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The Recent Respectability of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis through the Supreme Court's Summary Judgment Prism

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THE RECENT "RESPECTABILITY" OF SUMMARY JUDGMENTS AND DIRECTED VERDICTS IN INTENTIONAL AGE DISCRIMINATION CASES: ADEA CASE ANALYSIS THROUGH THE SUPREME COURT'S SUMMARY JUDGMENT "PRISM"

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I. INTRODUCTION

The Age Discrimination in Employment Act of 1967,[2] ADEA, is a noble and important part of employment law in the United States today.[3] It is a major source of federal litigation and a growing factor in the marketplace, and it has been called the successor to the civil rights suit and the sexual harassment suit as the major preoccupation of corporate labor attorneys.[4]

The ADEA is patterned in many ways on Title VII of the Civil Rights Act of 1964 (Title VII) which is designed to eliminate most forms of employment discrimination based upon race, color, religion, sex, or national origin.[5] One important difference between the two statutes, however, is the availability of a jury in an age discrimination case.[6] Title VII cases are heard by a judge acting as both the trier of law and the trier of fact, a situation that has only recently changed due to the passage of the Civil Rights Act of 1991.[7] It has been said that fear of juror sympathy toward displaced older workers leads employers and their attorneys to believe that ADEA cases often are won or lost at the motion stage.[8] The purpose of this Article is to review recent Supreme Court

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[2] 29 U.S.C. §§ 621-34 (1988).

[3] Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd*, Shell Oil Co. v. Dartt, 434 U.S. 99 (1977). "The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Id.* at 1260.

[4] Richard Green, *Over The Hill To The Courthouse*, FORBES, February 24, 1986, at 72. *See also*, Visser v. Packer Engineering Assoc., Inc., 924 F.2d 655 (7th Cir. 1991) ("The Age Discrimination in Employment Act . . . is a major source of federal litigation and a growing factor in American labor markets.")

[5] 42 U.S.C. § 2000e(b) (1985). Both the ADEA and Title VII are administered by the Equal Employment Opportunity Commission (EEOC).

[6] 29 U.S.C. § 626(c)(2).

[7] Section 102(c), Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[8] *See* Visser v. Packer Engineering Assoc. Inc., 924 F.2d 655, 660-61 (7th Cir. 1991) ("Put simply, employers and their counsel may well conclude that ADEA cases are won or lost on summary judgment, because jurors find it difficult to close their hearts to the plight of the terminated older employee but easy to open the purse strings of his employer.") Presumably, similar sympathies may apply to other civil rights employment cases under the new Civil Rights Act of 1991.

"guidance" on standards for summary judgment and directed verdict and the effect these decisions are having upon ADEA cases.

II. BACKGROUND

A. Legislative History and Purpose of the ADEA

In 1965 the Secretary of Labor reported to Congress on a Labor Department report titled *The Older American Worker-Age Discrimination in Employment.*[9] According to the report, there existed in the United States "persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability."[10] According to the legislative history, this employer attitude persisted despite empirical facts that the psychological and physiological degeneration associated with aging varies with each individual, and the fact that many older workers outperform their younger counterparts.[11] In his "Older American's" message of January 23, 1967, President Johnson sought passage of the ADEA to protect older workers from this type of discrimination.[12]

The new law was passed by Congress, stating as its purpose: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; (and) to help employers and workers find ways of meeting problems arising from the impact of age on employment."[13] This law has made it unlawful to discriminate against persons 40 years of age or older with respect to "compensation, terms, conditions or privileges of employment because of such individual's age."[14]

The law, however, provides for some fairly liberal exemptions that are not always applicable in Title VII cases. Employers who employ fewer than 20 employees are not subject to the Act.[15] Title VII, on the other hand, only exempts those with fewer than 15 employees.[16] Similarly, the ADEA allows that age (or, more accurately, youth) may be a bona fide occupational qualification

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[9] *U.S. Code Cong. & Admin. News,* [hereinafter *Adminisrative News*] 2213, 2214 (1967).

[10] Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 409 (1985).

[11] *Id.*

[12] *See Administrative News, supra* note 9, at 2214.

[13] 29 U.S.C. § 621(b) (1985).

[14] *Id.* at § 623(a)(1).

[15] *Id.* at § 630(b).

[16] 42 U.S.C. § 2000e(b) (1985).

(BFOQ) for certain positions.[17] While Title VII generally recognizes BFOQs, they are not permitted with respect to matters of race or color.[18]

Although the substantive law developed in Title VII cases is applied to ADEA cases,[19] it has been recognized that "the application of that body of law is unmistakably influenced by the difference in the parties' litigation strategy created by the availability of a jury trial in ADEA cases, but not Title VII cases."[20] The rational desire of defendants and their lawyers to avoid the risk of juror sympathy has engendered a greater emphasis on summary judgment and directed verdict motions in ADEA cases than in Title VII cases.[21]

B. Recent Developments in the Supreme Court Concerning Requirements for Summary Judgment and Directed Verdict

The procedural requirements for summary judgment and directed verdict are set out in the Federal Rules of Civil Procedure.[22] Historically, these rules pursuant to which cases are dismissed before they advance to the jury apply only if there are no controverted issues of fact upon which reasonable people could differ.[23] In considering either of these motions, the judge should consider all of the evidence in the light most favorable to the party opposed to the motion.[24]

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[17] 20 U.S.C. § 623(f)(1) (1985).

[18] 42 U.S.C. § 2000e-2(e) (1985).

[19] Overgard v. Cambridge Book Co., 858 F.2d 371, 375 (7th Cir. 1988).

[20] Visser v. Packer Engineering Assoc., Inc., 924 F.2d 655, 660 (7th Cir. 1991).

[21] *Id.* at 661.

[22] FED. R. CIV. P. 56(c) on "Summary Judgment" provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

FED. R. CIV. P. 50(a) on "Directed Verdict" provides in pertinent part: "A motion for directed verdict shall state the specific grounds therefor." *Id.*

See Anderson v. Liberty Lobby, 477 U.S. 242 (1986)("The petitioners suggest, and we agree, that this standard [Rule 56c] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.").

[23] *See generally* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

[24] *Id.* at 329.

The year 1986 has been called the "year of the summary judgment."[25] In that year, the Supreme Court handed down three rulings (hereinafter referred to as the "summary judgment trilogy") which, it has been said, have placed courts in an era where summary judgments have become respectable.[26] The first decision, *Matsushita Elec. Indus. Co. v. Zenith Radio*,[27] addressed whether the Third Circuit had applied the proper standards in overturning the district court's grant of summary judgment.[28] The suit was an antitrust case that concerned American manufacturers' contentions that Japanese companies had illegally conspired to drive American manufacturers from the U.S. market.[29] The evidence in this case was mountainous.[30] On granting the defendants' motion for summary judgment, the trial judge ruled that any inference of conspiracy was unreasonable.[31] The Third Circuit reversed, concluding that there was both direct and circumstantial evidence "having some tendency to suggest that other kinds of concert of action may have occurred."[32] Holding that a reasonable factfinder could find in the plaintiffs' favor, the Third Circuit Court of Appeals overturned the summary judgment.[33]

On certiorari, the Supreme Court stated that "[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility'

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[25]MacDonald v. Eastern Wyoming Mental Health Ctr., 941 F.2d 1115, 1123 (10th Cir. 1991).

[26]*Id.* at 1122. "Summary judgments in these circumstances have not been in disfavor since the Supreme Court decided (these cases) in 1986." *Id.* at 1123.

[27]475 U.S. 574 (1986).

[28]*Id.* at 576.

[29]*Id.* at 578.

[30]The Court described the mountain of evidence as follows:

> The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long (citation omitted) Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

Id. at 576-77.

[31]The inference was deemed unreasonable:

> because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it.

Id. at 574.

[32]475 U.S. at 580.

[33]*Id.* at 581.

that the alleged conspirators acted independently."[34] The Japanese defendants had argued that the alleged conspiracy was "economically irrational and practically infeasible."[35] The Supreme Court agreed that the defendants had no rational motive to engage in the action alleged.[36] The Court stated that to survive a motion for summary judgment, the plaintiffs would have had to show a genuine issue of material fact as called for in Rule 56(e).[37] This would require in this case a showing of economic injury to plaintiffs and more than a showing of "metaphysical doubt as to the material facts."[38] Quoting from an earlier Supreme Court decision, the Court stated that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"[39] Here, where the Court was convinced that the claim made no economic sense, the plaintiff was required to come forward with "more persuasive evidence to support [his] claim than would otherwise be necessary."[40] The Court determined that existing antitrust law limited the range of permissible inferences from ambiguous evidence as in this case.[41] Thus, in reversing the Third Circuit, the Supreme Court remanded the case to that court to search the record for other sufficiently unambiguous evidence that might "permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so."[42] Absent such unambiguous evidence, the district court's grant of summary judgment was proper.

The dissent by Justice White, which Justices Brennan, Blackmun, and Stevens joined, took the majority to task for making "confusing and inconsistent statements about the appropriate standard for granting summary judgment," and for making "a number of assumptions that invade the factfinder's province."[43] The dissenters stated that in requiring the lower courts to consider the plausibility of the defendants' actions, the majority was suggesting that a trial judge "in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff."[44] They also denied that the cases cited by the majority

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[34] *Id.*

[35] *Id.* at 588.

[36] *Id.* at 595.

[37] FED. R. CIV. PROC. 56(e).

[38] 475 U.S. at 586.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 588.

[42] *Id.* at 597.

[43] 475 U.S. at 599.

[44] *Id.* at 600.

stood for the propositions claimed. Finally, they stated that "[i]f the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law, [but if] the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language."[45]

The second and least controversial case of the trilogy was *Celotex Corp. v. Catrett*.[46] In *Celotex*, a products liability case, the Supreme Court decided that if a plaintiff fails to make a showing on a summary judgment motion "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,"[47] then summary judgment is proper since there is no genuine issue as to any material fact.[48] Justices Brennan, Burger, and Blackmun dissented, but not on the majority's interpretation of the law; instead, they were concerned that the majority had not properly applied the law to the facts of this particular case.

Finally, in *Anderson v. Liberty Lobby, Inc.*,[49] the Court addressed the issue of whether a trial court must consider a heightened evidentiary standard in a libel suit brought by a public figure under the "absence of malice" rationale of *New York Times Co. v. Sullivan*.[50] The district court granted summary judgment, acknowledging the higher standard of "convincing clarity" in a case controlled by *Sullivan*. The District of Columbia Circuit held that, for summary judgment purposes, the plaintiffs need not show that a jury could find "actual malice" with convincing clarity, because

> to impose the greater evidentiary burden at summary judgment would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well.[51]

The Supreme Court launched into an explanation of the materiality and genuineness requirements of Rule 56 and concluded that in this case the more important issue was whether the dispute was genuine: "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[52] The majority reviewed past precedent and declared that "there is no issue for

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[45] *Id.* at 601.

[46] 477 U.S. 317 (1986).

[47] *Id.* at 322.

[48] *Id.* The Court went on to say that the failure to prove an essential element "necessarily render[s] all other facts immaterial." *Id.*

[49] 477 U.S. 242 (1986).

[50] 376 U.S. 254 (1964).

[51] 477 U.S. at 247.

[52] *Id.* at 248.

trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."[53] Summary judgment would be proper, it said, if the evidence were merely colorable or was not significantly probative.[54] In holding that the "convincing clarity" standard is relevant at the summary judgment stage, the Court stated:

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual *quantum* and *quality* of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient *caliber* or *quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence.[55]

The Court went on to say that its holding was not denigrating the role of the jury, nor was it authorizing trial by affidavits, nor were the traditional presumptions favoring the non-movant overturned.[56] Finally, the Court admonished judges to act with caution in granting summary judgments.[57]

In a scathing dissent, Justice Brennan chided the majority for once more changing the rules on summary judgment while pretending to be explaining established precedent. According to his dissent, the Court's result was akin to the child's game of "telephone," where "a message is repeated from one person to another and then another; after some time the message bears little resemblance to what was originally spoken," for in this case, "[t]he Court purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted."[58] He accused the Court of muddying the water without offering any guidance on how to clarify it. How, for instance, was a judge to "consider" heightened evidentiary standards? How shall a judge "assess how one-sided evidence is, or what a 'fair-minded' jury could 'reasonably' decide?"[59] The Court's conflicting clues, he stated, "can lead only to increased confusion in the district and appellate courts."[60]

Justice Brennan's sharpest barbs were directed to what he considered the "invitation--if not an instruction--to trial court to assess and weigh evidence much as a juror would."[61] Nor was he convinced by the Court's instruction that

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[53] *Id.* at 249.

[54] *Id.* at 249-50.

[55] *Id.* at 254 (emphasis added).

[56] 477 U.S. at 255.

[57] *Id.*

[58] *Id.* at 265.

[59] *Id.*

[60] *Id.*

[61] 477 U.S. at 265.

judges should not weigh the evidence.[62] He feared that this ruling was written in terms broad enough to be generally applicable in all types of cases,[63] and that it would turn summary judgment hearings into "'full blown' paper trials on the merits."[64] Justice Brennan also reiterated Justice White's concern in *Matsushita* that the Court "should refrain from using unnecessarily broad and confusing language."[65]

Justice Rehnquist and Chief Justice Burger also dissented, predicting more erratic and inconsistent grants of summary judgment in the future, "largely because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as

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[62] *Id.* Justice Brennan further dissented:

> I simply cannot square the direction that the judge 'is not himself to weigh the evidence' with the direction that the judge also bear in mind the 'quantum' of proof required and consider whether the evidence is of sufficient 'caliber or quantity' to meet that 'quantum.' I would have thought that a determination of the 'caliber and quantity,' *i.e.*, the importance and value, of the evidence in light of the 'quantum,' *i.e.*, amount required could *only* be performed by weighing the evidence.

Id. (emphasis in the original).

[63] *Id.* at 257, n.1.

> Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the 'quantum and quality' of proof necessary to support liability under *New York Times* . . . and then ask whether the evidence presented is of 'sufficient caliber or quantity' to support that quantum and quality, the court must ask the same questions in a garden variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision by its terms applies to all summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

Id. (Brennan, J. dissenting). *But see* Sischo-Nownejad v. Merced Community College District, 934 F.2d 1104, 1110, n.10 (9th Cir. 1991) ("*Anderson* required that when a substantive claim may only be proved by 'clear and convincing evidence,' a district court considering a motion for summary judgment must take that heightened evidentiary standard into account.") The Ninth Circuit was interested in explaining that its precedential summary judgment case Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985) was unaffected by *Celotex*, *Anderson*, and *Matsushita*. That court, apparently, did not feel that those cases had materially altered the status quo with respect to summary judgment jurisprudence.

[64] Anderson v. Liberty Lobby, 477 U.S. 242, 267 (1986).

> It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the 'quantum' of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence that he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Id. (Brennan, J. dissenting).

[65] *Id.* at 261, n.2.

to how its new standard will be applied to particular cases."[66] They indicated that, regardless of what evidentiary standard applied to a particular case, credibility determinations were the province of jurors and that, although the quantity of evidence (such as the number of witnesses) arrayed against the defendant probably goes to the strength of the case, "[as] long as credibility is exclusively for the jury, it seems the Court's analysis would still require [the] case to be decided by that body."[67]

As has been shown, the summary judgment trilogy has generated serious questions from several of the Justices on the High Court. These cases have also generated particular interest in the appellate and district courts. The latest bound volume of Shepard's Citator[68] lists seven complete pages of references to *Anderson* alone.

It could easily be argued that the trilogy encourages the use of summary judgment and directed verdict by signaling that such cases would be reviewed less stringently by the Supreme Court in future appeals. On the other hand, there is considerable language in these three cases from which a jurist could conclude that very little has changed in summary judgment jurisprudence.[69]

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[66] *Id.* at 273.

[67] *Id.* at 270.

[68] SHEPARD'S UNITED STATES CITATIONS, 6TH ED., CASE EDITION SUPPLEMENT 1988-1990, Part 5 (McGraw-Hill 1990).

[69] *See* Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1110 n.10 (9th Cir. 1991) where the court noted:

> Although it may be self-evident, we note here that nothing in *Celotex* affects our decision in *Lowe*. *Celotex* involved the question whether a party moving for summary judgment satisfies its burden of production by simply pointing to the absence of any record evidence demonstrating the existence of a genuine issue of material fact. *Lowe*, in contrast, involved the situation where the nonmoving party *has* produced record evidence-albeit 'very little'-giving rise to an inference of intentional discrimination. *Lowe* is also unaffected by the Supreme Court's decisions in *Anderson v. Liberty Lobby* and *Matsushita*. *Anderson* required that when a substantive claim may only be proved by 'clear and convincing evidence,' a district court considering a motion for summary judgment must take that heightened evidentiary standard into account. The ultimate burden of persuasion in *Lowe*, however, was that of proving intentional discrimination by a preponderance of the evidence. *Matsushita* is also not on point. There, the Supreme Court held that when the factual context rendered a claimed antitrust violation implausible because the claim made no economic sense, the plaintiffs must produce more evidence than would normally be necessary in order to defeat summary judgment. No such factual considerations existed in *Lowe*, nor do they exist in the case before us today.

Id. (citations omitted).

It can be argued that the Ninth Circuit has given an extremely literal interpretation to the trilogy. It should also be noted that *Lowe* was a sex discrimination case where the trial was to a judge alone, and not to a jury as in an age discrimination case. It can be questioned whether the summary judgment standards are identical in these two circumstances.

Therefore, appellate courts could view the more expansive language in these cases as an invitation, but not a mandate, to be more flexible when reviewing summary judgments from overworked trial court judges.[70] It could reasonably be said that the trilogy merely improved the climate for summary judgments or, in the words of Judge Seth of the Tenth Circuit, created an era where they "have become respectable."[71]

C. Procedural Complexities in ADEA Cases

Complicating matters in ADEA cases is the notion that in considering motions for summary judgment or directed verdict, the judge "must consider both the substantive law of employment discrimination and burdens of proof under this law."[72] To permit a plaintiff in a Title VII or ADEA intentional discrimination case[73] to make a case without direct or "smoking gun" evidence,

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[70] *See* Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990). The court stated:

> The growing difficulty that district judges face in scheduling civil trials, a difficulty that is due to docket pressures in general and to the pressure of the criminal docket in particular, makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter because the plaintiff's case (or the defense, in the rare case where it is the plaintiff's motion for summary judgment that was granted) is marginal.

Id. at 403.

See also Palucki v. Sears Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989) in which Judge Posner expressed similar views:

> The workload crisis of the federal courts, and realizing that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment. A district judge . . . must decide . . . whether the state of the evidence is such that, if the case were tried tomorrow, the plaintiff would have a fair chance of obtaining a verdict.

Id. at 1572-73. Despite the reference to possible abuse of Title VII, the *Palucki* case involved the ADEA.

[71] *See infra* note 132.

[72] Visser v. Packer Engineering Assoc., Inc., 924 F.2d 655, 661 (7th Cir. 1991), (citing Weihaupt v. American Medical Ass'n, 874 F.2d 419, 424 (7th Cir. 1989)). *See also* MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1122 (10th Cir. 1991)(Seth, J. concurring).

> There is an interaction of doctrines in cases decided on summary judgment motions in ADEA actions as in the one before us. This consists of the application of doctrines as to the sequence and burden of going forward with the proof, as derived from *McDonnell Douglas*, mixed with the Federal Rules of Civil Procedure as to the burdens placed on the movant and the nonmovant in summary judgment cases as construed by *Celotex*, *Liberty Lobby*, and *Matsushita Elec.*, and encouraged by those cases.

[73] This does not include plaintiff's making an unintentional, or disparate impact, discrimination case.

the United States Supreme Court established a burden shifting three-step analysis in the case of *McDonnell Douglas Corp. v. Green*.[74] In that case, Green, a black mechanic for McDonnell Douglas, was laid off as part of a reduction in force (RIF). He was a self-avowed racial activist who protested his discharge and the company's hiring practices. He participated in at least one disruptive action outside the company premises, a so-called "stall-in" where the plant entrance was blocked at the morning shift change. Thereafter, the company advertised that it was hiring mechanics. Green applied, but was turned down. The company cited his disruptive activity as its reason for failing to offer him a job. Green went to the EEOC claiming he was not rehired because of his civil rights activities. At trial, the judge believed the company's proffered explanation and held against Green. There was no smoking-gun evidence of discrimination with which to resolve the parties' opposing factual contentions.

The Court decided that in cases of this type, the complainant must carry the initial burden under Title VII of establishing a prima facie case of discrimination, which could be done by showing:

> (i) that the complainant belongs to a racial minority; (ii) that the complainant had applied and was qualified for a job for which the employer was seeking candidates; (iii) that despite the complainant's qualifications, he or she was rejected; and (iv) that, after the complainant's rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.[75]

At that point the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for [respondent's] rejection."[76] The complainant then must be afforded a fair opportunity to show that the employer's stated reason for the rejection was in fact a pretext, or in other words, that the "presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision."[77]

The Court thought that evidence demonstrating that white employees who had engaged in the stall-in were treated better than the plaintiff in this case would have been especially relevant to showing pretext in this case.[78] Other relevant, but seemingly less powerful evidence of pretext would have included things such as the company's prior treatment of the plaintiff, its reaction to his prior valid civil rights activities, and the company's general practice and policy with regard to minority employment.[79]

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[74] 411 U.S. 792 (1972).

[75] *Id.* at 802.

[76] *Id.*

[77] *Id.* at 805.

[78] *Id.* at 804.

[79] 411 U.S. at 802-05.

A complementary case to *McDonnell Douglas* is *Texas Department of Community Affairs v. Burdine*.[80] The specific question raised in that case was whether, after the plaintiff has established a prima facie case, "the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged activity existed."[81] The Supreme Court decided that the ultimate burden of proof remains with the plaintiff.[82] The defendant's burden is a burden of production--to produce evidence of legitimate nondiscriminatory reasons. According to *Burdine*, the burden of proving the *McDonnell Douglas* prima facie case is not onerous.[83] Once the plaintiff has met this burden, the defendant rebuts the presumption of discrimination created by the prima facie case by showing "through the introduction of admissible evidence, the reasons for plaintiff's rejection."[84] Should the defendant not meet his or her burden of production, then the plaintiff will prevail based upon the prima facie case. However, the defendant's burden of production is not particularly onerous: "The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[85] The Appeals Court had placed a burden of persuasion upon the defendant to convince the court of its proffered reasons, fearing that if an employer only had to articulate (as opposed to prove) its lawful reasons, then it could offer "fictitious, but legitimate reasons."[86] The Supreme Court was not persuaded.[87]

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[80] 450 U.S. 248 (1980).

[81] *Id.* at 250.

[82] *Id.* at 253.

[83] *Id.*

[84] *Id.* at 255.

[85] 450 U.S. at 254-55. The Seventh Circuit in Aungst v. Westinghouse Electric Corp., 937 F.2d 1216 (7th Cir. 1991), stated "This burden, however, is merely a burden of production . . . that is not difficult to satisfy." 937 F.2d at 1220. "We must give the employer the benefit of the doubt regarding its explanation of employment decisions . . . With respect to an employer's explanation for an employee's discharge, we again note that we do 'not sit as a super-personnel department that reexamines an entity's business decisions." *Id.*

[86] 450 U.S. at 257-58.

[87] *Id.* The Court stated:

> We do not believe, however, that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employ-

In the subsequent case of *Price Waterhouse v. Hopkins*,[88] Justice O'Connor[89] elaborated on *McDonnell Douglas* in a concurring opinion. In that case, she wrote, the Court dealt with a situation where the plaintiff had presented no "direct evidence"[90] of illegal discrimination.[91] She noted that the prima facie case "was not difficult to prove, and was based only on the statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision."[92] It has been often noted in discrimination cases that the employer's true motive is rarely easy to discern and that the intent question is a pure question of fact.[93]

The complainant's rebuttal of the employer's proffered legitimate, nondiscriminatory reasons, by which the complainant attempts to show "pretext" on the employer's part, may be shown by direct or indirect means as set out in *McDonnell Douglas*. It is an axiom in these cases that discrimination is rarely provable by "smoking gun" evidence.[94] It was stated in *Burdine* that the plaintiff could carry his or her burden of persuasion by attempting to show that the employer's proffered reasons were pretextual "either directly by persuading the trier of fact that a discriminatory reason more likely motivated

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> ment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to a civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.

Id. at 258.

[88] 490 U.S. 228 (1989).

[89] Justice O'Connor's concurring opinion is important because the decision was a plurality opinion in which she and Justice White filed opinions concurring in the judgment. Justice Brennan, since departed from the Court, wrote the main opinion, in which he was joined by Justices Marshall (similarly departed), Blackmun and Stevens.

[90] Evidence in form of testimony from a witness who actually saw, heard or touched the subject of interrogation . . . Evidence, which if believed, proves existence of fact in issue without inference or presumption . . . That means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect."

BLACK'S LAW DICTIONARY 460 (6th ed. 1990).

[91] 490 U.S. at 270.

[92] *Id.*

[93] *See, e.g.*, Sischo-Nownejad v. Merced Community College, 934 F.2d 1004, 1111 (9th Cir. 1991).

[94] *See, e.g.*, Visser v. Packer Engineering Assoc., Inc., 924 F.2d 655 (7th Cir. 1991).

the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[95]

III. Recurring Issues and Unanswered Questions in ADEA Summary Judgment and Directed Verdict Cases

At the summary judgment or directed verdict stages, ADEA cases are superimposed (or overlaid) with the *McDonnell Douglas/Burdine* framework and the summary judgment guidelines set out both in Rule 56 and the summary judgment trilogy. While ADEA cases are unique, they are also prone to certain recurring or standard fact situations, legal issues, and arguments. This section will analyze these recurring patterns in light of these procedural "overlays."

In the usual ADEA discharge case based on intentional discrimination, the employee either has been discharged during an alleged "reduction in force", or has been discharged for some more personalized reason. The plaintiff will normally make a prima facie showing under *McDonnell Douglas*. The employer will then offer the RIF or personalized justifications as a legitimate, nondiscriminatory reason for the discharge. Some courts have elevated a RIF to the status of a "heightened standard" under *Anderson*, requiring more of a showing from the discharged employee in order to avoid summary judgment.[96]

Also at the "legitimate, nondiscriminatory reason" stage, the employer often proffers evidence of poor performance on the part of the discharged employee.[97] Sometimes courts find the employer's documentary evidence so overwhelming that any hint of pretext is simply "implausible" (as in *Matsushita*).[98]

At the "pretext" stage, the "quality, quantity, and caliber" of the employer's and employee's evidence is often in dispute. It is not unusual for courts to dismiss the employee's evidence as nothing more than "mere speculation and conjecture." This was the case in *Matsushita's* derogation of "metaphysical doubts," and *Anderson's* dismissal of merely colorable or not significantly probative evidence.[99] Some courts require more than evidence tending to show that the employer's proffered reason is not believable in order for the employee to avoid summary judgment. These courts require evidence of age "animus."[100]

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[95] 450 U.S. at 256.

[96] *See, e.g.*, Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991).

[97] This is true both inside and outside of the RIF situation, because in a RIF the employer often determines whom to keep and whom to terminate on the basis of relative performance. The ADEA is not a tenure statute for older workers who are released in favor of more productive younger workers.

[98] Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

[99] *See supra* notes 22-71 and accompanying text.

[100] *See infra* note 108.

Failure to produce evidence of such animus will justify a summary judgment in those courts: arguably, this amounts to a failure to produce evidence of an "essential element" under *Celotex*, but it is more typically viewed as a lack of "significantly probative evidence" to show the pretext of masked illegal discrimination as in *Anderson*. Merely showing that the employer was incorrect in its evaluation of the discharged employee will seldom prevent summary judgment against the employee, because an employer is entitled to make bad business decisions so long as they are not influenced by improper age-related motives.

In most of these situations, the employer seems to have an advantage in the summary judgment contest (since the discussion above relates to justifications for granting summary judgments against plaintiffs). Where, however, the employee is able to adduce direct evidence of age animus, normally age-biased comments, derogatory remarks, and certain "talismanic" expressions made by decisionmakers of the employer close to the time of the adverse decision concerning the employee, then such direct evidence is normally held under *Price Waterhouse* to create a "dual motive" case where the employer has the burden of persuasion to prove that it would have taken the same action absent the impermissible motive. The dual motive case may be viewed as a "heightened standard" under *Anderson* which works to the detriment of the employer seeking summary judgment. Mere "stray remarks" under *Price Waterhouse*, or remarks made in jest, in the distant past, or by non-decisionmakers, are often viewed as too weak to raise a genuine issue of material fact (as in *Anderson's* interest in the "quality and caliber" of the evidence).

With this summary in mind, the remainder of this section shall be devoted to reviewing each of these recurring or "standard" ADEA issues in detail.

A. The Effect of Casting Doubt on the Employer's Proffered Reasons (On Raising a Genuine Issue of Material Fact, or On Failing to Produce Evidence of an Essential Element of the Employee's Case)

Considerable controversy has been generated in the circuit courts over the parameters of the *Burdine* indirect showing of pretext: that the proffered explanation is "unworthy of credence." In the recent case of *Connell v. Bank of Boston*,[101] the employer was a bank that was undergoing a reorganization due to changed business conditions. It eliminated the plaintiff's job, reassigned several employees from plaintiff's unit, and discharged plaintiff and one other employee. The reassigned workers and the other discharged employee were younger than plaintiff who was 47 years old. Plaintiff made his prima facie showing of discrimination under the *McDonnell Douglas* rationale (which in age discrimination discharge cases is modified) by showing (i) that he was in the protected class of persons; (ii) that he was performing his job at a level that

[101] 924 F.2d 1169 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 2828 (1991).

met his employer's legitimate expectation; and (iii) that he was replaced by someone with roughly similar qualifications.[102]

The bank's proffered legitimate, nondiscriminatory reasons were plaintiff's poor work performance relative to his fellow unit employees and the reorganization. The court recognized that the articulation of these reasons nullified the *McDonnell Douglas* inference of discrimination. Plaintiff, having overcome his "first hurdle" with his prima facie showing, was now required to clear the "second hurdle." He needed to show that the proffered reasons were only a pretext for age discrimination. The plaintiff could not save himself from summary judgment by merely casting doubt or refuting the articulated reasons of the defendant.[103] The court stated that the plaintiff was required to "show a discriminatory animus based on age."[104] This animus could be shown without the proverbial "smoking gun."[105]

The court acknowledged that this is not an area that can be addressed by formula. Recognizing that the intent issue is a pure question of fact, the court felt that the plaintiff had not offered sufficient evidence from which a reasonable jury could infer age animus. Plaintiff had offered affidavits from former employees alleging age discrimination, but the court deemed them insufficient for several reasons, including the fact that they lacked sufficient facts to justify the conclusions stated.[106] In a strongly worded dissent, Judge Bownes took the First Circuit to task for adopting a unique three prong approach for avoiding summary judgment: the prima facie case, proving the proffered reasons are pretextual, and adducing additional evidence of age animus.[107] Judge Bownes surveyed cases from the other circuits and argued that only the Fourth Circuit might be aligned with the First Circuit in requiring the "additional" evidence of animus.[108]

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[102] *Id.* at 1172.

[103] *Id.* at 1175 (citing Dea v. Look, 810 F.2d 12, 17 (1st Cir. 1987)).

[104] *Id.* at 1172.

[105] *Id.* 1172, n.3

> We do not suggest that the plaintiff must, necessarily, offer affirmative evidence of age animus in addition to rebutting the employer's evidence. Rather, the evidence as a whole, whether direct or indirect, must be sufficient for a reasonable fact finder to infer that the employer's decision was motivated by age animus.

Id.

[106] *See* FED. R. CIV. P. 56.

[107] 924 F.2d at 1183.

[108] *Id.* at 1184. The Second, Third, Seventh, Eighth, and Eleventh Circuits had decided cases cited by Judge Bownes that stated, at least for summary judgment purposes, a showing of pretext is sufficient to support an inference of discrimination. As the cited case from the 8th Circuit stated: "As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful

In a concurring opinion, however, Judge Torres approved of the animus requirement when the case has gone to trial, but not at the summary judgment stage. He offered an example of a company that would not be guilty of discrimination for firing a 41 year-old employee, where it had offered the pretext of unsatisfactory work, but had actually desired to create a job for an unemployed relative.[109] The judge agreed with the holding of the case because he reasoned that the plaintiff had not presented sufficient evidence to support an inference of pretext, and clearly not evidence of pretext "plus" animus.

Arguably, the majority would hold that an employer who was withholding its true "nondiscriminatory" reason from the court could still prevail at summary judgment if the plaintiff were unable to demonstrate evidence of animus. One can question why such a defendant should qualify for such favorable treatment.

In affirming the summary judgment in this case, the majority mentioned both *Anderson* and *Celotex*, but only in a generalized fashion, with no indication that it found either of these holdings important or dispositive of this case. The court did not view this case as involving a heightened standard of proof above a preponderance of the evidence. The court did not rely on *Celotex*, which presumably it could have done if it had felt that the plaintiff had failed to produce evidence of an essential element of his case. Instead, the court concluded that the plaintiff had failed to demonstrate a genuine issue of material fact because he failed to show age animus except through speculation, conjecture, and flawed affidavits.

The court in *Connell* relied on its earlier decision in *Medina-Munoz v. R.J. Reynolds Tobacco Co.*,[110] in which a discharged worker protected by the ADEA was subjected to a summary judgment. Relying heavily on *Anderson*, the court held that summary judgment was correct since the plaintiff, who had cast doubt on the company's legitimate reasons, had produced no evidence of discriminatory animus based on age. The court stated that when the employer has proffered a legitimate reason for its actions, the plaintiff "must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive: age discrimination."[111] Again, the court did not base its decision on the failure to produce evidence of an "essential element" under *Celotex*. Rather, it quoted *Anderson* for the proposition that there was "no 'significantly probative' evidence to show that the pretext masked age discrimination."[112] As will be

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discrimination actually occurred." MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1057-59 (8th Cir. 1988).

[109] 924 F.2d at 1180.

[110] 896 F.2d 5 (1st Cir. 1990).

[111] *Id.* at 9 (citing *Celotex* for the proposition that "summary judgment opponent who bears burden of proof on an issue must reliably demonstrate existence of genuine dispute as to material facts.").

[112] *Id.*

seen below, when an additional element is elevated to the prima facie case level, courts tend to cite *Celotex* as the relevant trilogy decision. The court analyzed the plaintiff's proffered proof of age animus, but dismissed it, essentially, as implausible, without making any reference to *Matsushita*.[113]

In *Villanueva v. Wellesley College*,[114] a denial of tenure case, the trial court granted the employer's motion for summary judgment. The First Circuit, in affirming the trial court, took an opportunity to respond to Judge Bowne's criticism, stating that "when, as here, the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive: . . . discrimination."[115] The court reiterated its argument that this is not an additional requirement over and above that imposed in the *McDonnell Douglas* case; rather, it is mandated by Rule 56's requirement that the non-moving party demonstrate the existence of a "material fact."[116] The First Circuit apparently continues to allow an employer to mislead the court as to the employer's true motivation and not suffer any penalty.[117] The court referred to *Anderson* in a general fashion, without purporting to find it important to the resolution of this particular case.[118] Again, the plaintiff had failed to accomplish anything more than to cast doubt upon the employer's articulated reason, an insufficient showing in the First Circuit.[119]

A less stringent attitude concerning the effect of casting doubt upon the employer's proffered reason is found in the recent decision, *Goetz v. Farm Credit Services*,[120] in which the Eighth Circuit stated that "as a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence that may persuade the

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[113] *Id.* ("It is too large a leap to apply the report's conclusions to managers.") *See also id.* at 10, n.5 ("Medina's garbled reference to two pages of figures prepared by Perez, entitled '1984 Value Analysis,' is so far off any conceivable mark that we need not dignify it by elaboration.")

[114] 930 F.2d 124 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 181 (1991).

[115] *Id.* at 127 (citing Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)).

[116] *Id.* at 128.

[117] *Id.*

> Nondiscriminatory motive is immaterial to a discrimination case; therefore, the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact. Only if there is evidence from which a reasonable inference of discrimination can be drawn has the plaintiff defeated the summary judgment motion.

Id.

[118] *Id.*

[119] 930 F.2d at 131.

[120] 927 F.2d 398 (8th Cir. 1991).

finder of fact that such unlawful discrimination actually occurred."[121] In *Goetz*, an older secretary was terminated during a RIF, while a younger secretary was retained.[122] In affirming the summary judgment, the court held that the plaintiff had failed, as a matter of law, to show a genuine issue of material fact. In fact, she had merely attempted to demonstrate inconsistencies in her ex-employer's proffered reasons.[123] There was no mention of a "heightened standard"[124] nor was an "essential element" said to be lacking. The court believed that the plaintiff had failed to raise any genuine issue of pretext due to a lack of probative evidence (as in *Anderson's* concern over possible deficiencies in the quality and quantum of the evidence).[125]

Similarly, the Seventh Circuit in *Visser v. Packer Engineering Associates, Inc.*,[126] stated that "if the employer offers a pretext-a phony reason-for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age."[127] In *Shager v. Upjohn Co.*,[128] Judge Posner has succinctly stated the view of the Seventh Circuit:

> If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas*. It is important to understand however that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability. The point is only that if the inference of improper motive *can* be drawn, there must be a trial.[129]

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[121] *Id.* at 400-01 (quoting MacDissi v. Valmont Indus., Inc., 865 F.2d 1054, 1059 (8th Cir. 1988)).

[122] *Id.* at 400.

[123] *Id.* at 405. *See infra* section C; the court was extremely impressed with the quantity and quality of the employer's documented proof which along with other reasons made it extremely implausible that the employer was out to "get" this employee because of her age.

[124] Despite the fact that some courts hold that a reduction in force calls for a heightened standard. *See infra* section D.

[125] *Goetz*, 927 F.2d at 406.

[126] 924 F.2d 655 (7th Cir. 1991).

[127] *Id.* at 657 (citing Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990)).

[128] 913 F.2d 398 (7th Cir. 1990).

[129] *Id.* at 401 (citation omitted). Judge Posner's opinion makes only passing reference to *Anderson* as standing for the proposition that "if this were a trial rather than a summary judgment proceeding, would the judge be required to grant a directed verdict to that party seeking summary judgment?" *Id.* at 402.

In *MacDonald v. Eastern Wyoming Mental Health Center*,[130] the Tenth Circuit's result, without discussion of the animus issue, was in accord with that of the First Circuit. In this summary judgment affirmance, the husband and wife plaintiffs were fired from their positions as psychologist and therapist, respectively, after a series of problems with the administration for reasons demonstrably unrelated to age. While the plaintiffs cast doubt upon the proffered reasons, the court did not deem that doubt alone as sufficient to deny the summary judgment. There was no credible evidence that the real reason was age discrimination; rather the only reasonable inference was a desire to retaliate against the plaintiffs due to their outspokenness.[131] The court made no reference to the trilogy, but Judge Seth acknowledged the importance of these cases in a separate opinion:

> I feel that I must write a separate opinion as this case presents part of an ongoing and unfinished resolution of summary judgments in ADEA cases by the trial courts. There is an inter-action of doctrines in cases decided on summary judgment motions in ADEA actions as in the one before us. This consists of the application of doctrines as to the sequence and burden of going forward with the proof, as derived from *McDonnell Douglas*, mixed with the Federal Rules of Civil Procedure as to the burdens placed on the movant and the non-movant in summary judgment cases as construed by *Celotex, Liberty Lobby*, and *Matsushita Elec.*, and encouraged by those cases. The courts are apparently now placed in an era when summary judgments in these cases have become respectable . . . . Summary judgments in these circumstances have not been in disfavor since the Supreme Court decided in 1986 *Celotex Corp., Anderson v. Liberty Lobby*, and *Matsushita Elec.* 1986 was the year of the summary judgment. Perhaps the most significant was *Matsushita* wherein the Court in substance held that this question should be put: considering all the evidence submitted, would a rational trier of fact find for the non-movant. This necessarily required the non-movant to have met a greater burden in opposition to the motion.[132]

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[130] 941 F.2d 1115 (10th Cir. 1991).

[131] *Id.* at 1122. The court stated:

> While the MacDonalds may have created a genuine question as to whether the proffered reasons were the real reasons for their discharge, they have offered no credible evidence that the real reason was age discrimination. To the contrary, assuming the proffered reasons were pretextual, the only reasonable inference to be drawn from this record is that defendants were motivated not by age discrimination but by the desire to retaliate against the MacDonalds for criticizing Center practices.

Id.

[132] *Id.* at 1122-23.

B. The Effect of Poor Business Judgment (On Raising a Genuine Issue of Material Fact)

In *Aungst v. Westinghouse Electric Corp.*,[133] a judgment notwithstanding the verdict was granted against an ADEA plaintiff.[134] The Seventh Circuit explained why it agreed with the trial judge's action in this case involving an engineer who, after thirty-five years of loyal service, was laid off in a RIF. After the articulation of the employer's legitimate reason, lack of "versatility" on the part of the plaintiff who was otherwise a satisfactory employee, the plaintiff was required to answer the proffered reason with specificity.[135] Under Seventh Circuit precedent, there were three suggested methods to demonstrate pretext by indirect means (when there is no "smoking gun evidence"): (1) that the alleged reasons had no basis in fact; (2) if they did, that they were not really factors motivating the discharge; or (3) if they were, that they were jointly insufficient to motivate the discharge.[136] Under the specific facts of this case, the plaintiff needed to attack the "lack of versatility" reason by showing: (1) that the company was not really concerned with versatility; (2) and if it was, plaintiff was fired for reasons other than lack of versatility; or (3) if lack of versatility was the actual reason, then plaintiff must show that lack of versatility should not have caused him to be chosen for the RIF.[137] The Seventh Circuit Court of Appeals noted, however, that it does not sit as a "super-personnel department."[138] Rather, its concern is "whether the employer gave an honest

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[133]937 F.2d 1216 (7th Cir. 1991).

[134]Judgment notwithstanding the verdict can legitimately be analogized to summary judgment and directed verdict, since the issue is whether a rational factfinder could have reached the same conclusion as this particular jury. There is a presumption, however, in favor of the verdict being legitimate. *See* Kimberly K. Fayssonx, Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA. L. REV. 601, 603 (1987) which states, "Conducting jury trials under a burden of proof scheme developed for non-jury Title VII actions has, however, resulted in a considerable number of judgments notwithstanding the verdict and reversals on appeal in ADEA cases." *Id.*

[135]937 F.2d at 1223. The court said,

> [T]o show pretext, it does not help for the plaintiff to repeat the proof that his job performance was generally satisfactory. That question has already been resolved in his favor. The Company advanced specific reasons for his discharge, and his rebuttal evidence should be focused on them. The court finds no proof that employees of any age with similar work credentials were accorded more favorable treatment.

Id. (citation omitted).

[136]*Id.* at 1221.

[137]*Id. See also* Connell v. Bank of Boston, 924 F.2d 1169, 1181 (1st Cir. 1991), *cert. denied*, 111 S. Ct. 2828 (1991) (Torres, J., concurring) ("Thus, the relevant inquiry is not whether the articulated reason is factually correct but whether it really prompted the employer's action.").

[138]*See supra* note 85.

explanation of its behavior."[139] It would seem that if the employee was demonstrably the most versatile employee in the company, labelling him as non-versatile would be patently implausible, thereby casting sufficient doubt upon the veracity of the employer, and assuring a chance for a jury.

According to the Fifth Circuit, the plaintiff may demonstrate pretext by evidence showing that the reason given by the employer "though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext for illegal discrimination."[140] That Circuit has written that when indirectly trying to demonstrate pretext by showing the proffered reasons are unworthy of credence, the evidence "must extend beyond casting doubt on the reasonableness of the employer's action; otherwise the law would be converted to a 'just cause' provision for the protected class of employees, an effect that Congress clearly did not intend."[141]

In *Billet v. Cigna Corp.*,[142] a long-term employee who lost his job due both to a restructuring as well as problems with his supervisor, claimed that the reasons offered were pretextual. The employer offered voluminous proof of deficiencies in the employee's recent performance. The employee cast significant doubt upon the significance of several of the allegations. Regardless, the Third Circuit, in upholding a directed verdict against the plaintiff, held that the employee's view of his own performance is immaterial, stating "what matters is the perception of the decisionmaker."[143] A company is entitled to make subjective business decisions, even wrong ones, so long as the motive is not illegal discrimination.[144] The court held that the plaintiff's evidence was insufficient to create a jury question regarding the company's articulated concerns over his performance.

C. The Effect of Employer Documentation of Poor Performance by the Employee (On Making Pretext Implausible)

Due to the significance that some circuits place upon the employer's subjective belief in its stated reasons, it would appear that documentation, like that in the *Billet* case, would greatly bolster the employer's motion seeking summary judgment or directed verdict. In *Billet*, the court was truly impressed with the detailed records maintained by the employer, stating that "there was

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[139] 937 F.2d at 1220 (citing Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988)).

[140] Normand v. Research Institute of America, Inc., 927 F.2d 857, 859 (5th Cir. 1991).

[141] Hanchey v. Energas Co., 925 F.2d 96, 98 (5th Cir. 1990). In Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990), Judge Posner spoke of jury perceptions: "The statute is not a guarantee of tenure for the older worker, although not all juries understand this." *Id.*

[142] 940 F.2d 812 (3rd Cir. 1991).

[143] *Id.* at 825.

[144] *Id.*

simply too much *objective* evidence of problems with Billet's performance to make his claim of pretext plausible."[145] The plaintiff, anticipating a problem with the detailed records, apparently felt that the best defense was a good offense, and attacked the documentation process itself claiming "that the documented criticism of his performance during this period was not made in good faith and was designed for the sole purpose of creating a record to withstand an age discrimination case."[146] The court stated that it could "not understand why it is improper for an employer to maintain records regarding an employee's conduct even if it recognizes that the record may be useful in defense against a discrimination claim. Indeed, it would be expected that an employer would do exactly that."[147]

In *Danielson v. City of Lorain*,[148] a sixty-seven year old secretary (who had been hired at the age of sixty-five) was terminated after a two-year long battle with her supervisor and others over her alleged poor work performance. Her personnel file was replete with samples of poor work, deficient evaluations, and memoranda of complaint stretching over a two year period. The Sixth Circuit affirmed the trial court's directed verdict in favor of the employer concluding that "a reasonable fact finder could not find that all of Danielson's supervisors created a false paper trail for the purpose of dismissing her because of her age and waited a year before presenting the fabricated record . . . recommending dismissal."[149]

A less respectful attitude toward employer documentation is found in the case of *Sischo-Nownejad v. Merced Community College District*,[150] an age and sex discrimination case arising out of California. In this case, a female art professor in her fifties claimed her employer subjected her to worse treatment than other faculty members not part of the protected categories. The trial court granted summary judgment stating that she had failed to establish a prima facie case. The appellate court reversed, holding that proving discrimination is difficult because "an employer's true motive in an employment decision is rarely easy to discern."[151] The court felt that a thorough review of the employer's motives would be necessary at trial, rather than being dispensed within a summary judgment review, because "without a searching inquiry into these motives,

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[145] *Id.* at 828.

[146] *Id.* at 822.

[147] 940 F.2d at 826.

[148] 938 F.2d 681 (6th Cir. 1991).

[149] *Id.* at 685.

[150] 934 F.2d 1104 (9th Cir. 1991).

[151] *Id.* at 1111 (quoting Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985)) (quoting Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982)).

those acting for impermissible motives could easily mask their behavior behind a complex web of post hoc rationalizations[.]"[152]

The First Circuit, however, in *Medina-Munoz*,[153] seemed impressed with the documentation produced by the employer. The personnel file reflected the employee's history of tardiness, failure to meet deadlines, apparent distaste for field supervision duties, hostile and negative attitude, and one instance of his having shouted obscenities at a supervisor.[154] The file seems to have been particularly persuasive because the problems were reflected as having "increased with the passage of time."[155] The trial court, seemingly impressed with the defendant's recordkeeping, granted summary judgment premised on the plaintiff's failure to make out his prima facie case, specifically, in that he failed to demonstrate that he had performed his job up to the defendant's legitimate expectations. The First Circuit reasoned, despite the defendant's "amplitudinously documented set of reasons,"[156] that this put too great a burden on the plaintiff's prima facie showing. The court opined that the summary judgment was correct, however, due to the plaintiff's deficiencies at the pretext stage.

Despite some courts' misgivings concerning the weight accorded employer records, lack of records, or ambiguous records, such records or lack thereof will often undo an employer's attempt to take the case away from the jury. In the case of *Kraus v. Sobel Corrugated Containers, Inc.*,[157] the Sixth Circuit criticized the employer's weak file, noting: "that at the time of the firing there were no documents in Kraus' file that demonstrated either that her work was unsatisfactory or that her employer had given her prior notice that she was in danger of losing her job."[158]

In *Moody v. Pepsi-Cola Metro. Bottling Co., Inc.*,[159] the same court concluded that suspicious notations of "Age" and "Minority" made in personnel files could be viewed by a jury as evidence of discriminatory motive.[160] The employer tried to explain that the notations were made after the employees had departed to indicate potential legal problems.[161] That concern appears to have turned into a self-fulfilling prophesy.

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[152] 934 F.2d at 1111.

[153] Medina Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1991).

[154] *Id.* at 7.

[155] *Id.*

[156] *Id.* at 9.

[157] 915 F.2d 227 (6th Cir. 1990).

[158] *Id.* at 228.

[159] 915 F.2d 201 (6th Cir. 1990).

[160] *Id.* at 209.

[161] *Id.* at 205.

In the Sixth Circuit case of *Wheeler v. McKinley Enterprises*,[162] the employer's detailed notes prepared immediately following his meetings with the later-fired plaintiff gave credence to the employer's case, but the jury, after hearing the evidence, was within its right to give more weight (or perhaps sympathy) to the plaintiff. Since this was a case where the employer complained that the trial court had not granted a judgment notwithstanding the verdict, the appellate court was constrained not to second-guess the jury on matters of credibility. This case illustrates, perhaps, the often crucial nature of summary judgment or directed verdict in age discrimination cases.

The jury in *Wheeler* was within its province to disbelieve the contemporaneously prepared, detailed records of the employer. Certainly, such records can be viewed as totally subjective and self-serving. Interestingly, however, such records are often viewed as "objective." In *Aungst*,[163] the Seventh Circuit sustained the trial court's granting of a judgment notwithstanding the verdict, citing at length the testimony of the plaintiff's supervisor concerning the plaintiff's lack of "versatility."[164] The jury concluded that the plaintiff was terminated for age related discrimination. In dissent, Judge Cudahy stated that the court's reliance on the supervisor's testimony, while it characterized the plaintiff's as "self-serving," may well have "exactly reversed the order of reliance" of the jury.[165]

In *Billet* the Third Circuit concluded that in the end "there was simply too much *objective* evidence of problems with Billet's performance to make his claim of pretext plausible."[166] The evidence were reports of incidents entered into plaintiff's file by the supervisors. The plaintiff had different interpretations of the events.[167] In dissent, Judge Sloviter stated that "when there is objective evidence (such as in this case the inclusion of Billet as a finalist for the position) which could discredit the proffered subjective view, then it is the function of a jury and not the court on a directed verdict to decide whether the ultimate decision to terminate the plaintiff was tainted with the impermissible consideration of age."[168]

In the case of *Conkwright v. Westinghouse Elec. Corp.*,[169] the Fourth Circuit remarked that subjective poor evaluations could possibly tend to show that an employer's proffered reasons were actually pretexts, but such proof is "close to

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[162]937 F.2d 1158 (6th Cir. 1991).

[163]Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216 (7th Cir. 1991).

[164]*Id.* at 1220.

[165]*Id.* at 1220.

[166]940 F.2d 812, 828 (3d Cir. 1991).

[167]*Id.* at 832.

[168]*Id.* at 832.

[169]933 F.2d 231 (4th Cir. 1991).

irrelevant."[170] It might only be relevant if the "ratings were wildly out of line with other indicia of an employee's performance. Then one may question whether the rating system had a bias in its implementation."[171] Similarly, past good evaluations will not, according to *Billet*, prove that the current bad evaluations are suspicious, because "[t]o hold otherwise would be to hold that things never change."[172] But, in *Colgan v. Fisher Scientific Co.*,[173] the Third Circuit reversed the trial court's grant of summary judgment where "after many years of service with consistently good evaluations," when the plaintiff declined to take early retirement, he was given substantial new responsibilities, was given a surprise, premature evaluation, and received a substantially lower evaluation than he ever had before.[174] The court acknowledged that on a summary judgment review, it would be improper to decide, as a matter of law, "that an inference of retaliation cannot be drawn."[175] Finally, in *Shager v. Upjohn Co.*,[176] evidence that the plaintiff's deficiencies were exaggerated, and that his outstanding sales record was ignored resulted in the Seventh Circuit finding that his "marginal" rating was "inexplicable."[177] Accordingly, the grant of summary judgment in favor of the employer was reluctantly overturned.[178]

170*Id.* at 235.

171*Id.* at n.4.

172940 F.2d 812, 826 (3d Cir. 1991).

173935 F.2d 1407 (3d Cir. 1991).

174*Id.* at 1422.

175*Id.*

176913 F.2d 398 (7th Cir. 1990).

177*Id.* at 400. The totality of factors in this case led the court to overturn the trial judge's grant of summary judgment. These factors included demonstrated animosity from a younger supervisor toward older personnel, and favorable evaluations to a younger, less productive employee. The court indicated a less than favorable attitude toward the routine granting of summary judgment, stating when a jury question would be raised as follows:

> This is not a case where the plaintiff's only evidence of age discrimination is that he was replaced by a younger worker and that the stated ground for firing him is spurious. That would be the kind of case that just barely survives the employer's motion for summary judgment: a case where the evidence of discrimination is entirely circumstantial, indirect.

Id. at 402.

178*Id.* at 406. The court also said:

> So we must reverse. We are not entirely happy in doing so, being perplexed that the middle-aged should be thought an oppressed minority requiring the protection of federal law. But that is none of our business as judges. We also are sympathetic to the argument that . . . the threat of such market sanctions deters age discrimination at lower cost than the law can do with its cumbersome and expensive machinery, its gross delays, its frequent errors, and its potential for rigidifying the labor market. But this sanguine view of the power of the marketplace was not shared by the framers and supporters of the Age Discrimination in Employment Act, and we shall not

D. The Effect Of Reduction in Force (On Creating a Heightened Standard of Proof for the Plaintiff to Overcome)

One of the most prolific sources of age discrimination claims has been the RIF, often brought about by adverse economic conditions or restructuring flowing from many of the reorganizations and takeovers of the eighties. All of the issues discussed above have been raised both inside and outside of the RIF context. Courts have generally stated, however, that in RIF situations the plaintiff has a greater burden than in non-RIF situations because economic necessity or improved efficiency are bona fide legitimate reasons for dismissing employees.

The Sixth Circuit case of *Ridenour v. Lawson Co.*,[179] is a leading case on this greater burden requirement. In that case the court declared that "a plaintiff whose employment position is eliminated in a corporate reorganization or work force reduction carries a heavier burden in supporting charges of discrimination than does an employee discharged for other reasons."[180] Courts acknowledge that even in the most innocent RIF situations "someone has to go."[181] The victim of a RIF must present direct, circumstantial, or statistical evidence that age was a determining factor in his discharge.[182]

In *Leichihman v. Pickwick Int'l*,[183] the Eighth Circuit modified the *McDonnell Douglas* prima facie case to cover the typical RIF situation. This situation exists when an employee's position is terminated and no new employee is hired to take over the responsibilities of the terminated employee; rather the employer reassigns that work to others in the name of efficiency. In *Leichihman*, the court modified the elements to be shown under *McDonnell Douglas'* indirect approach as follows: (1) that the plaintiff was within the protected age group; (2) that the plaintiff was performing at a level that met the employer's legitimate expectations; (3) that despite such acceptable performance the plaintiff was terminated[184]; (4) that the plaintiff's job in its various parts continued in existence; and (5) that the plaintiff's age was a determining factor

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subvert the Act by upholding precipitate grants of summary judgment to defendants.

Id. at 406-07.

[179]791 F.2d 52 (6th Cir. 1986).

[180]*Id.* at 57.

[181]Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 235 (4th Cir. 1991).

[182]*Id.*

[183]814 F.2d 1263 (8th Cir. 1987), *cert. denied*, 484 U.S. 855 (1987).

[184]It should be noted that the time for the employer to dispute this assertion by the plaintiff is normally held to be at the rebuttal stage - where the employer proffers its legitimate, nondiscriminatory reasons - and not at the prima facie case stage. *See* McDonald v. Eastern Wyo. Mental Health Center 941 F.2d 1115, 1119-20 (10th Cir. 1991) where the court lists the various circuits in accord with that view.

in the employer's actions.[185] The court recognized that under some circumstances this framework might require modification.[186]

The *Leichihman* framework was applied by the Eighth Circuit in the recent case of *Johnson v. Minnesota Historical Society*.[187] In *Johnson*, a summary judgment was granted against a fifty-four year-old employee of the Historical Society terminated under a reduction in force necessitated by reduced federal funding. The trial court held that the plaintiff had failed to make his prima facie case because he did not show that his job continued in existence after his dismissal; but even if it did, the RIF was for bona fide economic reasons which constitutes a legitimate, non-pretextual, nondiscriminatory reason which the plaintiff had not contradicted.[188] The appellate court reviewed its precedent, noting that "summary judgments should seldom be used in cases alleging employment discrimination,"[189] and that direct, "smoking gun," evidence is seldom available in such cases. The court reversed the grant of summary judgment because of the existence of conflicting evidence over whether some of the plaintiff's job components still continued to exist.[190] Additionally, there was testimony that other employees at the Society had referred to the plaintiff as a "blind old bat," "old coot," "blind old coot," and a "dirty old man."[191] More importantly, he introduced evidence that his supervisor mocked his back problems and mimicked his posture and walk.[192] The court, therefore, reasoned that "it is a question of fact whether Johnson's age was a determining factor in the Society's actions,"[193] citing the factual case-by-case nature of discrimination cases that requires courts "not be overly rigid in considering evidence of discrimination offered by a plaintiff."[194]

The five-step *Leichihman* analysis combines elements from the standard *McDonnell Douglas* approach (modified, of course, to accommodate the factual difference of a RIF), with the plaintiff's burden of proof on pretext. Specifically, the fifth step of *Leichihman* is similar to the way pretext is often shown, but elevated to the prima facie case stage. Direct evidence of age animus, like that offered in the *Johnson* case, is not a requirement. The fifth step can also be shown

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185 814 F.2d at 1268.

186 *Id.* In some cases showing that age was a determining factor might eliminate the fourth requirement of showing that the position continued to exist.

187 931 F.2d 1239 (8th Cir. 1991).

188 *Id.* at 1241.

189 *Id.* at 1244.

190 *Id.* at 1243-45.

191 *Id.* at 1244. The effect of disparaging remarks by fellow employees and supervisors is discussed at length in section F. See *infra* section F.

192 931 F.2d at 1244.

193 *Id.*

194 *Id.*

by statistical evidence, such as a pattern of forced early retirements or fewer promotions to older employees, or by circumstantial evidence such as a generalized showing of preference "for younger employees in the business organization."[195] This does not seem to be a departure from the Supreme Court's pretext analysis in *McDonnell Douglas*.[196]

What, then, is gained by adding the fifth step to the plaintiff's prima facie case, rather than relying upon the plaintiff's pretext burden of proof? In the case of *Barnes v. Southwest Forest Industries, Inc.*,[197] the Eleventh Circuit offered the view that in an ADEA case, summary judgment *must* be granted under *Celotex* if the plaintiff's showing is insufficient on any portion of the plaintiff's prima facie case.

Not all courts have formally modified the *McDonnell Douglas* prima facie case in the manner of the Eighth Circuit. The Eleventh Circuit has adopted a three-step prima facie showing where the plaintiff must demonstrate: (1) inclusion in the protected group; (2) qualifications for the position held prior to the RIF; and (3) evidence of animus.[198] The First Circuit, however, in the *Connell*[199] case made no reference to a higher burden in a RIF case. It must be remembered, however, that the First Circuit has adopted an animus requirement at the pretext stage that in many ways gives it the same effect as if it were part of the prima facie case.

In the case of *Hanchey v. Energas Co.*,[200] the Fifth Circuit reviewed a summary judgment granted to an employer that closed one of its offices, ostensibly due to the economic downturn in Louisiana in the eighties. The trial court granted summary judgment to the defendant based on the plaintiff's failure to make a prima facie case, the defendant's articulated reasons, and plaintiff's failure to raise a jury question on pretext. The Fifth Circuit stated that even if a genuine jury issue existed showing a prima facie case, there was still no genuine issue concerning "whether Energas articulated legitimate, nondiscriminatory reasons for the actions in question and, if so, whether Hanchey failed to carry her burden of showing that the reasons are pretexts for age discrimination."[201]

In *Hanchey*, the plaintiff had attempted to cast doubt on the financial problems of her employer by pointing out that it had recently spent $61.5 million for another company, and that the town where she was employed was not undergoing a financial downturn during the time period in question. The

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195 *Id.* at 1243.

196 *See supra* notes 74-80 and accompanying text.

197 814 F.2d 607, 609 (11th Cir. 1987).

198 Earley v. Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).

199 924 F.2d 1169 (1st Cir. 1991).

200 925 F.2d 96 (5th Cir. 1990).

201 *Id.* at 98.

court found no credence in such arguments.[202] Bolstering the company's case was its statistical evidence that in the RIF, of eleven positions eliminated, seven were held by people younger than forty years of age.[203] The Fifth Circuit, therefore, did not feel uneasy about affirming the summary judgment due to a failure of proof at the pretext level in light of the "implausibility" of the plaintiff's arguments. This would seem an affirmation of the holding of *Celotex*,[204] even though the court made no reference to any of the cases in the trilogy.

A case that demonstrates the difficulties faced by ADEA claimants who are victims of RIFs brought about by mergers is *Rose v. Wells Fargo & Co.*[205] In *Rose*, two large banks in the same geographic area merged, resulting in a managerial redundancy. The plaintiffs were two vice-presidents of the disappearing bank, both in their fifties. The plaintiffs' unit was scaled-back, resulting in substantial staff reductions. The decision of who would be released was "essentially left to the discretion of the managers of the various bank departments."[206] The plaintiffs were not offered any other positions with the bank. The trial court granted summary judgment based upon the plaintiffs' failure to demonstrate that they were replaced by substantially younger employees with equal or inferior qualifications. In fact, the judge concluded that their jobs simply disappeared, and "they were not replaced by anyone, let alone younger persons with similar qualifications."[207]

The Ninth Circuit used a standard four-step prima facie case analysis.[208] The circuit court stated that its precedent would forgive the lack of such a showing if the plaintiffs could "show through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an

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[202]The plaintiff could not convince the Court that the total area served by the company was not suffering an economic downturn, regardless of the possible fact that the immediate area of her office was economically sound. Also, it felt that the purchase of the other company confirmed, rather than refuted, the company's reasons, because it may have found itself in need of higher profits. *Id.* at 98-99.

[203]*Id.* at 98.

[204]Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[205]902 F.2d 1417 (9th Cir. 1990).

[206]*Id.* at 1420.

[207]*Id.* at 1421.

[208]*Id.* The court stated further:

> An employee may establish a prima facie case of age discrimination under the disparate treatment theory by showing he: (1) was a member of the protected class [age 40-70]; (2) was performing his job in a satisfactory manner; (3) was discharged; and (4) was replaced by a substantially younger employee with equal or inferior qualifications.

Id. (citation omitted).

inference of age discrimination."[209] Citing the Eighth Circuit's *Leichihman*[210] decision, the court noted that no inference of discrimination can be drawn from a RIF where the position and duties are completely eliminated.[211] According to the court, this completely eliminated the claim of one of the plaintiffs.[212]

With respect to the other plaintiff, there was evidence that many of his responsibilities were assumed by a younger employee some six months after the plaintiff's discharge. Citing Sixth Circuit precedent,[213] the Ninth Circuit argued that this substantially weakened plaintiff's claim, and the plaintiff should have produced "additional direct, circumstantial, or statistical evidence that age was a factor in his termination."[214]

Both plaintiffs offered four reasons in support of finding an inference of discrimination: failure of the bank to follow its own procedures; failure to offer new positions; references to them as part of an "old boys network;" and statistical evidence from their expert that the merger resulted in a heavier burden falling upon employees in the protected class. The court disposed of all of these arguments, finding: misinterpretation of the manuals by plaintiffs; no duty to transfer an employee terminated in a RIF (again following the Sixth Circuit precedent); no animus being displayed in the "old boy network" reference (as it is a colloquialism unrelated to age); and flawed statistics.[215] The court finally stated that although the replacement six months after the discharge and the statistics might "arguably support an inference of

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[209] *Id.*

[210] Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1270 (8th Cir. 1987), *cert. denied*, 484 U.S. 855 (1987).

[211] 902 F.2d at 1421. ("If [the discharged employee] cannot show that [his employer] had some continuing need for his skills and services in that his various duties were still being performed, then the basis of his claim collapses.")(citations omitted).

[212] *Id.* at 1421-22. The court stated:

> It is undisputed that most of Rose's responsibilities were eliminated due to the loss of the Bracton accounts. Rose has otherwise presented no facts which controvert Walker's deposition testimony that he was discharged because 'the job that he did in S.A.D. [was] not performed in L.A.D.' Moreover, there is no evidence to suggest that Rose's admittedly 'unique function' was needed elsewhere at Wells Fargo. Rose's limited duties as vice president were also duplicative of functions performed by Wells Fargo's own managers prior to the merger. Rose does not claim that his counterpart at Wells Fargo was younger or somehow less qualified than he.

Id. at 1422.

[213] Simpson v. Midland-Ross Corp., 823 F.2d 937 (6th Cir. 1987).

[214] 902 F.2d at 1422.

[215] *Id.* at 1422-23. With respect to the flawed statistics, the Court noted that in order to show a triable issue in that manner, there must be a "stark pattern of discrimination unexplainable on grounds other than age." *Id.* In this case, such a showing was absent because the casualties were greatest in upper management where older employees tend to be the rule.

discrimination . . . we find that evidence insufficient to support a jury verdict on the ultimate question of discrimination."[216]

It is hard to believe that the same Ninth Circuit handed down the *Sischo-Nownejad* decision which expressed the argument that employers motives are easily falsified, that summary judgments should rarely be granted, and that the term "old warhorse" was direct evidence of discriminatory intent.[217] This seemingly contradictory stance is a stark indication that in a RIF situation, the plaintiff can expect an extremely difficult time trying to avoid summary judgment. A plaintiff who does not come into court with the proverbial "smoking gun" will be likely to go away disappointed. At a minimum, it would seem that a defendant should wait a sufficient time before deciding to undo, as mistakes, various work reassignments brought about by the RIF. By doing that, the employer can rely on the presumption that "time heals all wounds," along with the defense that it merely made a stupid business judgment (which seems to be a strong defense in ADEA cases if they are made in good faith). Replacing older workers with new, younger workers in this manner should be permissible under the *Rose* rationale.

A direct assault on the issue of whether there really was a RIF occurred in the case of *Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*,[218] where the losing defendant appealed the trial court's refusal to grant a judgment notwithstanding the verdict. The defendant claimed the trial court should have granted defendant a judgment as a matter of law, because there was undisputed proof of an "economically mandated reduction in force."[219] The defendant argued this constituted a legitimate nondiscriminatory reason for termination. The court concluded that due to various inconsistencies in testimony and company actions, the jury could reasonably have concluded that the "alleged reduction in force was merely a pretext for discrimination."[220] The judgment was permitted to stand.

E. The Effect of Direct Evidence of Discriminatory Intent (On Creating a Heightened Standard for the Defendant to Overcome)

Is the *McDonnell Douglas* approach the exclusive means of establishing a prima facie case of age discrimination? While most of the reported cases launch into a review of the "easy" *McDonnell Douglas* rationale, courts have recognized alternative and more rigorous direct approaches. According to Judge Posner in

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216*Id.*

217Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1112 (9th Cir. 1991).

218915 F.2d 201 (6th Cir. 1990).

219*Id.* at 208.

220*Id.* at 209.

Shager, "direct proof of age discrimination is a permissible alternative . . . to dancing through the *McDonnell Douglas* quadrille."[221]

According to the Ninth Circuit's *Sischo-Nownejad*[222] case, when the plaintiff's prima facie case consists of more than the *McDonnell Douglas*[223] presumption, because of the introduction of direct or circumstantial evidence, then "a factual question will almost always exist with respect to any claim of a nondiscriminatory reason."[224] In *Sischo-Nownejad*, the direct evidence consisted of evidence of more favorable treatment toward workers outside of the protected class, and numerous statements probative of age and gender bias.[225] This case was tried as a "single motive" discrimination case-one in which the motive for the employer's action was alleged to be age (or in that case, age and sex) discrimination. The case was filed prior to the Supreme Court's landmark "dual motive" sex discrimination case, *Price Waterhouse v. Hopkins*.[226]

In *Price Waterhouse* a female senior manager for a major accounting partnership was denied partnership status. Based mainly upon written comments submitted by partners to the partnership committee, she claimed that she was the victim of "sex stereotyping"--a belief that females should or should not act in certain ways that are considered more the province of males.[227] The employer emphasized a legitimate, nondiscriminatory reason for its negative action: lack of interpersonal skills. The trial court judge found that this reason was not fabricated as a pretext to discriminate. Male candidates who were selected for partnership who similarly lacked interpersonal skills legitimately possessed positive characteristics she lacked. Regardless of these non-pretextual reasons, however, the trial and appellate courts, along with the Supreme Court found in the plaintiff's favor, placing the burden of persuasion

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[221]Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990). According to Justice O'Connor in *Price Waterhouse*: "Indeed, in one Age Discrimination in Employment Act case, the Court seemed to indicate that 'the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.'" 490 U.S. 228, 271-72 (1989) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

[222]Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104 (9th Cir. 1991).

[223]411 U.S. 792 (1972).

[224]934 F.2d at 1111.

[225]For the effect of derogatory remarks or age-related slurs *see infra* section F.

[226]Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[227]The Court stated that an employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind. *Id.* at 251.

upon the employer to demonstrate that it would have reached the same result had there been no taint of illegal discrimination.[228]

The possibility of mixed legitimate and illegitimate motives has long troubled courts. Employees have complained in the past, for instance, that their employers retaliated against them for exercising their statutory rights under the Wagner Act, and that the employer's proffered "legitimate" reasons were pretexts. The employer would present a list of infractions committed by the employee upon which it claimed to have made its employment decision. In its landmark decision in *NLRB v. Transportation Management, Corp.*,[229] the Supreme Court reversed the traditional burden of proof, requiring the defendant to prove, by a preponderance of the evidence, that it would have made the same decision absent the impermissible motive.[230] Some employees, however, deserve to be fired even though their employers' decisions were tainted by improper motives. An employee, for instance, whose pro-union activities lead the employer to attempt to punish that employee even though the law promotes self-organization rights, can still be fired if he or she engages in sufficient egregious activity, such as coming in drunk and attacking a number of employees and managers. Such activity would not be permitted of any employee whether they were for or against the union. If, however, the legitimate and illegitimate motives cannot be separated, then the risk of loss is fairly placed upon the employer who knowingly created the risk. This analysis complies with the Court's opinion for the Court presumed: "[t]he employer is a wrongdoer."[231]

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[228]This was an interesting plurality decision with Justices Brennan, Marshall, Blackmun and Stevens delivering the opinion of the Court. Justice White concurred in the opinion, but feared that the plurality mistakenly placed a burden on the employer to prove its case by "objective" evidence. Justice O'Connor concurred in the opinion, but was concerned that the level of taint suggested by the plurality might be too low, even though this was not a weak case for finding such taint. Justices Kennedy, Rehnquist, and Scalia dissented. *See also* CIVIL RIGHTS ACT OF 1991, *supra* note 7, at § 107, which adds § 703(m) to Title VII and which states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This new section overturns that portion of *Price Waterhouse* that totally exonerated the defendant who could show that it would have taken the same action despite its discriminatory activity. The new law also, however, adds § 706(g)(2)(B), which, when the defendant can satisfy the *Price Waterhouse* requirement of showing it would have taken the same action regardless, limits the employer's liability to declaratory relief, injunctive relief, attorney's fees, and costs directly attributable to bringing the claim, but not for damages, reinstatement, hiring, or promotion. Interestingly, these 1991 changes do not apply to the ADEA.

[229]462 U.S. 393 (1983).

[230]*Id.*

[231]*Id.* at 403.

How does a mixed motive case differ, on its face, from a single motive case? Justice White, in his *Price Waterhouse* concurring opinion, offered the following analysis:

> The Court has made clear that "mixed-motive" cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motive behind the decision." In mixed-motive cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.[232]

Must the employee choose whether to bring a single or dual motive case? The plurality opinion in *Price Waterhouse* answered this question in the negative.[233] Justice O'Connor expressly agreed with the plurality analysis on this point.[234] The case may be filed as either, but, at some point the plaintiff must make a choice.

In *Visser v. Packer Engineering Associates, Inc.*,[235] the Seventh Circuit struggled over a summary judgment granted by the trial court where a sixty-four year-old executive was fired allegedly for "disloyalty" by his sixty-three year-old boss.[236] The fired executive was nine months short of full vesting rights toward his pension.[237] His premature dismissal resulted in a two-thirds loss in his retirement benefits.[238]

The plaintiff successfully painted his boss in an unflattering light. The boss was the corporate employer's founder, and he allegedly continued to run the

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[232]490 U.S. 228, 260 (1989) (citations omitted).

[233]The Court added:

> Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a 'pretext' case or a 'mixed motives' case from the beginning in the district court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the district court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual."

Id. at 247, n.12.

[234]*Id.* at 277.

[235]924 F.2d 655 (7th Cir. 1991).

[236]*Id.* at 657.

[237]*Id.*

[238]*Id.*

company as a personal fiefdom.[239] Plaintiff and several other employees sat on the board of directors and opposed the founder, who served as chairman of the board.[240] The dissidents were dismissed from the board, and several left the company to begin a company of their own.[241] The plaintiff stayed on, possibly desiring to protect his retirement benefits.[242] The boss called the plaintiff into his office and demanded he make a declaration of "unqualified loyalty."[243] Plaintiff refused and was fired.[244] He claimed that his dismissal was improper, and the fact that his benefits were reduced should allow a presumption of impermissible discrimination based on age. Initially, the court analyzed the facts in light of the *Price Waterhouse* rationale. Following the wording of Justice O'Connor, the court stated that in a mixed-motives case the illegal motive must be "a sufficient condition, or but-for cause, of the employee's termination."[245] The court held that not only was age not a substantial factor, but also there was not an iota of evidence that age was any factor in the decision.[246] The fact that the reduction in the plaintiff's benefits would save the company money was not sufficient to create an inference of discrimination—neither for a dual motive nor for *McDonnell Douglas* prima facie case analysis.[247] While noting that a "smoking gun" is not required, circumstantial evidence, at a minimum, is required.[248] The timing of the firing did not arouse suspicion in the court since the firing was precipitated by past events and not the "looming date of full vesting of Visser's pension."[249] Accordingly, the court affirmed the summary judgment. In a terse dissent, Judge Cudahy stated that "a mean personality should not provide an impregnable shield against claims that are objectively plausible."[250]

239*Id.* at 656.

240924 F.2d at 656.

241*Id.*

242*Id.*

243*Id.*

244*Id.* at 657.

245924 F.2d at 658.

246*Id.*

247*Id.* at 658.

248*Id.*

249*Id.*

250924 F.2d at 664 ("Apparently Packer would be easier to convict of age discrimination if he were a kindly and forgiving soul with a short memory.") Another dissent by Chief Justice Bauer is worth quoting:

> My dissent is really occasioned by my conviction that summary judgment is too rapid a disposition in this case, that sufficient factual questions remain that belong to a jury. And when these factual questions unfold in the trial setting there always remains a right in the court to correct or prevent a verdict that is founded, not on the law and facts, but on sympathy and

F. The Effect of Derogatory Remarks and Talismanic Expressions (On Creating a Genuine Issue of Material Fact, or On Creating a Dual Motive Heightened Standard)

While direct evidence of discriminatory intent is not required to make a prima facie case of intentional discrimination under *McDonnell Douglas*, it is a plus. Demonstrating this evidence is useful as a supplement to the *McDonnell Douglas* standard. Direct evidence creates the dual motives situation which has the salutary effect of shifting the burden of proof to the defendant. So it would seem to behoove a plaintiff seeking to avoid summary judgment or directed verdict to inject as much direct evidence as possible, despite the cliche' that "smoking gun" evidence of discriminatory intent is rarely to be found.[251] The most often used direct evidence is the age-related derogatory remark offered to demonstrate an anti-age animus.

The leading case on derogatory remarks as evidence of discriminatory animus is the sex discrimination case *Price Waterhouse*, where the plaintiff introduced evidence that in their evaluations of plaintiff as a potential partner, some existing partners wrote comments such as: "macho," "overcompensated for being a woman," "take a course at charm school," and "tough talking somewhat masculine."[252] The plurality stated that "remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision."[253] They went on to say, however, the remarks are certainly evidence that gender played a part. According to the dissent "almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of 'stray remarks.'"[254]

In agreement with the *Price Waterhouse* dissent, Judge Posner reiterated in *Shager*: "Some stray remarks in the opinions in *Price Waterhouse v. Hopkins* . . .

> prejudice. I think we have denied the plaintiff in this case a basic right of all mankind: the right to rise at least to the height of failing.

Id. at 664.

[251] *See* Castleman v. Acme Boot Co., 959 F.2d 1417, 1420 (7th Cir. 1992) ("An employer, of course, does not normally memorialize an intention to discriminate on the basis of age. Direct evidence, such as an employer statement that reveals hostility to older workers, is rarely found.")

[252] Price Waterhouse v. Hopkins, 440 U.S. 228, 235 (1989).

[253] *Id.* at 251.

[254] *Id.* at 291. The dissent stated:

> One of their [trial courts] new tasks will be the generation of a jurisprudence of the meaning of 'substantial factor'. Courts will also be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial evidence.' Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process.

Id. (Kennedy, J., dissenting).

addressed to the issue of stray remarks in discrimination cases, bid fair to create a doctrine of 'stray remarks.'"[255] In *Shager*, a young supervisor was quoted as making statements derogatory to older workers and others in praise of young workers.[256] The court noted that these comments were ambiguous, but "the task of disambiguating ambiguous utterances is for trial, not for summary judgment."[257] Citing Ninth Circuit precedent, the Seventh Circuit acknowledged that the term "young" may be a legitimate "descriptive, not an evaluative, term."[258]

In contrast, Second Circuit rulings could be construed as conferring "talismanic significance" to the term "young."[259] Judge Altimari, in a concurring opinion in *Binder v. Long Island Lighting Co.*[260], expressed the concern that the Second Circuit had given talismanic significance to the term "overqualified" in an earlier case, *Taggart v. Time, Inc.*,[261] which then created a jury issue in *Binder* where the employer had used a similar term "underemployed." In both *Binder* and *Taggart* older employees lost their jobs in reorganizations, and were not offered lesser positions (even at lesser pay) due to the employers' fears that the older employees would become dissatisfied with these positions, suffer frustration, poor job performance, and ultimately termination. Judge Altimari felt that these decisions placed the employers in an untenable position: not to offer the overqualified person the job and be sued, or offer the job and wait to see if the bad results materialize.[262] Judge Altimari would allow the employer, in its business judgment, to conclude that an applicant is overqualified for a position without fear of an ADEA suit because "overqualified" was not a buzzword for "too old."[263] In a subsequent decision, the Second Circuit denied Judge Altimari's characterization of *Taggart* and *Binder*, stating that they were

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255Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990).

256*Id.* at 400. "These older people don't much like or much care for us baby boomers." "[T]he old guys know how to get around things." "It is refreshing to work with a young man with such a wonderful outlook on life and on his job." *Id.*

257*Id.*

258*Id.* (citing Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438-39 (9th Cir. 1990)).

259Binder v. Long Island Lighting Co., 933 F.2d 187, 194 (2nd Cir. 1991) (Altimari, J., dissenting).

260*Id.*

261924 F.2d 43 (2d Cir. 1991).

262933 F.2d at 194-95.

263*Id.* at 194.

aimed at the "conclusory" statement of overqualification that could serve as a "mask for age discrimination."[264]

Similarly, in *Aungst*, judgment notwithstanding the verdict was sustained, even though the employer terminated the plaintiff because he lacked "versatility."[265] In dissent, Judge Cudahy felt that "'versatile' may be virtually a synonym for 'young.'"[266] The Seventh Circuit refused to grant talismanic significance to that term.

As discussed above, the Ninth Circuit has had an interesting time dealing with "stray remarks." In *Rose* the court felt that the expression "old boys network" is a mere "colloquialism unrelated to age."[267] But, in *Sischo-Nownejad*, it felt that calling an older female employee, "an old warhorse" was direct evidence of discriminatory bias.[268]

The closest thing to easily available "smoking gun" direct evidence seems to be age-related derogatory remarks such as those found in *Minnesota Historical Society* where the employee was referred to as an "old coot," "dirty old man," and "blind old bat."[269] Similarly, in *Monarch Paper Co.* the court looked askance at a supervisor calling the plaintiff an "old man," and placing a banner in the workplace stating "Wilson is óld."[270] Telling the plaintiff that he was "too old to handle" a very large sales territory, referring to a terminated employee as an "old bastard," saying that someone suffered from "the old salesman burnout syndrome," and looking for "the I.B.M. type" were considered supportive of a presumption of age discrimination in *Normand v. R.I.A.*[271] On the other hand, the director of sales referring to the plaintiff as "el viejo" ("the old one") did not aid the plaintiff's case against summary judgment in *Medina-Munoz* where there was evidence that the supervisor was a "friendly, jovial person" who habitually used nicknames for co-workers as "terms of endearment."[272] But in *Levin v. Analysis & Technology, Inc.*[273] the court overturned summary judgment

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[264]Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 118 (2nd Cir. 1991). *See also* Stein v. National City Bank, 942 F.2d 1062, 1066 (6th Cir. 1991) ("The defendant's criterion in *Taggart* amounted to a label - 'overqualified' - without any objective content. This criterion would allow the employer to shift the standard at its pleasure, raising the standard for some applicants and lowering it for others.")

[265]Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216, 1226 (7th Cir. 1991).

[266]*Id.*

[267]Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990).

[268]*See supra* note 217.

[269]Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991).

[270]Wilson v. Monarch Paper Co., 939 F.2d 1138, 1140 (5th Cir. 1991).

[271]927 F.2d 857 (5th Cir. 1991).

[272]Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 10 (1st Cir. 1991). The court also said that "[t]he biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case."

[273]960 F.2d 314 (2nd Cir. 1992).

on appeal in large part due to evidence (not considered significant by the trial judge) that the plaintiff was subjected to negative age related remarks. For example, his superiors told him that he had memory loss, was set in his ways, and was "over the hill."[274] In addition, his supervisors playfully pushed him into a chair with wheels and asked if he was ready for the wheelchair.[275]

It is important to reiterate that not all derogatory remarks are probative of an intention to discriminate. Hence, these remarks may be considered as merely "stray." Several courts have focused upon the status of the person making the remark, asking whether that person became a decisionmaker with respect to the plaintiff. In *Danielson*, the lack of age animus exercised by the terminating decisionmaker swayed the court and the court ignored an allegedly discriminatory statement made by the plaintiff's supervisor.[276] In *Normand*, the Fifth Circuit, while distinguishing the case before it, noted that seven circuits had ignored discriminatory statements attributed to nondecisionmakers, stating: "In these cases, the remarks attributed to the defendants were either made by someone who did not participate in the decision to terminate the plaintiff, or they were isolated comments and were the plaintiff's only evidence of discrimination."[277]

In addition, the Eleventh Circuit has adopted a restrictive view of the relevance of derogatory remarks. In *Carter v. City of Miami*,[278] it stated that "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, . . . constitute direct evidence of discrimination."[279] Lastly, the Fourth Circuit in *E.E.O.C. v. Clay Printing Co.*,[280] viewing the totality of circumstances, ignored decision-maker comments concerning the need for "young blood" and the need to attract younger employees.[281]

IV. CONCLUSION

Reviewing the cases, it seems that in ADEA cases the trial and appellate courts treated summary judgments as alive and well and routinely sustained

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[274] *Id.* at 315.

[275] *Id.*

[276] Danielson v. City of Lorain, 938 F.2d 681, 684 (6th Cir. 1991).

[277] Normand v. Research Institute of America, Inc., 927 F.2d 857, 864, n.3 (5th Cir. 1991).

[278] 870 F.2d 578 (11th Cir. 1989).

[279] *Id.* at 582.

[280] 955 F.2d 936 (4th Cir. 1992).

[281] According to dissenting Judge Restani: "The majority finds these comments age-neutral. I question what type of evidence the majority would require before permitting a plaintiff to prevail." *Id.* at 949, n.6. The majority underpinned its decision on the holdings of Celotex Corp. v. Catrett, 477 U.S. 317 (1986) and Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

them. Whether this was the case because of crowded dockets, or fear of jury sympathy, or because of Supreme Court encouragement via the summary judgment trilogy is open to debate. Certainly the climate for granting summary judgments improved after the trilogy. This is true because the trilogy cases were both specific enough and yet vague enough to permit the appellate courts to interpret them either as changing the law, or as applying only to the specific types of cases before the court, or as not changing the status quo at all in view of the court's assertions that judges should not invade the province of the jury.

The different circuit courts have viewed the standards for summary judgment and directed verdict under Rule 56 and the trilogy differently. Some appear more disposed to upholding summary judgments, while others seem more disposed to leaving any possible factual disputes to the jury. Yet affirmances of summary judgments and directed verdicts in ADEA cases have been found in virtually all of the circuits.

The bottom line for plaintiffs' lawyers seeking to avoid those ultimate ignominies, summary judgment and directed verdict, is to assure that their cases include sufficient direct, circumstantial, or statistical evidence of an animus to their clients on the basis of age. While "smoking gun" evidence is not required, it has never hurt the plaintiff's case. By invoking direct evidence of age animus, a dual motive situation may arise, effectively insulating the case from summary judgment and directed verdict. One can find too many cases where statistical proof has been discredited, or where circumstantial evidence has been called implausible, speculative, or conjectural.[282] So, despite the protestations to the contrary, it seems that direct evidence of animus from a decisionmaker occurring close to the time of the adverse decision remains the best prescription for reaching the jury.

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[282] *See, e.g.*, Waggoner v. City of Garland, Texas, 987 F.2d 1160, 1166 (5th Cir. 1993) ("speculative conclusions," "conclusionary allegations"); Walther v. Lone Star Gas Co., 977 F.2d 161, 162 (5th Cir. 1992) ("gross statistical disparities generally are not enough to rebut a valid, nondiscriminatory reason for discharge"); Chappell v. GTE Products Corp., 803 F.2d 261, 268 (6th Cir. 1986) ("mere personal beliefs, conjecture and speculation are insufficient to support an inference of age discrimination"). For cases dealing with "implausibility" see *supra* Section III(C).