. 1993), the court applied \textit{St. Mary's} to an appeal of a grant of summary judgment to a defendant in an age discrimination case, stating that the "plaintiff's burden at summary judgment is met by introducing evidence that could form the basis for a finding of facts, which . . . could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext."
Finally, although Justice Souter feared that upon remand Hicks would be given no opportunity to disprove the district court's hypothesized explanation for St. Mary's action—personal animosity by Hicks's supervisor—that fear quickly proved unfounded. When St. Mary's arrived again at the Eighth Circuit, that court carefully noted that the plaintiff's prima facie case, coupled with the factfinder's disbelief of the defendant's proffered reasons, "will permit the factfinder to infer the ultimate fact of intentional discrimination, and . . . that, upon such rejection, '[n]o additional proof of discrimination is required.' The Eighth Circuit then remanded the case to the district court to determine whether the defendants were actually motivated by personal animosity or whether their animosity was racially motivated.

VI. CONCLUSION

Contrary to Justice Souter's contentions, St. Mary's does not ignore two decades of precedent. Nor does it make proving Title VII employment discrimination cases more difficult for plaintiffs. Instead, it merely clarifies the framework under which the plaintiff may prove intentional discrimination. That framework, first advanced in McDonnell Douglas, still consists of three basic stages: First, the plaintiff must establish a prima facie case of discrimination, upon which a rebuttable presumption arises that the defendant's actions were discriminatory. Next, the defendant must rebut the prima facie case by introducing legitimate, nondiscriminatory reasons for its actions. Finally, the plaintiff must prove intentional discrimination, either directly or indirectly. At this final stage, St. Mary's requires the factfinder to decide whom to believe. If the factfinder does not believe that the defendant's proffered reasons were the actual reasons for the

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236. Washington, 10 F.3d at 1433. The Court further explained:
Because, as St. Mary's recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.

Id.

237. St. Mary's, 113 S. Ct. at 2766 (Souter, J., dissenting).

238. Hicks III, 2 F.3d at 265.

239. Id. at 266-67 (quoting St. Mary's, 113 S. Ct. at 2749) (emphasis added) (footnote omitted in original).

240. Hicks III, 2 F.3d at 267.
adverse employment action, the factfinder is permitted—but not compelled—to determine on that basis alone that unlawful discrimination took place.

The key here, and the only real point of contention between the majority and the dissent, is that the factfinder must make a specific finding of proscribed discrimination. Disbelief of the defendant's reasons, absent this specific finding, is insufficient as a matter of law to allow the plaintiff to prevail. Still, the *St. Mary's* decision leaves much discretion to the factfinder in reaching the ultimate finding of intentional employment discrimination. As a result, *St. Mary's* will likely favor plaintiffs rather than defendants because courts of appeal previously inclined to follow the pretext approach are still permitted to do so provided the factfinder makes the requisite finding of intentional discrimination upon disbelief of the defendant's proffered reasons.

Perhaps more importantly, at least one federal court has read *St. Mary's* as making it difficult for defendants to win at the summary judgment or directed verdict stage, reasoning that once the plaintiff establishes a prima facie case and raises a genuine issue of fact as to the truth of the defendant's proffered reason, the factfinder—and not the court—must resolve the ultimate question of whether the defendant intentionally discriminated against the plaintiff. In short, contrary to Justice Souter's fear that the Court's decision in *St. Mary's* will greatly disadvantage Title VII plaintiffs, the Court's decision will most likely disfavor Title VII defendants.