

AGE DISCRIMINATION AND THE MODERN REDUCTION IN FORCE

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The years since the mid-1970's have produced an age discrimination plaintiff different in noteworthy respects from the person Congress and President Johnson contemplated in autumn 1967,¹ when the Age Discrimination in Employment Act ("ADEA")² was passed and signed into law. While ADEA's proponents were primarily concerned with the hiring barriers older workers faced, ADEA actions have tended to arise more often from termination, layoff or demotion.³ This

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1. Although the evidence is far from crystal clear, both Congress and President Johnson seemed most concerned about lower-paid and nonmanagerial workers when considering age discrimination. Discussion of age discrimination in the labor market was laced with references to elderly workers on welfare or below the poverty level. See President Johnson's Special Message to the Congress Proposing Programs for Older Americans, 12 PUB. PAPERS 32 (Jan. 23, 1967); 110 CONG. REC. 2598 (1964) (statement of Rep. Pucinski). While Congress was considering amending the Civil Rights Act of 1964 to include age, there was discussion of the "prerogatives of management", *id.* (statement of Rep. Roosevelt), and the effect of automation on older workers. U.S. DEP'T. OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965); 110 CONG. REC. 13,491 (1964) (statement of Sen. Long); 110 CONG. REC. at 2598 (statement of Rep. Pucinski). The heavy involvement of the Department of Labor in reporting on the problems of age discrimination may itself be indicative of a focus on workers traditionally classified as laborers. See 29 U.S.C. § 622 (1982). The Department of Labor's 1965 report was prepared pursuant to section 715 of the Civil Rights Act of 1964.

2. Age Discrimination in Employment Act Pub. L. No. 90-202, §§ 2-17, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C.A. §§ 621-634 (West 1985)).

3. See President Johnson's Special Message, *supra* note 1, at 37; U.S. DEP'T. OF LABOR, THE OLDER AMERICAN WORKER, *supra* note 1; 110 CONG. REC. 2597 (1964)

phenomenon persists, and furthermore, the pool of laid off or discharged workers seems to have changed composition. Once layoffs were principally a rank and file worry, often relatively brief and, insofar as they were governed by a labor contract's seniority provisions, usually without a disproportionate effect on older workers. While not unheard of, cutbacks in managerial or executive staff resulting in ADEA litigation were rare before the latter half of the past decade.

As layoffs have in recent years taken on a more ominously permanent form, and often sliced deep into white collar layers, an archetypal age discrimination plaintiff has emerged. He — and it usually is a man — is often near the upper end of the protected age bracket,⁴ and is frequently a middle or upper level manager.⁵ He is not a worker governed by strict seniority rules. Typically, he comes from a relatively small group of discharged employees, and accordingly presses his claim individually or in small numbers, although there are significant exceptions.⁶ And perhaps most notably, from the standpoint of age discrimination, he has not been replaced by a younger

(statement of Rep. Pucinski); Statement by the President After Signing the Age Discrimination in Employment Act of 1967, 12 PUB. PAPERS 1154 (Dec. 16, 1967). Both Congress and the executive branch were responding to statistics showing that older workers endured longer periods of unemployment after losing a job than younger workers.

4. See *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985) (57-year old); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir.), *cert. denied*, 105 S. Ct. 92 (1984) (65 affected workers 55 and over); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981) (61-year old); *Thornbrough v. Columbus & G.R.R.*, 760 F.2d 633 (5th Cir. 1985) (56-year old); *Grubb v. W.A. Foote Memorial Hosp., Inc.*, 741 F.2d 1486 (6th Cir. 1984) (61-year old).

5. See, e.g., *Thornbrough v. Columbus & G.R.R.*, 760 F.2d 633 (5th Cir. 1985) (vice-president); *LaGrant v. Gulf & W. Mfg. Co.*, 748 F.2d 1087 (6th Cir. 1984) (manager of administrative services); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981) (plant manager); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981) (vice-president for special assignments); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) (international sales manager). Note also that 29 U.S.C. § 631(c) (1982 & Supp. II 1984), added in 1978 and amended in 1984, kept the original age 65 cap on ADEA protection for employees in bona fide executive or high policymaking positions. If our admittedly informal empirical observations regarding typical age discrimination plaintiffs are correct, then an increasing percentage of potential plaintiffs face a *de facto* cutoff of ADEA protection at age 65, pursuant to section 631(c), instead of age 70.

6. See, e.g., *Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985); *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980); *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

worker; in fact, he has not been replaced, in the narrow sense of the word, at all. Rather, employers have truncated portions of their operations and reduced forever the size of their work force. The term "reduction in force," or "RIF," will be used to describe this modern hybrid of the layoff.

This article first skims the ADEA topography, providing a summary overview of that Act. It next discusses the two basic approaches to establishing and rebutting an age discrimination case, the disparate impact and disparate treatment theories. The article then turns to the problems that the modern RIF has created for courts as they seek to apply the traditional ADEA disparate treatment analysis. The traditional analysis includes a four element *prima facie* case, the fourth element requiring a plaintiff to show he was replaced by an employee outside the protected group or by a substantially younger employee, or that the employer sought others with similar qualifications to do the same work. Such a showing is usually impossible in the RIF context. Accordingly, this article will address the proper formulation in the RIF context of the fourth element needed to establish an inference of age discrimination.

I. OVERVIEW OF THE ADEA'S SUBSTANTIVE PROVISIONS

The ADEA, as amended,⁷ is the principal federal law prohibiting age discrimination.⁸ It forbids age discrimination

7. The original Act was amended by Pub. L. No. 93-259, 88 Stat. 74 (1974); Pub. L. No. 95-256, 92 Stat. 189-93 (1978); Pub. L. No. 97-248, 96 Stat. 353 (1982); Pub. L. No. 98-369, 98 Stat. 1063 (1984); and Pub. L. No. 98-459, 98 Stat. 1792 (1984). The Age Discrimination in Employment Act Amendments of 1978 raised the permissible mandatory retirement age from 65 to 70 for most private sector employees.

8. Age Discrimination Act of 1975 ("ADA"), 42 U.S.C. §§ 6101-6107 (1982) extends the prohibitions against age discrimination to programs or activities receiving federal financial assistance. *Id.* at § 6102. It does not amend or otherwise modify the ADEA. *Id.* § 6103(c)(2). The ADA is applicable only to a public service employment program or activity receiving federal financial assistance under the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982), 42 U.S.C. § 6103(c) (1982).

Exec. Order No. 11,141, 3 C.F.R. 179 (1964), *reprinted in* 5 U.S.C. § 3301 app. at 517 (1982), declares the federal executive branch's policy prohibiting federal contractors and subcontractors from discriminating against employees and job applicants on the basis of age. It does not specify a protected age group. It contains exceptions for bona fide occupational qualifications, retirement plans and statutory requirements. The Office of Federal Contract Compliance Programs ("OFCCP") has issued no regulations implementing the order, and one federal court has held the order creates no enforceable

in employment against workers between forty and seventy years of age,⁹ and applies to public¹⁰ and private employers,¹¹ labor unions¹² and employment agencies.¹³ All employment decisions are subject to ADEA scrutiny, including hiring, discharge, demotion, promotion, compensation, and other terms, conditions or privileges of employment.¹⁴

There are five principal affirmative defenses to ADEA claims. An employer may argue that its challenged employment decision is based upon (1) a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of the particular business;¹⁵ (2) a reasonable factor

right of action. See *Kodish v. United Airlines, Inc.*, 463 F. Supp. 1245, 1251-52 (D. Colo. 1979), *aff'd*, 628 F.2d 1301 (10th Cir. 1980).

9. 29 U.S.C. § 631(a) (1982). The 1978 amendments eliminated the upper age limit for federal employees, with the exception of certain positions for which a mandatory retirement age had previously been established by other statutes or regulations. *Id.* at §§ 631(b), 633a.

10. The ADEA applies to the federal government (with certain procedural and substantive differences), *id.* at § 633a, and to state and local government employers. *Id.* at § 630(b). See *EEOC v. Wyoming*, 460 U.S. 226 (1983) (the tenth amendment does not preclude application of the ADEA to state and local governments); *accord Arritt v. Grisell*, 567 F.2d 1267, 1269-71 (4th Cir. 1977) (Congress may exercise its powers under the Constitution to extend the application of the ADEA to the states).

11. The ADEA defines an "employer" as one engaged in an industry affecting commerce with 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b) (1982).

12. "Labor organizations" engaged in an industry affecting commerce with 25 or more members, or operating a hiring hall procuring employees for an employer or work opportunities with an employer, are covered under the ADEA. *Id.* at § 630(d) and (e). Such labor organizations are prohibited from discriminating on the basis of age with respect to membership or employment opportunities and are further prohibited from attempting to cause an employer to violate the ADEA. *Id.* at § 623(c).

13. "Employment agencies" are defined to include any person regularly undertaking (with or without compensation) to procure employees for an employer. *Id.* at § 630(c). Employment agencies are prohibited from discriminating with respect to employment referrals and are prohibited from classifying or referring job applicants on the basis of age. *Id.* at § 623(b).

14. *Id.* at § 623(a). See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 485 (2d ed. 1983).

15. 29 U.S.C. § 623(f)(1) (1982). In asserting the BFOQ defense, a defendant admits that age was a determining factor in its challenged employment decision, but argues it was reasonably necessary to the normal operation of its particular business. Whether a BFOQ is "reasonably necessary to the normal operation of the particular business" is determined by examining all pertinent facts. 29 C.F.R. § 1625.6(a) (1985).

The BFOQ exception is narrowly construed, and has a limited scope and application. *Id.* See also *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977). Employers must show that a claimed BFOQ is reasonably necessary to

other than age ("RFOTA");¹⁶ (3) a bona fide seniority system;¹⁷ (4) a bona fide employee benefit plan;¹⁸ or (5) good

the essence of the particular business operation. 29 C.F.R. § 1625.6(b)(1) (1985). See *Monroe v. United Airlines, Inc.*, 736 F.2d 394, 400 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1356 (1985); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 753 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976). Moreover, the employer must prove either that it is impossible or impracticable to deal with all excluded persons on an individualized basis, or that the employer has a factual basis for believing that all or substantially all excluded persons would be unable to perform the job duties safely and efficiently. 29 C.F.R. § 1625.6(b) (1985). See *Monroe v. United Airlines, Inc.*, 736 F.2d 394, 400 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1356 (1985); *Arritt v. Grisell*, 567 F.2d at 1271; *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976).

16. 29 U.S.C. § 623(f)(1) (1982). The ADEA permits an employer to differentiate between employees if "the differentiation is based on reasonable factors other than age. . . ." *Id.* The existence of such a differentiating factor must be determined on a case-by-case basis. 29 C.F.R. § 1625.7(b) (1985). When the defense is used, the employer has the burden of showing the asserted RFOTA exists factually. *Id.* at § 1625.7(e).

17. 29 U.S.C. § 623(f)(2) (1982). The ADEA permits an employer to observe the terms of a bona fide seniority system "which is not a subterfuge to evade the purposes of" the Act. *Id.* The seniority system may be qualified by factors such as merit, capacity, or ability, but length of service must be the primary criterion for allocating work opportunities and prerogatives among younger and older workers. 29 C.F.R. § 1625.8 (1985). No seniority system may require or permit the involuntary retirement of certain employees under 70 on the basis of age. 29 U.S.C. § 623(f)(2) (1982); 29 C.F.R. § 1625.9 (1985).

18. 29 U.S.C. § 623(f)(2) (1982). Employers are allowed to observe the terms of a bona fide employee benefit plan, such as a retirement, pension or insurance plan, if the plan is not a subterfuge to evade the purposes of the Act. *Id.* Typically, the cost to an employer of providing such fringe benefits increases with the age of the covered employee. Accordingly, this exception allows an employer to provide lower benefits to older workers if the lower benefits are justified by age-related cost considerations. 29 C.F.R. § 860.120(a)(1), (d) (1985).

An employee benefit plan is considered nondiscriminatory where the actual payments made or costs incurred on behalf of an older worker equal those made or incurred on behalf of a younger worker, even if the result is that the older worker receives lower benefits or less insurance coverage. Only the employer's cost in providing the benefits must be approximately the same. *Id.* Employers, however, must provide employees with the same level of group health care benefits. 29 U.S.C. § 623(g)(1) (1982). Benefit equivalence, not just cost equivalence, is required. 29 C.F.R. § 1625.20(a)(1) (1985).

Significantly, no employee benefit plan can require or permit the involuntary retirement of an individual in the protected age category because of that individual's age. 29 U.S.C. § 623(f)(2) (1982). An employee benefit plan may, however, permit individuals to *elect* early retirement upon reaching a specified age at their own option. 29 C.F.R. § 1625.9(f) (1985). The election must be truly voluntary.

An exception to the prohibition on mandatory retirement exists for employees who are at least 65 but less than 70 years old, who have held a bona fide executive or high policymaking position for a two-year period immediately preceding retirement, and who

cause.¹⁹ The "BFOQ", "bona fide seniority system" and "bona fide employee benefit plan" exceptions are true affirmative defenses: the employer acknowledges it discriminated on the basis of age, but justifies its employment decision under one of those exceptions. The "RFOTA" and "good cause" defenses, on the other hand, are asserted when an employer argues there was no causal connection between its employment decision and the employee's age; in this sense, they are not exceptions at all.²⁰

II. ESTABLISHING DISCRIMINATION: THE DISPARATE IMPACT AND DISPARATE TREATMENT THEORIES

The ADEA is a hybrid of Title VII of the Civil Rights Act of 1964 ("Title VII")²¹ and the Fair Labor Standards Act of 1938 ("FLSA");²² its prohibitions are modeled after Title VII, while its remedies follow those of the FLSA.²³ Courts consequently turn to Title VII cases to interpret ADEA's provisions.²⁴ Under Title VII, two distinct theories for establishing

are entitled to an immediate nonforfeitable annual retirement benefit of \$44,000. 29 U.S.C. § 631(c)(1) (1982). The EEOC states that this exception must be narrowly construed, and claims that it does not apply to federal employees. 29 C.F.R. § 1625.12(b), (g) (1985). To qualify as a "bona fide executive" the employee must meet the six specific requirements set forth in 29 C.F.R. § 541.1 (1985).

Formerly, a second exception to the prohibition against compulsory retirement allowed institutes of higher education to mandate retirement of teachers between 65 and 70 who had unlimited tenure. This exemption expired July 1, 1982. Pub. L. No. 95-256, § 3(a), (b)(3), 92 Stat. 189-90 (1978). See 29 U.S.C. § 631(d) (1976 & Supp. II 1978) (repealed 1978); 29 C.F.R. § 1625.11 (1985).

19. The ADEA does not prevent an employer from discharging or disciplining an employee for "good cause." 29 U.S.C. § 623(f)(3) (1982).

20. SCHLEI & GROSSMAN, *supra* note 14, at 504-05.

21. 42 U.S.C. §§ 2000e - 2000e-17 (1982).

22. 29 U.S.C. §§ 201-219 (1982).

23. SCHLEI & GROSSMAN, *supra* note 14, at 485. See also *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (the ADEA's substantive prohibitions were derived *in haec verba* from Title VII).

24. See *Douglas v. Anderson*, 656 F.2d 528, 531-32 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015-16 (1st Cir. 1979); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 62 (10th Cir. 1979). One significant difference between the two acts is that the ADEA, unlike Title VII, accords a plaintiff the right to trial by jury. 29 U.S.C. § 626(c)(2) (1982).

unlawful discrimination have emerged: disparate impact²⁵ and disparate treatment.²⁶

A. *The Disparate Impact Theory*

Under the disparate impact theory, a plaintiff is initially required to prove, most commonly through statistics, that an employer's facially neutral rule or policy has a disparate impact upon the employment opportunities of a protected class of persons.²⁷ Once disparate impact is demonstrated, the burden of going forward shifts to the employer, which must establish that the rule or policy under challenge is mandated by "business necessity."²⁸

That the employer is solely motivated by legitimate business concerns, and has no intent to discriminate against the plaintiff or his class, is of no moment under the disparate impact theory.²⁹ "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."³⁰

If the employer establishes that the challenged rule or policy is required by "business necessity," a difficult task, the plaintiff must then show the employer used the rule or policy as a mere pretext for discrimination.³¹ The plaintiff can discredit the "business necessity" defense by demonstrating either that the employer's evidence is insufficient to establish

25. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

26. See, e.g., *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579-80 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973).

27. See, e.g., *Massarsky v. General Motors Corp.*, 706 F.2d 111, 120 (3d Cir.), cert. denied, 464 U.S. 937 (1983); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981). See also *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

28. See *Massarsky*, 706 F.2d at 120; *Leftwich*, 702 F.2d at 691; *Allison*, 680 F.2d at 1322; *Geller*, 635 F.2d at 1032; see also *Teal*, 457 U.S. at 446-47.

29. See *Leftwich*, 702 F.2d at 690; *Allison*, 680 F.2d at 1322; *Geller*, 635 F.2d at 1031. See also *Albemarle Paper Co.*, 422 U.S. at 422; *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

30. *Griggs*, 401 U.S. at 432.

31. See *Massarsky*, 706 F.2d at 120; see also *Teal*, 457 U.S. at 447.

business necessity, or that an alternative rule or policy exists that has less disparate impact on the protected group.³²

While the disparate impact theory enjoys widespread acceptance under Title VII, there is little agreement concerning its applicability to ADEA cases,³³ and few ADEA cases have been brought under this theory.³⁴ Part of the reason perhaps lies in the fact that the disparate impact theory is not easily transferred to age cases.³⁵

It is difficult, for example, to determine when the degree of any disparate impact becomes legally significant. The Seventh Circuit has stated that the statistical disparity in age discrimination cases must be quite large before discrimination is shown. Some disparity is always present, and simply reflects the replacement of older workers by younger workers, as older workers retire from the labor force.³⁶

Despite this difficulty, some courts have applied the disparate impact theory to ADEA cases.³⁷ Indeed, a few courts have expressly found the disparate impact theory applicable.³⁸ Other courts simply utilize the theory without specifically discussing its applicability.³⁹

32. See *Geller*, 635 F.2d at 1032; see also *Dothard*, 433 U.S. at 329; *Albemarle*, 422 U.S. at 425.

33. See *Akins v. South Cent. Bell Tel. Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984) (court declines to determine whether disparate impact theory is available in ADEA cases).

34. SCHLEI & GROSSMAN, *supra* note 14, at 497.

35. See *Cunningham v. Central Beverage, Inc.*, 486 F. Supp. 59, 62-63 (N.D. Tex. 1980).

36. *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (any adverse impact reflected in hiring and promotion statistics is not legally significant unless it is large enough to factor out the normal progression of older workers out of the labor market, and their replacement by younger workers); see also *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 735-36 (5th Cir. 1977) (the replacement of older employees by younger did not raise inference of improper motive); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975).

37. See, e.g., *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117, 120 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983).

38. See, e.g., *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); cf. *Akins v. South Cent. Bell Tel. Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984) (the Fifth Circuit remanded the case to the district court to consider the disparate impact theory; the court acknowledged that numerous circuits have concluded the disparate impact theory is applicable to ADEA suits).

39. See, e.g., *Allison*, 680 F.2d at 1321-23.

B. *The Disparate Treatment Theory*

The second theory developed under Title VII to establish discrimination, and the theory upon which the balance of this article centers, is the disparate treatment theory. Unlike the disparate impact theory, the disparate treatment theory requires a plaintiff to show he was treated differently *because of* his membership in a protected class.⁴⁰

The proof adduced to establish discrimination may be direct, indirect or a combination of both.⁴¹ Direct evidence may consist of discriminatory statements made by an employer or an undisputed policy that treats employees differently based on prohibited criteria.⁴²

If an employee can forward direct evidence of unlawful discrimination, he need not use the three-part burden of proof scheme set forth in *McDonnell Douglas Corp. v. Green*.⁴³ Usually, however, there exists little direct evidence of discrimination. The system of proof developed under Title VII, set forth in broad outline by the Supreme Court in *McDonnell Douglas*, is then available.

The *McDonnell Douglas* system of proof is based upon the proposition that an inference of discrimination can be drawn from the existence of certain objective facts, and that elusive direct evidence of discriminatory intent is not required.⁴⁴ In brief, the *McDonnell Douglas* system of proof requires the establishment of a prima facie case, after which the burden of production shifts to the employer to demonstrate it had legitimate, nondiscriminatory reasons for its employment decision. Once such a reason is forwarded (with a modicum of support-

40. 29 U.S.C. § 623 (1982). See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1017 (5th Cir. 1979).

41. See *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983); *Douglas v. Anderson*, 656 F.2d 528, 531 n.2 (9th Cir. 1981).

42. See *Loeb*, 600 F.2d at 1018 (a plaintiff may rely on direct evidence of discriminatory intent, such as a letter or oral admission by defendant).

43. 411 U.S. 792 (1973). See also *Blackwell*, 696 F.2d at 1180; *Loeb*, 600 F.2d at 1017-18 (a plaintiff who has introduced direct evidence of discrimination may be entitled to a day in court, without proving each element of the *McDonnell Douglas* prima facie case).

44. See, e.g., *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117-18 (3d Cir.), cert. denied, 464 U.S. 937 (1983); see also *Player, Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 621, 627 (1983).

ing evidence), the burden shifts back to the plaintiff to establish that the reason proffered was merely a pretext disguising unlawful discrimination. Significantly, at all times the burden of persuasion rests with the plaintiff.

While some courts have expressed doubt concerning the applicability of the *McDonnell Douglas* analysis to ADEA jury trials, most courts agree that the system of proof developed in Title VII disparate treatment cases can be applied to the order, allocation and standards of proof set forth under the ADEA.⁴⁵ Courts have been flexible, however, in applying the *McDonnell Douglas* model to age cases, modifying it as circumstances require.⁴⁶

III. APPLYING THE *MCDONNELL DOUGLAS* ANALYSIS TO DISPARATE TREATMENT CASES UNDER THE ADEA

A. *The Prima Facie Case*

A prima facie case of age discrimination, in the normal discharge context, is established by demonstrating by a preponderance of the evidence the following objective facts:

- (a) Plaintiff was in the protected age group;
- (b) Plaintiff was qualified;
- (c) Plaintiff was discharged or demoted; and
- (d) Employer replaced plaintiff with either a person outside the protected group or a younger employee, or

45. See, e.g., *Huhn v. Koehring Co.*, 718 F.2d 239, 243 (7th Cir. 1983); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 323 (2d Cir. 1983); *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982); *Reeves v. General Foods Corp.*, 682 F.2d 515, 520 (5th Cir. 1982); *Douglas v. Anderson*, 656 F.2d 528, 531-32 (9th Cir. 1981); *Smith v. University of N.C.*, 632 F.2d 316, 332-35 (4th Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-19 (5th Cir. 1979) (*McDonnell Douglas* formula applies with modifications to ADEA cases).

46. See, e.g., *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983) (the court states the *McDonnell Douglas* guidelines cannot be applied mechanically, but rather should be applied on a "case-by-case" basis); *Smith v. University of N.C.*, 632 F.2d 316, 333-35 (4th Cir. 1980) (while the *McDonnell Douglas* system of proof may appropriately be used in an ADEA jury trial, not all the elements need be recited to the jury); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016-17 (5th Cir. 1979) (*McDonnell Douglas* system must not be used inflexibly in ADEA cases); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975) (it is inappropriate to apply *McDonnell Douglas* guidelines inflexibly); see also *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) (the *McDonnell Douglas* guidelines were not intended to be "rigid, mechanized or ritualistic").

sought someone else with similar qualifications to perform the same work.

The second and fourth elements of the prima facie case will be examined in greater detail.

1. The Second Element of the Prima Facie Case

The second element of a prima facie case of age discrimination requires proof that the plaintiff met applicable job qualifications, or was performing his job in a manner meeting his employer's legitimate expectations.⁴⁷ In the RIF context, a plaintiff's job has usually been eliminated, so plaintiff must prove he was qualified to assume another position at the time of his demotion or discharge.⁴⁸

2. The Fourth Element of the Prima Facie Case

The fourth and final element of the prima facie test is the element over which the most controversy has arisen. Three formulations of this last element are discernible from case law.

The most stringent formulation requires a plaintiff to prove he was replaced by a person *outside* the protected age group, *i.e.*, the favored person was under the age of forty.⁴⁹ A more lenient standard requires plaintiff only to establish that he was replaced by a substantially younger employee, who may himself be in the protected group.⁵⁰ Courts have not agreed on how many years' difference constitutes a "substantial" age gap; however, the greater the age difference, the

47. *See, e.g.*, Huhn v. Koehring Co., 718 F.2d 239, 243-44 (7th Cir. 1983); Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Rodriguez v. Taylor, 569 F.2d 1231, 1239-40 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

48. *See, e.g.*, Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321 (11th Cir. 1982); Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

49. *See, e.g.*, Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982); Harpring v. Continental Oil Co., 628 F.2d 406, 408 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981); *cf.* Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). The EEOC, however, takes the position that discriminatory employment decisions against persons within the protected age group are illegal irrespective of whether the person favored by the discrimination is also within the protected age group. 29 C.F.R. § 1625.2(a) (1985).

50. *See, e.g.*, Cuddy v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981); Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979).

stronger the inference of discrimination.⁵¹ A still more lenient formulation requires the plaintiff simply to show that the employer sought others with similar qualifications to do the same work.⁵² No proof of favoritism towards younger persons is required.⁵³

In RIF cases, a fourth formulation of this final element is required. Exactly what this fourth element should be is a matter of some dispute⁵⁴ and the focus of this article.

Once a prima facie showing is made, an inference of age discrimination arises.⁵⁵ The burden of production then shifts to the employer.

B. Articulation of a Legitimate, Nondiscriminatory Reason for the Employment Action

If a plaintiff succeeds in making a prima facie showing, the burden shifts to the employer to "articulate" a legitimate, nondiscriminatory reason for its action.⁵⁶ The burden to articulate requires the defendant to do more than simply deny a discriminatory intent or motivation; it must articulate a reason, legally sufficient to justify a judgment, and introduce credible, admissible evidence supporting the existence of the

51. See, e.g., *Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981).

52. See, e.g., *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1196 (8th Cir.), cert. denied, 460 U.S. 1080 (1982); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972).

53. See *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242-43 n.13 (4th Cir. 1982); see also *Player*, supra note 44, at 644; cf. *Smith v. World Book-Childcraft Int'l, Inc.*, 502 F. Supp. 96, 99-102 (N.D. Ill. 1980); *Moore v. Sears, Roebuck & Co.*, 464 F. Supp. 357, 360-62 (N.D. Ga. 1979).

54. Compare *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), cert. denied, 105 S. Ct. 592 (1984); *Douglas*, 656 F.2d at 532-33 (in a RIF case, it makes no sense to require proof of replacement by a younger employee) with *Williams*, 656 F.2d at 129 (plaintiff must produce evidence, circumstantial or direct, showing his employer intended to discriminate on the basis of plaintiff's age, in order to establish a prima facie case).

55. See *Lovelace*, 681 F.2d at 239; *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1322 (11th Cir. 1982).

56. See, e.g., *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), cert. denied, 464 U.S. 937 (1983); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

reason.⁵⁷ If the employer fails to meet this burden of production, the plaintiff is entitled to judgment as a matter of law.⁵⁸

The employer is not obliged to prove that the articulated reason actually motivated its employment action; the burden of persuasion never shifts to the employer.⁵⁹ Some courts hold, however, that when an employer asserts certain of the ADEA's affirmative defenses, it bears a greater burden of persuasion.⁶⁰

If the proffered reason is found to exist, the factfinder can infer it motivated the employer in making the employment decision.⁶¹ The burden of production then shifts back to the plaintiff, and he is left to carry his burden of persuasion.

57. See *Horn v. Bibb County Comm'n*, 713 F.2d 689, 691 (11th Cir. 1983); *Massarsky*, 706 F.2d at 118; *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982); *Allison*, 680 F.2d at 1322; see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 796, 807 (1973).

58. See, e.g., *Horn v. Bibb County Comm'n*, 713 F.2d 689, 691 (11th Cir. 1983); *Cuddy v. Carmen*, 694 F.2d 853, 857 n.21 (D.C. Cir. 1982); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1322 (11th Cir. 1982); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

59. See, e.g., *Blackwell v. Sun Elec. Co.*, 696 F.2d 1176, 1180 (6th Cir. 1983); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 412 (9th Cir. 1981); *Smith v. University of N.C.*, 632 F.2d 316, 332-33 (4th Cir. 1980); *Carter v. Maloney Trucking & Storage Co.*, 631 F.2d 40, 42 (5th Cir. 1980) (only the burden of going forward shifts to defendant after plaintiff makes out a prima facie case, not burden of proof); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011 (1st Cir. 1979) (burden of persuasion rests at all times with the plaintiff; the employer has the burden of production to articulate legitimate, nondiscriminatory reasons for its employment action, not the burden to persuade the trier of fact that it was in fact motivated by such reason or that such reason was not discriminatory); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590 (5th Cir. 1978) (risk of nonpersuasion always remains on plaintiff); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981); *Board of Trustees v. Sweeney*, 439 U.S. 24, 25, 29 (1978).

60. See *EEOC v. Baltimore & O.R.R.*, 632 F.2d 1107, 1110 (4th Cir. 1980), cert. denied, 454 U.S. 825 (1981) (burden on employer to provide successful § 623(f)(2) defense); *Marshall*, 576 F.2d at 591 (an employer has the burden of persuasion if it asserts the applicability of the BFOQ affirmative defense; in contrast, the "good cause" and "RFOTA" defenses are not treated as burden-shifting exceptions); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976).

61. See *Loeb*, 600 F.2d at 1015 (the inference of discrimination created by the prima facie case is dispelled after the employer articulates a legitimate, nondiscriminatory reason for its action); see also *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 578 (1978).

C. Plaintiff's Demonstration of Pretext

The plaintiff must respond to the employer's articulation of a legitimate, nondiscriminatory reason by presenting evidence showing the employer's stated reason was a pretext for unlawful discrimination, or not the determinative reason for the employer's action.⁶² In doing so, the plaintiff generally introduces additional evidence of illegal motivation that goes beyond establishing the bare objective facts needed to make the prima facie showing.⁶³

Pretext may be demonstrated either by indirect or direct evidence. The plaintiff may introduce evidence that the employer had expressed a specific prejudice against members of the plaintiff's class,⁶⁴ that similarly situated employees or job applicants, not members of plaintiff's group, were treated differently,⁶⁵ that established rules or procedures were not uniformly applied,⁶⁶ or that plaintiff's relevant abilities or potential were superior to the person selected or retained.⁶⁷ Plaintiff may also produce statistical evidence as indirect support for the inference of improper motivation.⁶⁸

62. See *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3d Cir.), cert. denied, 105 S. Ct. 592 (1984) (plaintiff must directly persuade the court that a discriminatory reason more likely motivated the employer, or indirectly show the employer's articulated explanation is not credible); *Horn v. Bibb County Comm'n*, 713 F.2d 689, 691 (11th Cir. 1983); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir. 1983); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

63. See *Reeves v. General Foods Corp.*, 682 F.2d 515, 521-23 (5th Cir. 1982); *Lovell v. Sherwin-Williams Co.*, 681 F.2d 230, 239-40 (4th Cir. 1982). Compare *Hallsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 291-92 (8th Cir. 1982) (establishment of a prima facie case of age discrimination does not automatically entitle a plaintiff to a jury determination on his discrimination claim) with *Douglas v. Anderson*, 656 F.2d 528, 535 n.7 (9th Cir. 1981) (under proper circumstances, if the employer's rebuttal evidence is discredited, plaintiff's evidence establishing a prima facie case alone may support a jury verdict).

64. See *Williams v. General Motors Corp.*, 656 F.2d 120, 130 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982) (direct evidence of discriminatory motive, e.g., a document with a discriminatory notation, would suffice); see also *Hatton v. Ford Motor Co.*, 508 F. Supp. 620, 624 (E.D. Mich. 1981).

65. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979); see also *Burdine*, 450 U.S. at 259; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

66. See, e.g., *Anderson v. Savage Laboratories*, 675 F.2d 1221, 1224 (11th Cir. 1982).

67. See *Michaelis v. Polk Bros.*, 545 F. Supp. 109, 112 (N.D. Ill. 1982).

68. See, e.g., *EEOC v. Sandia Corp.*, 639 F.2d 600, 621-24 (10th Cir. 1980).

The crucial factual issue of the employer's motivation is then joined. The factfinder must examine all the evidence and determine whether the employment decision was discriminatorily motivated.⁶⁹

Ultimately, a plaintiff must establish by a preponderance of the evidence that his age was a determining factor in the adverse employment decision, in the sense that "but for" his age the adverse action would not have occurred.⁷⁰ Age need not, however, be the sole determining factor.⁷¹

IV. REDUCTIONS IN FORCE: PROVING A PRIMA FACIE CASE OF DISPARATE TREATMENT

A. *The Problem*

A survey of the reported decisions suggests two very basic observations about reduction in force cases. First, like other age discrimination cases, they are usually premised on a disparate treatment theory, as opposed to disparate impact.⁷² Even the cases that chronicle heavy reliance on statistical evidence are generally disparate treatment claims, in which statistics are calculated more to support an inference about the employer's motivation than to prove the invidious effect of a facially neutral policy.⁷³

69. *Duffy*, 738 F.2d at 1395; *Douglas*, 656 F.2d at 531 (proof of discriminatory intent is essential to plaintiff's action).

70. *Duffy*, 738 F.2d at 1395; *Pena v. Brattleboro Retreat*, 702 F.2d 322, 323 (2d Cir. 1983); *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1181 (6th Cir. 1983); *Cuddy v. Carmen*, 694 F.2d 853, 857-58 (D.C. Cir. 1982); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1222 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Loeb*, 600 F.2d at 1019.

71. *See, e.g.*, *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 105 S. Ct. 592 (1984); *Cuddy v. Carmen*, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982); *Smith v. University of N.C.*, 632 F.2d 316, 333 (4th Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979).

72. *See SCHLEI & GROSSMAN, supra* note 14, at 497; Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 837-38 (1982). *But see* *Massarsky v. General Motors Corp.*, 706 F.2d 111, 120 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983) (assuming but not deciding that disparate impact theory is proper, even standing alone, in ADEA cases); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318 (11th Cir. 1982); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

73. Statistics can be difficult to apply in age discrimination cases, because unlike race or sex, age discrimination presents a question of degree, so to speak. *Cf.* Statement by the President, *supra* note 3, at 1154 ("The report of the Secretary of Labor showed that . . . half of all jobs were closed to workers over 55, and one-fourth of all jobs were

Second, although the courts have imported the *McDonnell Douglas* model from Title VII disparate treatment actions to ADEA disparate treatment claims, there is unmistakable confusion over the traditional fourth step of the *McDonnell Douglas* prima facie case.⁷⁴ Plainly, the common formulations of this element are not applicable to reduction in force cases, where the employer's very purpose is to not replace the involuntarily departing plaintiff.⁷⁵ All courts of appeal agree that some proof beyond the first three steps of the *McDonnell Douglas* formula⁷⁶ is necessary to establish the prima facie case and, although this is often overlooked, there is almost uniform agreement on those first three steps in RIF cases.⁷⁷

closed to workers over 45."'). It is entirely possible that statistics would reveal a much different impact of a facially neutral policy on 42-year olds, for instance, than on 57-year olds — although both are equally protected under ADEA. For examples of cases in which statistical evidence was heavily relied upon, see *Geller*, 635 F.2d 1027; *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980).

74. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

75. The Supreme Court acknowledged immediately in *McDonnell Douglas* that the prima facie case set out there would not apply "in every respect to differing factual situations." *Id.* See also *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613, 622 (1985) (assumes, but does not decide, that *McDonnell Douglas* generally applies to ADEA actions).

76. As the *McDonnell Douglas* Court set it out, the prima facie case is comprised of a showing:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the 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 from persons of complainant's qualifications.

411 U.S. at 802. Steps (i) and (ii) are merely requirements for standing under Title VII, or ADEA if age is the issue. Step (ii) requires the plaintiff to show only that he was minimally qualified for the job.

77. Until recently, the Sixth Circuit was loathe to acknowledge that *McDonnell Douglas* might be used at all in ADEA cases. Compare *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975) (inappropriate to apply automatically) with *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982) (applies without discussion); *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179-80 (6th Cir. 1983) (*McDonnell Douglas* elements not exclusive criteria). Agreement on application of the first three steps of the *McDonnell Douglas* prima facie case does not mean that courts view *McDonnell Douglas* as the only vehicle for presenting a prima facie case. See *Blackwell*, 696 F.2d at 1179 (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1018 (1st Cir. 1979)); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1093 (5th Cir. 1981); *Stanojev v. Ebasco Serv., Inc.*, 643 F.2d 914, 920-22 (2d Cir. 1981).

There is disagreement, however, over exactly what the additional step should require.⁷⁸

B. *The Williams Case*

The Fifth Circuit set the terms of the debate over the fourth step in the leading case of *Williams v. General Motors Corporation*.⁷⁹ In *Williams*, nineteen salaried supervisory employees alleged they had either lost their jobs or been demoted to hourly wage positions because of age discrimination in a series of "personnel adjustments" at two General Motors plants in Georgia.⁸⁰ Plaintiffs pointed to two allegedly discriminatory policies: a secret rating system for salaried employees under which older employees consistently received lower potential ratings, and the insulation of recent college or General Motors Institute graduates from layoff.

At the close of plaintiffs' case, General Motors moved for a directed verdict as to fifteen of the plaintiffs on grounds that each had failed to demonstrate that he was replaced by a person outside the age group protected under ADEA.⁸¹ The district court took the motion under advisement, but later denied it in the renewed form of a motion for judgment N.O.V.⁸²

General Motors argued on cross-appeal that the district court erred in failing to require each plaintiff to show that he was replaced by a worker outside the protected age group. Further, General Motors argued that the court erred in refusing to demand proof that each plaintiff either was considered for a job later filled by a younger person, or was "consciously refused" consideration for jobs within the scope of his qualification.⁸³ Because of these failings, General Motors contended, the plaintiffs did not establish a prima facie case of age discrimination. The *Williams* court called this a "penetrating

78. Primarily, the dispute is whether a plaintiff must prove that someone outside the protected class was favored, or that any younger worker, protected or not, was favored, or possibly that age was simply a determinative consideration against the plaintiff, even if a replacement worker was older. See 9A EMPLOYMENT COORDINATOR (RIA) ¶EP-38655, at 98,624 (1985); Player, *supra* note 44, at 643-44 and cases cited therein.

79. 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

80. *Id.* at 122.

81. *Id.* at 123.

82. *Id.* at 124.

83. *Id.* at 126.

attack" and "incisive."⁸⁴ Significantly, the district court appears to have discredited the evidence that recent graduates were effectively shielded from layoff.⁸⁵

After tipping its hand in this fashion, the *Williams* court held that the district court should have required the plaintiffs to complete their prima facie case by "producing evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue."⁸⁶ Accordingly, the court reversed the trial court's judgment in favor of the plaintiffs.⁸⁷

Surely the Fifth Circuit could have improved its analysis of the prima facie case and its statement of the plaintiff's burden of production in future reduction in force cases. In particular, *Williams* clung unfortunately to language in the earlier Fifth Circuit cases of *Price v. Maryland Casualty Co.*⁸⁸ and *Harpring v. Continental Oil Co.*,⁸⁹ strongly suggesting that "circumstantial or direct" evidence of the employer's intent requires reference to persons altogether outside the protected age group. Later Fifth Circuit opinions have also failed to truly consider this issue, and have continued to assume that the plaintiff must show that other employees altogether outside the protected class were treated more favorably.⁹⁰

84. *Id.*

85. *Id.* at 130 n.15.

86. *Id.* at 129. The *Williams* court explained further:

Our third requirement simply insists that a plaintiff produce some evidence that an employer has not treated age neutrally, but has instead discriminated based upon it. Specifically, the evidence must lead the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.

Id. at 129-30.

87. *Id.* at 131.

88. 561 F.2d 609 (5th Cir. 1977).

89. 628 F.2d 406 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981).

90. *Thornbrough v. Columbus & G.R.R.*, 760 F.2d 633, 637-38, 644 (5th Cir. 1985); *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 562 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2658 (1984); *Pace v. Southern Ry. Sys.*, 530 F. Supp. 381, 385 (N.D. Ga. 1981) (looking to Fifth Circuit law in a demotion case). Professor Player objects vehemently, and rightly so in our opinion, to this interpretation by the Fifth and Eleventh Circuits. See Player, *supra* note 44, at 636-41. To this list we would then add the Third Circuit. *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). What is worse, these courts treat the terms "younger" and "outside the protected class" interchangeably. See *Thornbrough*, 760 F.2d at 633.

This assumption is wrong. A showing that younger workers, even if they are also within the protected group, were treated more favorably than the plaintiff should be sufficient to satisfy the fourth step, under *Williams* or any formulation. Thus, evidence that an employer favored a forty-five year old over a fifty-five year old, largely on the basis of age, should satisfy the fourth step.⁹¹ Of course, the inferential strength of the evidence gets weaker as the favored employee's age draws closer to the disfavored employee's, but this line-drawing problem on the reasonableness of an inference is not cause to demand that the referent employee must always be under forty.⁹²

Williams also left doubt, at least in the minds of some, whether this reformulation of the prima facie case in RIF actions hewed to the role *McDonnell Douglas* established for the prima facie case. This ambiguity has resulted in misplaced criticism.⁹³ In the only academic evaluation of *Williams* to date, Professor Player has taken strong exception to the *Williams* restatement of the *McDonnell Douglas* test in RIF cases, on the grounds that the Fifth Circuit now requires "direct evidence of age motivation"⁹⁴ as part of a plaintiff's prima facie case. According to Player, by adding this requirement, the Fifth Circuit has raised the ante so high for plaintiffs that it has made the prima facie case almost unattainable, and hence has "virtually abandoned"⁹⁵ *McDonnell Douglas*. He writes:

In the reduction-in-force situations the Fifth and Eleventh Circuits have thus turned away from the concept that age motivation can be inferred from the fact that younger persons are retained in their jobs while older plaintiffs, who perform similar work, are laid off. These Circuits did not make clear, however, why an inference of age motivation is weaker

91. The EEOC agrees. 29 C.F.R. § 1625.2(a) (1985). Professor Player is also in accord. Player, *supra* note 44, at 640-41.

92. If "outside the protected age group" is the required element of proof, a 41-year old replaced by a 39-year old has a prima facie case, while a 68-year old replaced by a 41-year old does not. Although this makes line-drawing easier, it also makes the line drawn very troubling in some instances, if we are truly concerned with eradicating discriminatory misconceptions about older workers.

93. See, e.g., *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1221-24 (7th Cir. 1985) (Flaum, J., concurring); *Oxman v. WLS-TV*, 609 F. Supp. 1384, 1390 (N.D. Ill. 1985); Player, *supra* note 44, at 636-41.

94. Player, *supra* note 44, at 637 n.75.

95. *Id.* at 637.

when the older worker is laid off than when the same worker is discharged or denied employment that is subsequently offered to a younger applicant. The practical result is that in many, if not most, layoff situations the plaintiff simply will be unable to establish a prima facie case because evidence of actual age animus is rarely available, and unless there is a significant number of persons laid off any statistical data may be inherently unreliable.⁹⁶

This view of *Williams* has found some recent approval in judicial quarters,⁹⁷ but proponents of the Fifth Circuit's approach seem to outnumber detractors. Most courts of appeal purport to follow the *Williams* formulation in RIF cases, although some state it differently.⁹⁸ Ironically, those who have criticized *Williams* have almost uniformly cited the Third Circuit's opinion in *Massarsky v. General Motors Corp.*⁹⁹ as establishing a fairer formulation of the prima facie case, from a plaintiff's vantage point.¹⁰⁰ *Massarsky*, though, clearly demands proof that "others *not in the protected class* were treated more favorably,"¹⁰¹ and goes on to cite *Williams* approvingly.¹⁰²

96. *Id.* at 638-39.

97. See cases cited *supra* note 93. Indicative of the confusion *Williams* caused is the almost simultaneous acceptance and renunciation of that opinion by district courts within the Seventh Circuit. Compare *Oxman*, 609 F. Supp. at 1390, with *Roe v. International Harvester Co.*, 604 F. Supp. 57, 65 (N.D. Ind. 1984). That split carried over to the Court of Appeals for the Seventh Circuit in *Matthews*.

98. See, e.g., *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1166 (8th Cir. 1985); *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090-91 (6th Cir. 1984); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 n.3 (3d Cir. 1984); *EEOC v. Western Elec. Co., Inc.*, 713 F.2d 1011, 1015 (4th Cir. 1983); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1018 (1st Cir. 1979) (endorsing reasoning very similar to that in *Williams*). The District of Columbia Circuit used a similar standard in *Coburn v. Pan Am. World Airways*, 711 F.2d 339, 343 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

99. 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

100. *Matthews*, 769 F.2d at 1224; *Oxman*, 609 F. Supp. at 1390. *Massarsky* was decided after Professor Player wrote his article, *Player, supra* note 44. Arguably he would have objected to that case as requiring reference to persons outside the protected age group, which seems to be more than the Third Circuit formerly required. See *Smithers v. Bailar*, 629 F.2d 892, 895 (3d Cir. 1980).

101. *Massarsky*, 706 F.2d at 118 (emphasis added).

102. *Id.* at 118 n.13.

In fact, *Williams* has probably been wrongly maligned. Before defending what we think¹⁰³ the Fifth Circuit meant in *Williams*, it is helpful to step back and consider what value, if any, the tripartite, burden-shifting approach of *McDonnell Douglas* has in discrimination cases, and what a standard for the prima facie case should demand of a plaintiff.

C. *Evaluating the Prima Facie Case After a RIF*

In the context of a trial, *McDonnell Douglas* looks, and is, artificial and unrealistic. The plaintiff will offer what evidence he has, most of which in the end must go to the question of pretext, and then he will rest. The defendant will move for a directed verdict. The judge will, in the ordinary case, take the motion under advisement and the defendant will then attempt to persuade the factfinder that age had nothing to do with the employment decision. Although the plaintiff may indeed offer rebuttal evidence, the liability phase of an age discrimination trial does not magically take on a new evidentiary format because of *McDonnell Douglas*.

In the context of pretrial maneuvering and discovery, however, the scheme *McDonnell Douglas* envisions is quite useful. Specifically, it provides the structure for a summary judgment motion by isolating a relatively discrete group of issues — the prima facie case — upon which the plaintiff must have garnered some favorable evidence through discovery, at peril of summary judgment in the employer's favor. The *McDonnell Douglas* prima facie case also serves as a handy yardstick by which employers and plaintiffs alike can assess the wisdom of settling out of court. A defendant employer who gauges a plaintiff able to establish a prima facie case, suggest pretext, and thus reach a jury, may well decide that discretion dictates serious settlement negotiations.

If the *McDonnell Douglas* concept of a prima facie case is valuable as a framework for evaluating a settlement proposal or summary judgment motion, the next question is what these

103. The ambiguity of the discussion in *Williams* is reason enough for mild criticism, but the Fifth Circuit has recently done much to elucidate the fourth step announced in *Williams*. See *Thornbrough*, 760 F.2d at 642-44. We remain critical of the Fifth Circuit's insistence that a plaintiff prove that workers outside the protected class were favored. See discussion *supra* notes 86-102.

special settings demand of the actual elements of the prima facie case. The ideal formulation of a prima facie disparate treatment case would approach two related objectives that are deceptively immodest. A perfect prima facie standard would first permit every meritorious case to go forward to trial, and second, would winnow out every case in which the plaintiff has not been adversely treated by an employer for reasons proscribed by the ADEA.

Such a perfect prima facie standard is of course unattainable in the real world. At best, the legal system can merely hope to approximate both objectives. At the summary judgment stage, our system's normative decision to err on the side of the nonmoving party works in favor of age discrimination plaintiffs, and this is surely in keeping with the liberal purpose of the ADEA. In this vein, it is important to note that plaintiffs bear a lesser burden of production at the summary judgment stage than at trial. To reach a jury, the plaintiff must prove his prima facie case by a preponderance of the evidence and offer evidence to contest a legitimate, nondiscriminatory reason. To survive summary judgment, the plaintiff need only demonstrate a genuine dispute of material fact with respect to each step of the prima facie case.¹⁰⁴

The two aspects of the *McDonnell Douglas* test that establish standing under the ADEA are a sensible starting point for the prima facie case. A plaintiff must show first that he is in the protected class and, second, that he was adversely affected by some action of the employer,¹⁰⁵ or he clearly cannot claim refuge in the ADEA, regardless of his employer's inner motives.

The third step of the *McDonnell Douglas* prima facie case, proof of qualification for the job, warrants brief reexamination in the RIF context. In a RIF case, the employer has by definition eliminated jobs, and then has necessarily made adjustments affecting the workers who held those positions. ADEA

104. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Thornbrough v. Columbus & G.R.R.*, 760 F.2d 633, 641 n.8 (3d Cir. 1985).

105. The term "employer" is used throughout the case law and ADEA, but 29 U.S.C. § 623(c) (1982), an ideological descendant of the Taft-Hartley Act, makes clear that the strictures of ADEA apply as well as to labor organizations.

requires only that the employer not discriminate against protected employees in making those adjustments.

Thus it is logically of no moment that the complaining employee was qualified for the job he used to have. What matters is that he was qualified for a function that remained available in the organization.¹⁰⁶ This is the proper understanding of the qualification plank of a plaintiff's prima facie case in an ADEA reduction in force case and, contrary to Professor Player's argument, is the reason that the inference of age discrimination is weaker when a protected worker loses his job in a RIF, without more, than when a younger worker is selected after an older worker is fired.

If we assume that employers do not permanently eliminate integral job functions within their businesses simply for the sake of ridding themselves of old employees, then summary judgment is appropriate in RIF cases where the plaintiff cannot demonstrate that he was qualified for duties remaining in the organization. Where the function has been eliminated, requiring an employer to articulate a legitimate, nondiscriminatory reason for terminating an employee who performed that function, but could perform no other, would be to tacitly shift the burden of demonstrating the employee's (lack of) qualification to the employer. The protected worker who is qualified for but one function in his employer's organization has no age discrimination claim when the job itself — the duty, as opposed to just the person performing it — is eliminated.¹⁰⁷

Conversely, a showing that the plaintiff was qualified for a job remaining in the workplace, which ordinarily will be easily made, cannot fairly complete the prima facie case. If the prima facie case were limited to three steps in RIF actions, a forty-five year old foreman who was laid off and could demonstrate competence to perform the work he supervised would have established that it was presumptively illegal to terminate

106. Cf. *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1224 n.1 (7th Cir. 1985) (Flaum, J., concurring) (requirement that some job must actually have been available at the time of the plaintiff's discharge).

107. Cf. *Mizrany v. Texas Rehabilitation Comm'n*, 522 F. Supp. 611, 615-16 (S.D. Tex. 1981) (a pre-*Williams* RIF case that required no fourth step showing, but found only that the plaintiff was qualified for the job she held, which was eliminated for legitimate reasons).

him.¹⁰⁸ Such a showing would not suffice to meet the prima facie standard in a discharge case,¹⁰⁹ and should no more suffice in a RIF case, where the employer's motives for termination probably have, if anything, less to do with the particular employee affected. The practical effect of truncating the prima facie case after the third step would be to make it nearly impossible for an employer to obtain summary judgment in a RIF case, assuming that a plaintiff will ordinarily be able to prove that he could have performed some other function. Again, courts appear to agree that something more is required to establish a prima facie case arising from a reduction in force.¹¹⁰

D. *Williams Reaffirmed*

Returning then to *Williams*, the fourth step we understand that court to propose is appropriately adaptable and contextual. The RIF plaintiff is instructed to present "some evidence" — direct, statistical or otherwise circumstantial¹¹¹ — from which a factfinder might reasonably conclude the employer discriminated on the basis of age in reducing its workforce.¹¹²

Far from imposing a more onerous burden of proof on the plaintiff than *McDonnell Douglas*, the fourth step in *Williams* can and should be interpreted to allow a broad range of evidence, as the context of the particular reduction in force may suggest. This adaptable final step comes with a reminder of the very purpose of the prima facie case under *McDonnell Douglas*, which is to raise a reasonable inference of discrimination.¹¹³ The contextual fourth step of *Williams* should not

108. See *Burdine*, 450 U.S. at 252-54, 254 n.7.

109. See, e.g., *Player*, *supra* note 44, at 635-36.

110. See, e.g., *EEOC v. Western Elec. Co.*, 713 F.2d 1011, 1015 (4th Cir. 1983); *LaGrant v. Gulf W. Mfg. Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984); *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1221 (7th Cir. 1985) (Flaum, J., concurring).

111. It is patently incorrect to say, as Professor Player does, *supra* note 44, at 638 n.75, that the *Williams* prima facie case requires direct evidence of age motivation. See *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

112. *Williams*, 656 F.2d at 129-30.

113. *Furnco Constr. Corp v. Waters*, 438 U.S. 567, 577 (1978); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The Fifth Circuit has recently explained that the fourth step of the *Williams* prima facie case is very flexible

be read to require evidence that would allow a conclusion of age discrimination standing alone. Rather, the fourth and last step should be seen as exactly that: some evidence that will reasonably clinch plaintiff's entitlement to hear the employer's evidence of a legitimate reason for its employment decision.

Having satisfied the first three steps of his *prima facie* case, the plaintiff is asked to probe the context of his adverse treatment for some additional evidence that will confirm the reasonableness of a mandatory presumption that the employer discriminated on the basis of age, unless that evidence is explained by the employer.¹¹⁴ Assuming he can also contest any proffered legitimate reason, this commends a trial for any plaintiff who has some evidence which, when considered along with his protected status, harm incurred and qualification for a remaining job, would reasonably warrant a presumption of discrimination. If such a reading of *Williams* reflects the Fifth Circuit's intent, then this contextual fourth step is no greater burden on the plaintiff than the traditional *prima facie* showing.

The best contextual evidence in RIF cases would often be placement or retention of a younger person in a remaining job for which the plaintiff was qualified, although this is not true where an employer has merely thinned the ranks of a large job category and older workers are proportionately represented among the RIF survivors. *Williams* should be read to acknowledge, in any case, that other evidence, as the circumstances may suggest, would serve as well for a fourth step showing. There is a trade-off in this flexibility, of course; in the absence of having the fourth step spelled out, judges must decide what type of evidence rises to the level of sealing a reasonable presumption. However, courts ought to be guided in this determination by the fourth step showing permitted in other situations, and by the fact that the Supreme Court has never meant to limit a *prima facie* case in any set of circum-

indeed in the evidence it will allow to raise this reasonable inference. *Thornbrough*, 760 F.2d at 642-44.

114. *Burdine*, 450 U.S. at 254 n.7.

stances to a rigid formula.¹¹⁵ Under this interpretation of *Williams*, a prima facie showing is most nearly accessible to all plaintiffs with meritorious claims, and at the same time is foreclosed to as many plaintiffs with nonmeritorious claims as possible in an imperfect legal system.

V. CONCLUSION

The federal courts have had varying degrees of success in applying the traditional ADEA disparate treatment analysis to reduction in force cases. Although not a model of clarity, the Fifth Circuit's approach in *Williams* to formulating a prima facie case of age discrimination in the RIF context lends both negative and positive guidance to other courts. The Fifth Circuit wrongly continued to insist that a plaintiff must show that persons outside the protected group were treated more favorably. A showing that a younger employee, even one within the protected age group, was treated more favorably should suffice.

However, the balance of the *Williams* formulation of the fourth element of a prima facie case of age discrimination in the RIF context has merit. The *Williams* court provided a flexible and contextual rendering of the fourth step. A plaintiff who presents some other evidence, gleaned from the circumstances of his discharge, will have raised an inference of age discrimination sufficient to justify imposing upon the employer the burden of articulating a legitimate, nondiscriminatory reason for selecting the plaintiff in reducing its work force. To require less of the plaintiff would allow more non-meritorious claims to proceed to trial than necessary, even in an imperfect legal system, and would needlessly burden employers seeking to adjust to changing economic times through admittedly painful reductions in force.

115. *Id.* at 253 n.6; *Furnco Constr. Corp.*, 438 U.S. at 577 (*McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973).