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Mills v. Health Care Service Corporation: Are "Background Circumstances" too Much to Ask of a Plaintiff Alleging Reverse Discrimination in Employment?

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MILLS v. HEALTH CARE SERVICE CORPORATION: ARE "BACKGROUND CIRCUMSTANCES" TOO MUCH TO ASK OF A PLAINTIFF ALLEGING REVERSE DISCRIMINATION IN EMPLOYMENT?

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Title VII of the Civil Rights Act of 1964 was enacted to eradicate discrimination against persons on the basis of "race, color, religion, sex, or national origin"[1] in employment determinations.[2] Title VII protects members of *any* race, gender,

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1 42 U.S.C. § 2000e-2(a)(1) (1994). This section provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id.

2 *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (stating that Title VII requires that employers make employment decisions that are not based on race, sex, or national origin); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating that "[t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities"); Joyce A. Hughes, *"Reverse Discrimination" and Higher Education Faculty*, 3 MICH. J. RACE & L. 395, 399 (1998) (stating that Title VII "seeks to eliminate discrimination in employment opportunities"); Peter Gene Baroni, Case Note, *Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims Under Title VII*, 39 HOW. L.J. 797, 797 (1996) (noting that Title VII prohibits employers from discriminating based on unlawful criteria); Brenda D. DiLuigi, Note, *The* Notari *Alternative: A Better Approach to the Square-Peg-Round-Hole Problem Found in Reverse Discrimination Cases*, 64 BROOK. L. REV. 353, 357 (1998) ("Title VII . . . established the Equal Employment Opportunity Commission ('EEOC') and marked its task: to ensure that all individuals are given an evenhanded opportunity for employment and promotion on the basis of ability and qualification, without regard to race, color, sex, religion or national origin."); Tristin K. Green, Comment, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 983 (1999) (stating that Title VII has "served as an important tool in fighting discrimination in the workforce"); Janice C. Whiteside, Note, *Title VII and*

religion, or national origin.[3] In *McDonnell Douglas Corp. v. Green*,[4] a case involving discrimination against a black employee, the United States Supreme Court set the standard for the evaluation of disparate treatment employment discrimination claims using circumstantial evidence.[5] As suits were commenced

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Reverse Discrimination: The Prima Facie Case, 31 IND. L. REV. 413, 415 (1998) (stating that "[i]n sum, *McDonnell Douglas* enunciates that the primary purpose of Title VII is to assure neutral employment decisions"). Title VII provides "a federal cause of action for victims of invidious discrimination in the workplace." DiLuigi, *supra*, at 353. The protections afforded by Title VII extend to both individuals and groups. *See* E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 447 (1998).

[3] *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–80 (1976) (holding that because the terms of Title VII are "not limited to discrimination against members of any particular race," the Act applies to white plaintiffs in the same manner as it applies to minority groups); *McDonnell Douglas*, 411 U.S. at 800 (noting that, in reference to Title VII, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971))); Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (holding that "[w]hites are also a protected group under Title VII"); Carey v. Mt. Desert Island Hosp., No. 95-0157-B, 1996 U.S. Dist. LEXIS 12397, at *18–20 (D. Me. Aug. 21, 1996) (applying Title VII to a male plaintiff's claim of sex discrimination in employment); 45A AM. JUR. 2D *Job Discrimination* § 130 (1993) ("The same standards that prohibit race discrimination against nonwhites apply to whites."); DiLuigi, *supra* note 2, at 357 (stating that "[a]lthough [Title VII's] legislative history underscored the need to provide increased employment opportunity to minority persons, the neutral language of the statute reveals that the scope of Title VII was intended to reach persons of all races, including non-minorities") (footnote omitted); Bridget E. McKeever, Survey, *Tenth Circuit Provides Alternative for Majority Plaintiffs to State a Prima Facie Case Under Title VII:* Notari v. Denver Water Department, 34 B.C. L. REV. 440, 440–41 (1993) (noting that "Title VII's protections . . . extend to members of historically or socially favored groups").

[4] 411 U.S. 792 (1973).

[5] *See id.* at 802–04 (establishing the three-part framework for evaluating a black male's employment discrimination claim under Title VII); *see also* Scott Black, McDonnell Douglas' *Prima Facie Case and the Non-Minority Plaintiff: Is Modification Required?*, 1994 ANN. SURV. AM. L. 309, 310 (1995) (delineating the four elements required to make a prima facie case of discrimination under Title VII and the three-stage burden-shifting framework for evaluating Title VII employment discrimination cases); Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 659 (1998) (recognizing *McDonnell Douglas* as establishing a "three-stage, burden-shifting framework for analyzing employment discrimination cases"); DiLuigi, *supra* note 2, at 353 (stating that "*McDonnell Douglas Corp. v. Green*, established a framework for determining the existence of Title VII race-based employment discrimination on the basis of indirect evidence") (footnote omitted); Green, *supra* note 2, at 986–88 (noting that *McDonnell Douglas* established the three-stage "framework for the order and allocation of proof in Title VII individual disparate treatment cases based on

by non-minority plaintiffs, the federal courts split on the framework that must be established by "majority"[6] plaintiffs in employment discrimination actions.[7] Recently, in *Mills v. Health*

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circumstantial evidence"); Whiteside, *supra* note 2, at 419 (stating that all but one circuit has adopted the *McDonnell Douglas* framework in some form when evaluating "reverse discrimination" cases). The Supreme Court and other courts have since adopted the *McDonnell Douglas* framework in evaluating Title VII employment discrimination claims brought by females, whites, and males. *See Burdine*, 450 U.S. at 252 (adopting the *McDonnell Douglas* framework in evaluating a Title VII claim brought by a female); *McDonald*, 427 U.S. at 281–84 (discussing the three-part burden-shifting framework established by *McDonnell Douglas* in reference to a white plaintiff's claim of employment discrimination); Harding v. Gray, 9 F.3d 150, 152–53 (D.C. Cir. 1993) (adopting, with some adjustment, the *McDonnell Douglas* test in evaluating a male plaintiff's Title VII claim).

The *McDonnell Douglas* framework is a three-part burden-shifting test. *See McDonnell Douglas*, 411 U.S. at 802–05. The first part requires that the plaintiff establish a four-prong prima facie case. *See id.* at 802. Once the plaintiff has made a prima facie case, the second part requires that the defendant articulate non-discriminatory reasons for the employment decision. *See id.* If the defendant does articulate non-discriminatory reasons, the third part requires that the plaintiff show that those reasons are merely a pretext for a racially discriminatory decision. *See id.* at 804–05; *see also infra* Part I (providing an in-depth discussion of the *McDonnell Douglas* framework).

[6] The term "majority" refers to those plaintiffs who do not belong to historically disfavored groups or minorities. The term thereby includes both males and white persons. It does not, however, reflect the actual population numbers of any of these groups. *See* Iadimarco v. Runyon, 190 F.3d 151, 158–59 (3d Cir. 1999).

[7] *See id.* at 160–61. The *Iadimarco* court rejected the "background circumstances" test adopted by the Seventh and Tenth Circuits and held that:

> all that should be required to establish a prima facie case in the context of "reverse discrimination" is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII.

Id.; *see also* Mills v. Health Care Serv. Corp., 171 F.3d 450, 454–56 (7th Cir. 1999) (discussing the approaches taken by various federal courts in reverse discrimination cases); *Parker*, 652 F.2d at 1017 (requiring that in order to establish a prima facie case, majority plaintiffs show "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority"); *Carey*, 1996 U.S. Dist. LEXIS 12397, at *19 (requiring a male plaintiff to set forth the traditional *McDonnell Douglas* prima facie case); Baroni, *supra* note 2, at 797 (stating that some circuit courts have required that plaintiffs alleging reverse discrimination establish a different element in their prima facie case); DiLuigi, *supra* note 2, at 354–55 (noting that application of the *McDonnell Douglas* framework to reverse discrimination cases has been complex and has resulted in conflicting views among circuit and district courts); Whiteside, *supra* note 2, at 413 (noting that "[d]espite the number of reverse discrimination claims, the circuits have been unable to agree upon the requirements of the *McDonnell Douglas* prima facie case for a reverse discrimination claim") (footnote omitted). The reason for the disagreement among the courts is that the first element of the prima facie case set forth by the United States Supreme Court in *McDonnell Douglas*

Care Service Corp.,[8] the Seventh Circuit Court of Appeals concluded that the "majority" plaintiff, Douglas Mills, established a prima facie case of employment discrimination by setting forth evidence of "background circumstances which give rise to an inference of discrimination."[9]

Douglas M. Mills was employed by the defendant, Health Care Service Corporation (HCSC).[10] Mills began working at HCSC in 1988.[11] During his employment at HCSC's Quincy, Illinois office, he held a variety of positions.[12] Mills usually received favorable employment reviews.[13] In 1995, an assistant manager position was created at the Quincy office after one of the co-managers resigned.[14] Mills and three women applied for the position.[15] The sole remaining manager in the Quincy office, Linda Amburn, interviewed Mills and one of the women applying for the position, Darlene Butler.[16] The position was ultimately offered to Butler.[17] After the decision was made, Mills brought suit in the United States District Court for the Central District of Illinois alleging gender discrimination in violation of Title VII.[18] The District Court granted summary judgment in favor of the defendant, concluding that Mills could not establish that HCSC's articulated reasons for failing to promote him were merely pretextual.[19] The Seventh Circuit subsequently affirmed the district court's decision employing a somewhat different rationale.[20]

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requires that a plaintiff show membership in a minority group. *See Iadimarco*, 190 F.3d at 158. In a "reverse discrimination" case, the plaintiff necessarily cannot establish membership in a minority group. *See id.*; DiLuigi, *supra* note 2, at 356 (describing reverse discrimination as the " 'square-peg-round-hole' problem").

[8] 171 F.3d 450 (7th Cir. 1999).

[9] *Id.* at 457. The "background circumstances" test requires that a reverse discrimination plaintiff produce evidence that "support[s] the suspicion that the defendant is that unusual employer who discriminates against the majority." *Parker*, 652 F.2d at 1017; *see also infra* notes 63–72 and accompanying text (providing a detailed discussion of the "background circumstances" test).

[10] *See Mills*, 171 F.3d at 453.

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.* The resigning co-manager was a female. *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.* at 453–54.

[20] *See id.* at 460.

The circuit court began its analysis by discussing the two ways in which a plaintiff can avoid summary judgment in favor of a defendant in an employment discrimination action.[21] Because Mills did not set forth direct evidence of employment discrimination, the court analyzed his claim in terms of the *McDonnell Douglas* framework, which is used when indirect evidence is proffered.[22] The court addressed the problem encountered when a "majority" plaintiff attempts to present indirect evidence of employment discrimination using the *McDonnell Douglas* framework.[23] The court discussed two of the several ways in which the first element of the prima facie case could be altered to fit a "reverse discrimination"[24] claim.[25] The

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[21] *See id.* at 454. One way in which a plaintiff may avoid summary judgment in favor of a defendant is to "present direct evidence showing discriminatory intent by the defendant or its agents." *Id.* Direct evidence "must be supported by allegations which, 'if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.' " *Id.* (quoting Eiland v. Trinity Hosp., 150 F.3d 747, 751 (7th Cir. 1998)).

The second way in which a plaintiff may defeat a defendant's summary judgment motion is to offer some form of indirect evidence of discrimination. *See id.* Indirect evidence is generally presented in the form of the *McDonnell Douglas* burden-shifting framework. *See id.* An alternative way for a plaintiff to present indirect evidence of discrimination, without using the *McDonnell Douglas* framework, is to show " 'indirect evidence sufficient to support a reasonable probability... that but for [his] status [as a white male,] the challenged employment decision' would not have occurred." *Id.* at 456 (alteration in original) (quoting Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366, 1369 (10th Cir. 1997)).

[22] *See id.* at 454–55. The court began its analysis of the plaintiff's claim using the first part of the *McDonnell Douglas* framework. *See id.* The first part of the framework requires the plaintiff to establish a four-prong prima facie case. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[23] *See Mills*, 171 F.3d at 454–55. In order to use the *McDonnell Douglas* framework in a "reverse discrimination" action, the first prong of the prima facie case, which requires the plaintiff to belong to a protected minority class or be a female, must be altered. *See id.* at 454. The need to alter the first prong of the prima facie case in "reverse discrimination" claims has resulted in several different interpretations. *See infra* Part II.

[24] In this context, the term "reverse discrimination" refers to discrimination against a member of a "majority" group. The term has several definitions. *See* Philip L. Fetzer, *'Reverse Discrimination': The Political Use of Language*, 12 NAT'L BLACK L.J. 212, 216 (1993) (describing six different definitions of the term "reverse discrimination"); Hughes, *supra* note 2, at 404 (discussing the origin of the term in relation to affirmative action); *see also* Baroni, *supra* note 2, at 797 n.4 (defining "reverse discrimination" as a "Title VII discrimination claim by a majority plaintiff"); DiLuigi, *supra* note 2, at 354 n.12 (referring to the term and its definition "as '[a] type of discrimination in which majority groups are purportedly discriminated against in favor of minority groups' " (alteration in original) (quoting BLACK'S LAW DICTIONARY 1319 (6th ed. 1990)); Whiteside, *supra* note 2, at 413 n.2

court ultimately adopted the "background circumstances" test as a replacement for the first prong of the prima facie case.[26] The court also discussed, but did not apply, an alternative method by which a reverse discrimination plaintiff could use indirect evidence to survive a summary judgment motion by a defendant.[27] The court concluded that Mills established a prima

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(noting that the term "refers to discrimination against members of groups which have not traditionally been subjected to discrimination, such as nonminorities and males"). The term "reverse discrimination," however, has invoked much criticism. *See* Fetzer, *supra*, at 212 (stating "that 'reverse discrimination' is a covert political term which should be removed from the vocabulary of any serious academician or lay-person"); Hughes, *supra* note 2, at 405 (noting that "politicizing Title VII by reliance on the concept of 'reverse discrimination' is detrimental").

[25] *See Mills*, 171 F.3d at 455–56. The first option the court addressed was to drop the first prong of the prima facie case in actions involving "reverse discrimination." *See id.* at 455. The court, however, went no further than a one-sentence reference to this option. *See id.* The court then discussed an alternative option adopted by the District of Columbia Circuit and the Tenth Circuit. *See id.* This option is known as the "background circumstances" test. *See id.* The case most often cited as the origin of the "background circumstances" test is *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981). *See* Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993); Notari v. Denver Water Dep't, 971 F.2d 585, 588–89 (10th Cir. 1992); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985); Baroni, *supra* note 2, at 800–01; DiLuigi, *supra* note 2, at 361–62 (discussing *Parker*'s creation of the "background circumstances" test).

The *Mills* court also referred to the test adopted by the Sixth Circuit, which is similar to the "background circumstances" test. *See Mills*, 171 F.3d at 455 n.2 (discussing *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 (6th Cir. 1985), and the Sixth Circuit's continued use of the *Murray* test even though it was subjected to controversy within that circuit). The *Murray* test requires a reverse discrimination plaintiff to satisfy the "background circumstances" test and show "that the employer treated differently employees who were similarly situated but not members of the protected group." *Murray*, 770 F.2d at 67. In *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796 (6th Cir. 1994), the Sixth Circuit criticized, but did not reject, the use of the "background circumstances" test in reverse discrimination cases. *See id.* at 801 n.7 ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts.").

[26] *See Mills*, 171 F.3d at 456–57 (agreeing with the underlying rationale employed by the circuits that already adopted the "background circumstances" test); *see also infra* Parts II & III.

[27] *See Mills*, 171 F.3d at 456. The court noted that a reverse discrimination plaintiff who has failed to establish a prima facie case, in its modified form, may nonetheless produce indirect evidence that " 'establish[es] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground.' " *Id.* at 456–57 (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (per curiam)). The court also cited with approval the alternative approach adopted in *Taken v. Oklahoma Corp. Commission*, 125 F.3d 1366 (10th Cir. 1997). *See Mills*, 171 F.3d at 456. The alternative allows reverse discrimination plaintiffs to make out a prima facie case by producing evidence that

facie case by showing, along with the other three elements of the traditional formulation, sufficient "background circumstances which give rise to an inference of discrimination" in order "to overcome the background presumption that a white man was not subject to employment discrimination."[28] Having established the requisite prima facie case, the court went on to review the other two parts of the *McDonnell Douglas* framework.[29]

Under *McDonnell Douglas*, once the plaintiff establishes a prima facie case, the defendant must offer legitimate non-discriminatory reasons for the employment decision.[30] HCSC stated that Butler, the female candidate, had superior qualifications as compared to Mills.[31] Some of the qualifications emphasized by HCSC included Butler's computer science degree,

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is " 'sufficient to support a reasonable probability . . . that but for [his] status [as a white male] the challenged employment decision' would not have occurred." *Id.* (alteration in original) (quoting *Taken*, 125 F.3d at 1369). The court in *Taken* adopted this alternative test as it was set forth in *Notari v. Denver Water Department*, 971 F.2d 585 (10th Cir. 1992). *See Taken*, 125 F.3d at 1369.

The court in *Notari* adopted the alternative "but for" test in order to deal with the potentially anomalous situation where a black plaintiff would be able to establish a prima facie case of discrimination and a white plaintiff, subject to the "background circumstances" test, would not be able to establish a prima facie case using similar indirect evidence. *See Notari*, 971 F.2d at 589–90. The *Notari* court stated that "[t]he claims of two similarly situated victims of intentional discrimination should not be subjected to such dissimilar dispositions." *Id.* at 590.

Several other circuits adopted a form of the "but for" test in reverse discrimination cases. *See* Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999) (noting that in order to establish a prima facie case, all that a "reverse discrimination" plaintiff must show is "sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII"); Duffy v. Wolle, 123 F.3d 1026, 1036–37 (8th Cir. 1997) (citing *Notari* in adopting this alternative test in an action brought by a male plaintiff alleging gender discrimination); Ticali v. Roman Catholic Diocese, 41 F. Supp. 2d 249, 263 (E.D.N.Y. 1999) (discussing a plaintiff's reverse discrimination claim in terms of whether she produced direct or indirect evidence "sufficient to support a finding that [she] was assigned to teach a different class because of her religion, race or national origin").

[28] *Mills*, 171 F.3d at 457. Evidence that HCSC disproportionately promoted women during the seven years Mills was employed in the Quincy office was considered appropriate background circumstances by the court. *See id.* (noting that "[b]etween 1988–1995, nearly all promotions at the office went to women, and at the time the challenged hiring decision was made, females dominated the supervisory positions in the relevant office").

[29] *See id.* at 457–60.

[30] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[31] *See Mills*, 171 F.3d at 457–58.

her greater breadth of experience, and her superior performance on both oral and written interviews.[32]

In order to satisfy the third component of the *McDonnell Douglas* framework, the plaintiff must demonstrate that the non-discriminatory reasons offered by the defendant are pretextual.[33] Mills produced evidence that some of the reasons proffered by HCSC were possibly pretextual.[34] The court ultimately concluded, however, that Mills failed to prove that all of the non-discriminatory reasons set forth by HCSC were in fact pretextual.[35]

It is submitted that although the ultimate conclusion in *Mills* is correct, the court improperly adopted the "background circumstances" test in its evaluation of the plaintiff's prima facie case. The adoption of the background circumstances test does not mesh with the purposes of Title VII and *McDonnell Douglas*. In addition, because the evidence necessary to make a showing of background circumstances is vague, plaintiffs have a difficult time knowing what they must allege and prove in order to make out a prima facie case and survive a summary judgment motion.

Part I of this Comment will focus on *McDonnell Douglas* and the creation of the three-part burden-shifting framework. Part II will discuss reverse discrimination cases and the division among the circuits regarding appropriate changes that need to be made to the *McDonnell Douglas* standard for establishing a prima facie case. Part III will analyze the "background circumstances" test followed by some circuit and district courts, including the court in *Mills*. Part IV will discuss the alteration that should be made to the *McDonnell Douglas* framework in order to resolve the reverse discrimination problem.

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[32] *See id.* at 458.

[33] *See McDonnell Douglas*, 411 U.S. at 804. In order to defeat a summary judgment motion by the defendant, the *Mills* court required that the plaintiff "produce evidence from which a rational trier of fact could infer" that the employer lied about the reasons given for the employment decision. *Mills*, 171 F.3d at 458 (internal quotations and citation omitted).

[34] *See Mills*, 171 F.3d at 459. The court did not find that Mills' evidence of the falsity of HCSC's statement regarding the use of inquiry unit experience in its decision-making process "created a genuine issue of material fact" as to pretext because Mills did not show that *all* the reasons articulated by the defendant were pretext. *Id.* at 459–60.

[35] *See id.* at 459–60 (holding that "the plaintiff cannot show that the reasons HCSC proffered for hiring Darlene Butler over him were pretextual").

I. TITLE VII EMPLOYMENT DISCRIMINATION CLAIMS IN LIGHT OF *MCDONNELL DOUGLAS CORP. V. GREEN*

The United States Supreme Court, in *McDonnell Douglas Corp. v. Green*,[36] set forth the three-part framework courts use in evaluating employment discrimination claims brought under Title VII of the Civil Rights Act of 1964.[37] In *McDonnell Douglas*, a black plaintiff brought suit against his former employer alleging racial discrimination.[38] The defendant employer terminated the plaintiff's employment in 1964.[39] The plaintiff, in response to his dismissal, joined a "stall-in" protest planned by members of the Congress on Racial Equality.[40] At about the same time as the "stall-in," a "lock-in" took place at one of the defendant's buildings.[41] While it was unclear whether the plaintiff had any knowledge of the "lock-in," he was not arrested for any involvement in the event.[42] After the "lock-in," the defendant employer began advertising for mechanics, the same type of position the plaintiff once held at the corporation.[43]

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[36] 411 U.S. 792 (1973).

[37] *See id.* at 802–05; *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (recognizing *McDonnell Douglas* as the opinion that established the framework for analyzing Title VII cases); Chin & Golinsky, *supra* note 5, at 659 (stating "[i]n 1973, the Supreme Court established the *McDonnell Douglas* test"); Hughes, *supra* note 2, at 401–02; Baroni, *supra* note 2, at 798 (stating that the Supreme Court set forth the "framework governing a prima facie case of employment discrimination and the allocation of the burdens of proof" in *McDonnell Douglas*); DiLuigi, *supra* note 2, at 353–54 (referring to the *McDonnell Douglas* case as a "watershed" decision); Green, *supra* note 2, at 986 (referring to the three-part framework laid out in *McDonnell Douglas*); Whiteside, *supra* note 2, at 414–15.

[38] *See McDonnell Douglas*, 411 U.S. at 794.

[39] *See id.* Prior to his dismissal, the defendant had employed the plaintiff continuously for eight years, except for the plaintiff's twenty-one month military service. *See id.* at 794 & n.1. The defendant was in the process of reducing its work force when the plaintiff was dismissed. *See id.* at 794.

[40] *See id.* The "stall-in" was in protest to the defendant's alleged racial discrimination in employment decisions. *See id.* The protest involved the blockage of the access roads to the defendant's plant during a shift change. *See id.* The police broke up the protest shortly after it began and the plaintiff was arrested for his participation in the event. *See id.* at 795. The plaintiff pleaded guilty to an obstruction of traffic charge and received a fine. *See id.*

[41] *See id.* The "lock-in" involved the padlocking of the front door of an office building while certain employees of the defendant were still inside. *See id.*

[42] *See id.* at 795 & n.3. Because the plaintiff had participated in the "stall-in," the Court chose not to resolve the issue of whether the plaintiff knew about and/or participated in the "lock-in." *See id.*

[43] *See id.* at 796.

The plaintiff applied for a position but was allegedly rejected because of his participation in both the "stall-in" and "lock-in."[44]

The plaintiff filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), which eventually led to an employment discrimination suit against the corporation.[45] When the Eighth Circuit Court of Appeals reviewed the dismissal of the case, it attempted to establish rules to govern the burden of proof in employment discrimination actions.[46] The Supreme Court noted that the resulting decision of the Eighth Circuit was split into several opinions that failed to reflect a harmonious set of rules.[47] The Court granted certiorari "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination."[48]

The result of the Supreme Court's review of *McDonnell Douglas* was the creation of a three-part burden-shifting framework.[49] The first part of the framework consists of the four-prong prima facie case, which must be established by the plaintiff.[50] The first prong of the prima facie test requires the plaintiff to assert "that he belongs to a racial minority."[51] To satisfy the second prong, the plaintiff must establish "that he applied and was qualified for a job for which the employer was seeking applicants."[52] The third prong requires the plaintiff to demonstrate "that, despite his qualifications, he was rejected" for the position.[53] The fourth prong requires the plaintiff to show

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[44] *See id.*

[45] *See id.* at 796–97.

[46] *See id.* at 801.

[47] *See id.* ("The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.").

[48] *Id.* at 798. The Court held that the plaintiff should be given the opportunity, in a new trial, to prove that the defendant's reasons for not re-hiring him were pretextual. *See id.* at 807.

[49] *See id.* at 802–04.

[50] *See id.* at 802. The purpose of the prima facie case is to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). By establishing a prima facie case, the plaintiff "creates a presumption that the employer unlawfully discriminated against the employee." *Id.*

[51] *McDonnell Douglas*, 411 U.S. at 802.

[52] *Id.*

[53] *Id.*

"that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[54] These prongs, however, can be adjusted to fit different factual situations in Title VII employment discrimination actions.[55]

Once the plaintiff establishes, by a preponderance of the evidence, a prima facie case of employment discrimination, the burden shifts to the defendant to articulate non-discriminatory reasons for the employment decision.[56] If the defendant does not

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[54] *Id.*

[55] In *McDonnell Douglas*, the Court noted that "the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13. Courts have altered the prongs of the prima facie case in order to adapt the framework to the specific facts of the case. *See Burdine*, 450 U.S. at 253 n.6 (changing the first prong of the prima facie case to a showing that the plaintiff is a female); Iadimarco v. Runyon, 190 F.3d 151, 163 (3d Cir. 1999) (holding that "a plaintiff . . . should be able to establish a prima facie case . . . by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin' " (alteration in original) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978))); Parker v. Baltimore & Ohio R.R., 652 F.2d 1012, 1017–18 (D.C. Cir. 1981) (requiring reverse discrimination plaintiff to satisfy the background circumstances test instead of the traditional first prong of the prima facie case); Carey v. Mt. Desert Island Hosp., No. 95-0157-B, 1996 U.S. Dist. LEXIS 12397, at *16–19 (D. Me. 1996) (rejecting the heightened standard of background circumstances); Collins v. School Dist., 727 F. Supp. 1318, 1320–23 (W.D. Mo. 1990) (holding that "because plaintiff is male and is claiming that defendant unlawfully discriminated against him on the basis of his sex, he has satisfied the first element of the *McDonnell Douglas* prima facie case of discrimination"); Chin & Golinsky, *supra* note 5, at 663–64 (discussing the various changes made to the prima facie case requirements since the *McDonnell Douglas* decision); Baroni, *supra* note 2, at 799 (discussing changes to the prima facie elements in a discriminatory promotion case); DiLuigi, *supra* note 2, at 359–60 (discussing several cases in which courts have adjusted the framework to fit different types of employment discrimination claims).

[56] *See McDonnell Douglas*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 254–55 (applying the *McDonnell Douglas* framework). The defendant carries the burden of production at this stage, not the burden of persuasion. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993) (explaining that this presumption only shifts the burden of production, not the burden of persuasion, to the party who does not bear the original burden of persuasion); *Burdine*, 450 U.S. at 255–58 (explaining that the Court of Appeals improperly required the defendant to carry the burden of persuasion, instead of the burden of production); Chin & Golinsky, *supra* note 5, at 664–65 (noting that the *Burdine* Court made it clear that the defendant bears the burden of production); Baroni, *supra* note 2, at 799–800 (noting that "defendant's burden is merely one of production"); Green, *supra* note 2, at 988. The burden of persuasion always remains with the plaintiff. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983); *Burdine*, 450 U.S. at 255–56 (discussing the burdens of production and persuasion assigned to the parties); Chin

set forth a non-discriminatory reason for the decision and the evidence produced by the plaintiff in his or her prima facie case is believed, the trier of fact must find for the plaintiff.[57] If, however, the defendant does articulate non-discriminatory reasons for the employment decision, the burden shifts back to the plaintiff[58] to show that the reasons proffered by the defendant are pretextual.[59] The plaintiff must satisfy the third element of the framework in order to prevail in an employment discrimination action.[60]

& Golinsky, *supra* note 5, at 664; Baroni, *supra* note 2, at 799–800; Green, *supra* note 2, at 988.

[57] *See Burdine*, 450 U.S. at 254 & n.7. ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.").

[58] *See Aikens*, 460 U.S. at 714–15 (noting that when the defendant provides a non-discriminatory reason, the presumption of discrimination is dropped and the inquiry proceeds to the ultimate question of whether the decision was in fact discriminatory); *McDonnell Douglas*, 411 U.S. at 804–05.

[59] *See Burdine*, 450 U.S. at 256 (noting that a plaintiff may succeed at this stage if she demonstrates "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence"); *McDonnell Douglas*, 411 U.S. at 804–05 (holding that a plaintiff must show "that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision"); Baroni, *supra* note 2, at 800 (stating that pretext may be demonstrated using direct evidence; indirect evidence of disparate treatment of one race or gender in comparison to other races or another gender; or statistical evidence of disparate treatment of others of the same race or gender as the plaintiff). The Supreme Court later refined the requirements of the pretextual showing. *See Hicks*, 509 U.S. at 511; *see also* Whiteside, *supra* note 2, at 418. The *Hicks* Court held that the plaintiff must show the reasons offered by the defendant were false and that the discrimination was the actual basis for the decision. *See Hicks*, 509 U.S. at 511 & n.4; *see also* Whiteside, *supra* note 2, at 418 (describing the *Hicks* opinion as establishing a "pretext-plus" analysis). The *Hicks* decision prompted a variety of interpretations and criticism among lower courts and legal scholars. *See* Chin & Golinsky, *supra* note 5, at 666; Whiteside, *supra* note 2, at 418 n.34.

[60] *See Hicks*, 509 U.S. at 515 (recognizing that "what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands"); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (explaining that the Court of Appeals improperly equated the prima facie case with a determination that an employer discriminated against the plaintiff in violation of Title VII); Whiteside, *supra* note 2, at 418 (noting that in most cases, "the plaintiff must present evidence beyond that required to establish a prima facie case").

II. "REVERSE DISCRIMINATION" CASES AND THE SPLIT AMONG THE CIRCUITS

The clash between the *McDonnell Douglas* framework and suits alleging discrimination against a majority plaintiff caused a division among the federal courts.[61] In their attempts to adapt the *McDonnell Douglas* holding to instances involving reverse discrimination, courts have modified the prima facie case in several different ways.[62] The modification adopted by the most circuits is some form of the "background circumstances" test.[63]

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[61] *See* Iadimarco v. Runyon, 190 F.3d 151, 158–60 (3d Cir. 1999) (noting the different changes made to the *McDonnell Douglas* framework by many courts); Mills v. Healthcare Serv. Corp., 171 F.3d 450, 454–57 (7th Cir. 1999) (discussing various approaches to reverse discrimination cases taken by circuit and district courts); Ticali v. Roman Catholic Diocese, 41 F. Supp. 2d 249, 260–61 (E.D.N.Y. 1999); 45A AM. JUR. 2D *Job Discrimination* § 130 (1993) (recognizing two different approaches to "reverse discrimination" cases); Baroni, *supra* note 2, at 802–04 (noting that "[t]here is an ongoing battle among the circuits over whether to follow *Parker's* background circumstances test in reverse discrimination actions under Title VII"); DiLuigi, *supra* note 2, at 355 ("Circuit and district courts addressing this issue have produced conflicting views"); McKeever, *supra* note 3, at 445 (noting that the *Notari* court focused on the conflict between two approaches to the reverse discrimination problem); Whiteside, *supra* note 2, at 419–20 (asserting that federal courts have not agreed on the correct formulation for the prima facie case in reverse discrimination claims).

[62] *See Iadimarco*, 190 F.3d at 163 (stating that to establish a prima facie case, "[t]he Title VII plaintiff needs only to present sufficient evidence to allow a fact finder to conclude that the unexplained decision that forms the basis of the allegation of discrimination was motivated by discriminatory animus"); Notari v. Denver Water Dep't, 971 F.2d 585, 589–90 (10th Cir. 1992) (stating that a reverse discrimination plaintiff may either follow the "background circumstances" test or produce "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff"); Ustrak v. Fairman, 781 F.2d 573, 577 (7th Cir. 1986) (holding that the *McDonnell Douglas* framework does not apply to cases of employment discrimination against a white employee because "no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black"); Parker v. Baltimore & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (requiring that a reverse discrimination plaintiff satisfy the first prong of the *McDonnell Douglas* prima facie case by showing "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority"); Collins v. School Dist., 727 F. Supp. 1318, 1323 (W.D. Mo. 1990) (finding that because the plaintiff was male and claimed gender discrimination, the first prong of the *McDonnell Douglas* prima facie case had been met).

[63] *See* Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997) (adopting the background circumstances test and citing the *Notari* opinion with approval); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985) (adopting the background circumstances test); *Parker*, 652 F.2d at 1017; Barnes v. Federal Express Corp., No. CIV.A.95-CV-333-D-D, 1997 U.S. Dist. LEXIS 9882, at *21 (N.D. Miss. May 19, 1997) (holding that the background circumstances test "more

Instead of establishing the first prong of the traditional *McDonnell Douglas* prima facie case, a plaintiff must establish "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority."[64] This test is based on the assumption that most employers discriminate against minorities and that the promotion of a minority employee over a majority employee does not raise an inference of discrimination.[65]

Two types of evidence can be used to satisfy the "background circumstances" test.[66] The first type is "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites."[67] The second type is "evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of

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adequately encompasses the plethora of relevant facts that may give rise to such an inference of discrimination"); Black, *supra* note 5, at 313; DiLuigi, *supra* note 2, at 365 (noting that the background circumstances test is "perhaps the most widely accepted approach to reverse discrimination cases," even though it has been attacked by other courts). The Seventh and Tenth Circuits have adopted both the "background circumstances" as well as another test. *See Mills* 171 F.3d at 456–57; *Notari*, 971 F.2d at 589–90. The second test requires the plaintiff to establish "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff." *Notari*, 971 F.2d at 590.

[64] *Parker*, 652 F.2d at 1017; *see also* Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993).

[65] *See Parker*, 652 F.2d at 1017 (noting that "it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society"); *see also* Baroni, *supra* note 2, at 808–09 (discussing the *Harding* court's holding and the various ways a majority plaintiff can meet the heightened standard of proof in order to establish a prima facie case); DiLuigi, *supra* note 2, at 362 (citing *Parker* and *Harding* to explain why the higher standard of proof in reverse discrimination cases is required).

[66] *See Harding*, 9 F.3d at 153 (discerning from prior cases two general categories of evidence that are sufficient to establish "background circumstances"); Baroni, *supra* note 2, at 807–08; DiLuigi, *supra* note 2, at 363.

[67] *Harding*, 9 F.3d at 153; *see also* Baroni, *supra* note 2, at 808 (discussing the types of evidence that fit into this category); DiLuigi, *supra* note 2, at 363. The *Harding* court cited to several of its prior holdings that included evidence in this category. *See, e.g.*, Bishopp v. District of Columbia, 788 F.2d 781, 786–87 (D.C. Cir. 1986) (involving evidence of minority supervisors combined with proposed affirmative action plan); Lanphear v. Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (providing evidence of external pressure on hiring authority to increase percentage of minorities in its employ as well as proposed affirmative action plan); Daye v. Harris, 655 F.2d 258, 261 n.8 (D.C. Cir. 1981) (containing evidence that showed a disproportionate amount of promotions going to nonwhite nurses).

discrimination."[68] Specific types of evidence found to satisfy the background circumstances analysis have included: (1) superior qualifications of the plaintiff;[69] (2) "disproportionate hiring patterns" favoring women over men;[70] (3) an expression of an interest in hiring a female by the person in charge of hiring;[71] and (4) the fact that most supervisors and all employees in the department are Hispanic and the plaintiff is white.[72]

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[68] *Harding*, 9 F.3d at 153; *see also* Baroni, *supra* note 2, at 808–09; DiLuigi, *supra* note 2, at 363. The *Harding* court referred to cases it cited regarding the first type of "background circumstances" evidence to show the types of evidence that fit into the second category. *See, e.g.*, *Bishopp*, 788 F.2d at 786–87 (promoting "in an unprecedented fashion" a minority employee less qualified than four white plaintiffs); *Lanphear*, 703 F.2d at 1315 (explaining how an overly qualified plaintiff received "little or no consideration" for a position which was ultimately filled by a minority applicant and how the hiring official failed to fully inquire into the qualifications of the minority promotee); *Daye*, 655 F.2d at 260 (noting plaintiff's allegation of a conspiracy that sought to rig performance ratings within the "Hospital Merit Promotion Plan" ultimately resulting in the promotion of lesser qualified minority nurses). The *Harding* court also noted that this second type of evidence of "background circumstances" might establish, on its own, a prima facie case of discrimination. *See Harding*, 9 F.3d at 153.

[69] *See Harding*, 9 F.3d at 153–54. The *Harding* court reasoned that:

> A rational employer can be expected to promote the more qualified applicant over the less qualified, because it is in the employer's best interest to do so. And when an employer acts contrary to his apparent best interest in promoting a less-qualified minority applicant, it is more likely than not that the employer acted out of a discriminatory motive.

Id.; *see also* Baroni, *supra* note 2, at 808–09; DiLuigi, *supra* note 2, at 363.

[70] Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999) (finding plaintiff satisfied the "background circumstances" test by showing that at the plaintiff's office almost all promotions were given to women, and that women held most of the supervisory positions).

[71] *See* Duffy v. Wolle, 123 F.3d 1026, 1037 (8th Cir. 1997) (finding that interest in hiring a female, evidence of superior qualifications of the plaintiff, and evidence of other female hires were all "background circumstances"). The *Duffy* court noted that "Duffy [was] statutorily exempt from bringing a claim under Title VII." *Id.* at 1036 (citing 42 U.S.C. § 2000e-16 (1994). Duffy, however, was able to bring a *Bivens* action, which is "an inherent cause of action [recognized by the Supreme Court] for damages against federal actors for violations of federal constitutional rights." *Id.* at 1033. In this case, the federal constitutional right alleged to be violated was "[t]he Due Process Clause of the Fifth Amendment to the United States Constitution," which forbid[s] the federal government from discriminating on the basis of gender." Although this was not a Title VII employment discrimination claim, the court still applied the "background circumstances" test as a replacement for the first prong of the *McDonnell Douglas* prima facie case. *See id.* at 1036–37.

[72] *See* Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1534–35 (10th Cir. 1995) (concluding that a white plaintiff satisfied the "background circumstances" test by showing that she was the only non-Hispanic member of the Bilingual/ESOL Department).

A more recent approach has been to require the plaintiff to "present[] sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin,' " instead of requiring a showing of "background circumstances."[73] Other courts have required plaintiffs to satisfy either the background circumstances test or " 'establish[] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground.' "[74]

A fourth approach to the situation is to substitute a showing that the plaintiff is a member of a minority group for a showing that the plaintiff is a member of a class.[75] This test generally requires that a reverse discrimination plaintiff show that he is white, male, or both, depending on the type of discrimination alleged, instead of membership in a racial minority, as is required by the traditional prima facie case.[76] A final approach

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[73] Iadimarco v. Runyon, 190 F.3d 151, 163 (3d Cir. 1999) (second alteration in original) (quoting Furnco Const. Corp. v. Waters, 450 U.S. 567, 577 (1978)).

[74] *Mills*, 171 F.3d at 456–57 (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (per curiam)) (adopting both the background circumstances test and an alternative test and citing with approval most of the *Notari* approach to the reverse discrimination problem); *see also* Fucarino v. Thornton Oil Corp., No. 98-C1429, 1999 U.S. Dist. LEXIS 13609, at *20–21 (N.D. Ill. Aug. 23, 1999) (adopting the *Mills* standard). In *Notari v. Denver Water Department*, 971 F.2d 585 (10th Cir. 1992), the court adopted a similar approach, allowing reverse discrimination plaintiffs to establish a prima facie case either through the background circumstances test or by showing "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff." *Id.* at 590.

[75] *See* Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991) (requiring a reverse discrimination plaintiff to prove membership in a class); Carey v. Mt. Desert Island Hosp., No. 95-0157-B, 1996 U.S. Dist. LEXIS 12397, at *19 (D. Me. Aug. 21, 1996) (applying the traditional *McDonnell Douglas* framework to a suit alleging gender discrimination and holding that the male plaintiff satisfied the test); Collins v. School Dist., 727 F. Supp. 1318, 1323 (W.D. Mo. 1990) (finding that the first prong of the *McDonnell Douglas* prima facie case was established because the plaintiff was a male and alleged unlawful gender discrimination); DiLuigi, *supra* note 2, at 365–66 (underscoring the *Wilson* court's apparent rejection of the "background circumstances" test); Whiteside, *supra* note 2, at 426–27 (discussing the *Collins* court's rejection of the "background circumstances" test in favor of requiring the plaintiff simply to state class membership). The Eighth Circuit Court of Appeals eventually chose to adopt the "background circumstances" test in lieu of the standard set forth in *Collins* in a *Bivens* employment discrimination case. *See Duffy*, 123 F.3d at 1037; *see also supra* note 71 (discussing Duffy's *Bivens* employment discrimination action).

[76] *See Carey*, 1996 U.S. Dist. LEXIS 12397, at *14, 19 (observing that since the first prong of a prima facie gender discrimination suit requires membership in a

to the conflict is to reject altogether the *McDonnell Douglas* framework when analyzing a reverse discrimination claim.[77] This approach is based on the assumption that the *McDonnell Douglas* prima facie case was meant to assist minorities and women only.[78] Under this approach, the plaintiff in a reverse discrimination action may not rely on a presumption of discrimination solely because a minority candidate is chosen.[79]

III. THE "BACKGROUND CIRCUMSTANCES" TEST IS A FAILURE

The court in *Mills* applied the "background circumstances" test to the plaintiff's reverse discrimination case.[80] The "background circumstances" test, however, should not be used as a replacement for the first prong of the *McDonnell Douglas* prima facie case.[81] First, the test improperly requires a reverse discrimination plaintiff to make a greater showing at the prima facie level than other plaintiffs who allege employment discrimination under Title VII.[82] By requiring a greater degree

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protected class, the male plaintiff established that element); *Collins*, 727 F. Supp. at 1323 (stating that the plaintiff established the first prong of a prima facie case because he was a male and alleged gender discrimination).

[77] *See* Ustrak v. Fairman, 781 F.2d 573, 577 (7th Cir. 1986) (holding that the presumption of discrimination which arises when minorities and women make out a prima facie case does not arise for white plaintiffs). *But see* Whiteside, *supra* note 2, at 420 (criticizing the *Ustrak* court's decision to not apply the *McDonnell Douglas* framework to a reverse discrimination action). The Seventh Circuit has since held that the *McDonnell Douglas* framework does indeed apply, with some alteration, to reverse discrimination claims. *See Mills*, 171 F.3d at 454–56.

[78] *See Ustrak*, 781 F.2d at 577.

[79] *See id.*

[80] *See Mills*, 171 F.3d at 456–57 (adopting the "background circumstances" test, which emanates from the presumption that "it is the unusual employer who discriminates against majority employees").

[81] *See* Iadimarco v. Runyon, 190 F.3d 151, 160 (3d Cir. 1999) (rejecting the "background circumstances" test); *Carey*, 1996 U.S. Dist. LEXIS 12397, at *16–17 (holding that the "background circumstances" standard should not be adopted); *Collins*, 727 F. Supp. at 1322–23 (holding that reverse discrimination plaintiff need not make a showing of background circumstances to establish a prima facie case); *see also* Whiteside, *supra* note 2, at 428 (submitting that a reverse discrimination plaintiff should not have to show background circumstances).

[82] *See Iadimarco*, 190 F.3d at 159 (discussing several cases that regard the "background circumstances" approach as a heightened standard which should not be required of reverse discrimination plaintiffs); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."); *Carey*, 1996 U.S. Dist. LEXIS 12397, at *15–19 (discussing "background circumstances" as a heightened standard and holding that a heightened standard violates Title VII's

of proof from some plaintiffs and not others, the "background circumstances" test violates the intent of the neutral language in Title VII.[83]

Second, the "background circumstances" test alters the entire *McDonnell Douglas* burden-shifting framework.[84] The test requires the reverse discrimination plaintiff to present evidence that would usually be required of a plaintiff at the third

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language); *Collins*, 727 F. Supp. at 1321–22 (criticizing the "background circumstances" test as requiring more of reverse discrimination plaintiffs at the prima facie level of judicial inquiry); *see also* Black, *supra* note 5, at 313, 328 (asserting that any modification of the *McDonnell Douglas* analysis contravenes the broad purpose behind Title VII and confounds the role of the prima facie case in establishing employment discrimination claims); Baroni, *supra* note 2, at 816 (discussing the apparent contradiction in the *Harding* court's claim that background circumstances do not require more of a reverse discrimination plaintiff when that court specifically applied a different, more onerous burden to a majority plaintiff); DiLuigi, *supra* note 2, at 370 (commenting that reverse discrimination plaintiffs must bear a higher burden when the "background circumstances" formulation is applied); Whiteside, *supra* note 2, at 429–30 (noting that background circumstances require reverse discrimination plaintiffs to prove more at the prima facie stage). The District of Columbia Court of Appeals, however, held that the "background circumstances" test is not a heightened standard for reverse discrimination plaintiffs. *See* Harding v. Gray, 9 F.3d 150, 153–54 (D.C. Cir. 1993) (stating that the "background circumstances" approach is not an "additional hurdle" for reverse discrimination plaintiffs). The court in *Mills* suggested that eliminating the "background circumstances" test would actually allow reverse discrimination plaintiffs to prove less in order to make out a prima facie case. *See Mills*, 171 F.3d at 457.

[83] *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (listing "race, color, religion, sex, or national origin" as protected classifications without limitations on the *particular* "race, color, religion, sex, or national origin" of the individual); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (stating that "Title VII . . . proscribe[s] racial discrimination . . . against whites on the same terms as racial discrimination against nonwhites"); *Iadimarco*, 190 F.3d at 161 (discussing prima facie case requirements as applicable to all Title VII plaintiffs); *Collins*, 727 F. Supp. at 1322 (emphasizing that legitimate Title VII claims are defeated by a background circumstances requirement); *see also* Whiteside, *supra* note 2, at 434 (arguing that since Title VII prohibits discrimination based upon protected attributes, the "background circumstances" test should not be applied because it treats plaintiffs differently based on those very attributes).

[84] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (recognizing that the prima facie showing is not tantamount to an ultimate finding of fact that employment discrimination existed); *Iadimarco*, 190 F.3d at 161 (noting that background circumstances "can undermine the basic point of the *McDonnell Douglas* burden-shifting regime"); *Collins*, 727 F. Supp. at 1321 (stating that the "background circumstances" standard "eliminates the *McDonnell Douglas* framework from reverse discrimination cases"); Black, *supra* note 5, at 337 (stating that the "background circumstances" test almost requires reverse discrimination plaintiffs to demonstrate direct evidence of discrimination); Whiteside, *supra* note 2, at 427.

stage of the framework.[85] By prematurely invoking the third step, reverse discrimination plaintiffs must present evidence of pretext before they get the benefit of forcing the defendant to articulate nondiscriminatory reasons for its employment determination.[86]

The Supreme Court noted that "the method suggested in *McDonnell Douglas* for pursuing [an employment discrimination] inquiry . . . was never intended to be rigid, mechanized, or ritualistic."[87] The Court appears to be referring to the changes that are necessary to adapt the prima facie case to different types of employment decisions.[88] By adopting the background

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[85] *See Iadimarco*, 190 F.3d at 161; *Collins*, 727 F. Supp. at 1321; *see also* Whiteside, *supra* note 2, at 430 (noting that types of evidence reviewed by the *Parker* court in the background circumstances context were used by the *McDonnell Douglas* Court in determining pretext).

[86] *See Iadimarco*, 190 F.3d at 161 (noting that acceleration of the pretext analysis to the prima facie step destroys one of the underlying motifs of the framework, i.e., a gradual process of first removing some of the typical nondiscriminatory reasons for employment decisions and then placing the burden on the defendant employer to articulate a legitimate nondiscriminatory reason for its decision); *Collins*, 727 F. Supp. at 1321; *see also* Whiteside, *supra* note 2, at 430 (maintaining that a "background circumstances" standard requires a "reverse discrimination plaintiff [to] justify the presumption" that arises through the showing of a prima facie case, something which is clearly not required of minority plaintiffs).

[87] *Furnco Constr. Corp.*, 438 U.S. at 577. When it set down the elements of the prima facie case in *McDonnell Douglas*, the Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification... of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973). The Court, in discussing the elements of the prima facie case, further articulated that "[r]equirement (i) of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination." *McDonald*, 427 U.S. at 279 n.6. This supports the reading of Title VII as proscribing all discrimination based on race in the employment sector. It also implies that plaintiffs can present evidence of racial discrimination in another manner, so long as the burden on plaintiffs is not different. This reading is at odds with the "background circumstances" test because that test requires reverse discrimination plaintiffs to bear a higher burden than other plaintiffs. Another author has interpreted footnote six in *McDonald* in a similar manner, concluding that the "background circumstances" test is not in accord with Supreme Court precedent. *See* Whiteside, *supra* note 2, at 435–36. That author, however, further concluded that in reverse discrimination cases, the first element of the prima facie case should be changed from a statement of membership in a racial minority to a statement of class membership. *See id. But see infra* Part IV (discussing a better solution to the reverse discrimination problem).

[88] *See* Whiteside, *supra* note 2, at 435. The changes in the elements of the prima facie case that have been made in the past relate to different types of

circumstances test, however, the court in *Mills* overstepped the bounds provided by the United States Supreme Court. The *Mills* court distorted the proof required of plaintiffs at the prima facie level and made reverse discrimination plaintiffs put forth evidence of the ultimate question of discrimination at the very beginning of the case.

In addition, as the Court noted in discussing the burden-shifting framework, employment discrimination is often difficult to prove.[89] The prima facie case was designed to assist plaintiffs, rather than burden them.[90] The "background circumstances" test, however, performs just the opposite function by requiring a reverse discrimination plaintiff to meet a higher standard of proof at the prima facie level.[91]

Finally, the courts that have adopted the "background circumstances" test have failed to clearly define or apply it.[92] The test does not provide a clear standard for reverse discrimination plaintiffs to follow when attempting to establish a

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employment actions. *See id.* It is more likely that the Court was discussing these types of changes to the prima facie case when it noted that changes would need to be made in the prima facie elements to fit the facts of the case, not changes that would alter the entire framework, as does the "background circumstances" test. *See id.*

[89] *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult."); *Collins*, 727 F. Supp. at 1321 (stressing that "[t]he *McDonnell Douglas* framework was ... a procedural embodiment of the recognition that employment discrimination is difficult to prove with only circumstantial evidence"); Whiteside, *supra* note 2, at 433 ("The purpose of the prima facie case is to assist plaintiffs who do not have direct evidence of discriminatory intent."). The Court also noted that in dealing with the difficult problem of discriminatory intent, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Aikens*, 460 U.S. at 716.

[90] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (noting that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous"); Whiteside, *supra* note 2, at 436 (noting that, in establishing a prima facie case, the burden imposed upon the plaintiff is not "onerous" and the factual showing is "minimal" in order "to allow the plaintiff to get past the summary judgement stage of litigation").

[91] *See* Black, *supra* note 5, at 336 (underscoring that the "background circumstances" test adopted by the *Parker* court places a burden on the reverse discrimination plaintiff "that is nearly close to impossible to meet and one that destroys the very purpose of the prima facie case").

[92] *See* Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999) (stating that "the concept of 'background circumstances' is irremediably vague and ill-defined"); *see also* Whiteside, *supra* note 2, at 431 (noting that "[t]he factual showing necessary to meet the requirement of background circumstances is unclear; it changes with each individual case and the individual judges deciding each case").

prima facie case of reverse discrimination.[93] Plaintiffs should not be subjected to an undefined requirement in order to make out a prima facie case.

In *Mills*, the court found that the plaintiff produced evidence that was sufficient to satisfy the "background circumstances" test.[94] Other reverse discrimination plaintiffs, however, have not been as successful in satisfying the "background circumstances" test.[95] The *McDonnell Douglas* framework was meant to guide plaintiffs in order to sustain their case beyond summary judgment.[96] By requiring reverse discrimination plaintiffs to satisfy the "background circumstances" test, plaintiffs are less likely to defeat summary judgment motions than are other employment discrimination plaintiffs. In addition, the higher burden placed upon reverse discrimination plaintiffs defeats the equitable purposes of Title VII.

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[93] *See Iadimarco*, 190 F.3d at 161 (questioning whether the fact that the plaintiff was more qualified than the person actually hired is a background circumstance); *see also* Whiteside, *supra* note 2, at 430–31 (noting the confusion created by court decisions which hold that the plaintiff has failed to demonstrate facts sufficient to satisfy the "background circumstances" test without identifying facts that would be sufficient).

[94] *See* Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999) (holding that the facts presented by plaintiff were "enough to overcome the background presumption that a white man was not subject to employment discrimination").

[95] *See* Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 68 (6th Cir. 1985) (holding that because the reverse discrimination plaintiff failed to set forth "background circumstances suggesting the defendants are the unusual employers who discriminate against the majority," summary judgment in favor of the employer was proper, without providing any indication of what evidence would be acceptable); *see also* Whiteside, *supra* note 2, at 430–31 (discussing cases in which reverse discrimination plaintiffs did not satisfy the background circumstances test and demonstrating the lack of clarity regarding what facts are necessary to satisfy the background circumstances test).

[96] *See* Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985). The *Trans World* Court stated that "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Id.* (alteration in original) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)); *see also* Whiteside, *supra* note 2, at 429 (noting that the Court, in *Trans World*, has articulated the purpose of the *McDonnell Douglas* framework "as helping the plaintiff survive summary judgement so that he or she has an opportunity to prove the case in court despite the absence of direct evidence").

IV. A BETTER SOLUTION TO THE REVERSE DISCRIMINATION PROBLEM

When faced with a reverse discrimination plaintiff, courts should abandon the "background circumstances" test as a modification of the first prong of the *McDonnell Douglas* test in favor of the approach taken by the court in *Iadimarco v. Runyon*.[97] In *Iadimarco*, the court concluded that when a reverse discrimination plaintiff attempts to establish a prima facie case with indirect evidence, the plaintiff must present "sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin.' "[98] The *Iadimarco* approach conforms to the purposes and requirements of each stage of the traditional *McDonnell Douglas* framework and avoids the problems associated with the "background circumstances" test. Therefore, the *Iadimarco* approach more properly serves the equitable purposes of Title VII.

In *Iadimarco*, the plaintiff, a white male, alleged reverse discrimination in employment after his employer, the Postal Service, failed to offer him a promotion.[99] During a reorganization of the Postal Service, many positions were eliminated and managerial employees were asked to submit their preferences for available managerial positions.[100] As requested, Iadimarco indicated his preference for three of the available positions.[101] White male employees filled two of the three positions he listed.[102] Among the remaining candidates for the third position, only three were rated " 'superior' " in six different " 'knowledge, skills and abilities' " categories used by the Postal Service to evaluate employees.[103] Two of the candidates were placed in other jobs, leaving Iadimarco as the only candidate for the position who received a rating of

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[97] 190 F.3d 151 (3d Cir. 1999).

[98] *Id.* at 163 (alteration in original) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

[99] *See id.* at 154.

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *Id.* The categories were related to management abilities, customer service, and technical skills. *See id.* at 154 n.1.

"superior" in all six categories.[104] Instead of automatically promoting Iadimarco, his supervisor sought additional applicants for the position.[105] Shortly thereafter, Iadimarco took another job in the Postal Service.[106] A black female, Ms. Williams, subsequently filled the position Iadimarco had sought.[107]

The court found that the evidence presented by Iadimarco was sufficient to establish a prima facie case for the purpose of shifting the burden pursuant to the framework outlined in *McDonnell Douglas*.[108] The court noted that, unlike Iadimarco, Williams was not rated by the Postal Service.[109] Furthermore, Williams had no experience in a comparable position.[110] The court also discussed the change in the job requirements after Williams became a candidate for the position. Specifically, an engineering degree, which Williams allegedly did not possess, was no longer a requirement for the position.[111] The court stated that this evidence must be viewed in light of a diversity memo distributed by the supervisor who declined to promote Iadimarco.[112] The court determined that, based on the evidence presented by Iadimarco, the district court erred in finding that Iadimarco failed to establish a prima facie case of "reverse discrimination."[113]

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104 *See id.* at 154.

105 *See id.* Iadimarco's supervisor testified that he sought additional applicants because "he did not think that Iadimarco should be promoted by 'default.' " *Id.*

106 *See id.* at 155.

107 *See id.*

108 *See id.* at 164–65.

109 *See id.* at 164 (stating that the fact that Iadimarco's supervisor hired Williams even though she was not rated by the Postal Service "certainly raises suspicions").

110 *See id.* (noting that "Iadimarco had previously been In-Plant manager in Trenton, and therefore had experience as an In-Plant manager [while] Williams did not").

111 *See id.* (stating that it was unexplainable why the focus on engineering backgrounds was subsequently abandoned).

112 *See id.* The memo discussed the importance of diversity in the workplace and stated that management positions "should reflect the composition of our workforce and communities if we are to benefit from the contributions that minorities, women, and ethnic groups can bring to our decision making processes." *Id.* at 155. The court noted that the memo itself did not establish a prima facie case of reverse discrimination. *See id.* at 164. The court, however, was willing to give greater weight to that evidence because when faced with a motion for summary judgment, it must draw inferences of discrimination in favor of the plaintiff. *See id.*

113 *See id.* at 165.

The court in *Mills* adopted a test to determine whether a plaintiff has established a prima facie case of reverse discrimination that takes a middle approach and is similar to the test adopted in *Iadimarco*.[114] The middle approach adopted by the court in *Mills* allows a reverse discrimination plaintiff to make out a prima facie case by " 'establish[ing] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground.' "[115] Both the *Iadimarco* approach and the *Mills* alternative seem to broadly view the indirect evidence presented to determine whether the employer discriminated against the plaintiff in violation of Title VII,[116] instead of requiring that the plaintiff fit his or her evidence into one of the two categories of background circumstances.[117] The *Mills* court, however, also adopted and subsequently applied the "background circumstances" test to analyze the plaintiff's claim.[118]

There is no need to apply a "background circumstances" test once the middle approach is taken.[119] The "background circumstances" test attempts to fit a new standard into the first prong of the prima facie case and requires a plaintiff to satisfy the modified four prongs of the prima facie case. Instead of this approach, a reverse discrimination plaintiff should be allowed to focus directly on the issue of employment discrimination.[120] Once the plaintiff establishes a prima facie case "by presenting sufficient evidence to allow a reasonable fact finder to conclude

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[114] *See* Mills v. Health Care Serv. Co, 171 F.3d 450, 457 (7th Cir. 1999).

[115] *Id.* (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (per curiam)).

[116] *See Iadimarco*, 190 F.3d at 163 (stating that "the totality of the circumstances" should be reviewed to determine whether the plaintiff has established a prima facie case); *Mills*, 171 F.3d at 457 (noting that the "background circumstances" test "is not to be interpreted in a constricting fashion" and allowing reverse discrimination plaintiffs to remove themselves from the restrictions of the test by " 'establish[ing] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground' " (second alteration in original) (quoting *Carson*, 82 F.3d at 159)).

[117] For a discussion of the "background circumstances" test, see *supra* notes 63–72 and accompanying text.

[118] *See Mills*, 171 F.3d at 457.

[119] *See Iadimarco*, 190 F.3d at 161–62. The court noted that it is not necessary to analyze whether a plaintiff has presented background circumstances when this new approach is adopted. *See id.* at 162. In adopting both tests, some courts have rendered the "background circumstances" test moot. *See id.* at 161.

[120] *See id.* at 163 (noting that instead of running into problems trying to " 'cram[]' the 'background circumstances' inquiry into the first prong of *McDonnell Douglas*," plaintiffs should follow a new test for establishing a prima facie case).

(given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin,' "[121] the traditional framework comes back into play.[122]

The *Iadimarco* approach to determining whether a reverse discrimination plaintiff established a claim is more appropriate than the "background circumstances" test adopted in *Mills*. First, this test may be applied to any type of employment discrimination claim, not just reverse discrimination, without requiring a heightened level of proof for any plaintiff.[123] Second, the test focuses the inquiry on the alleged discrimination against the plaintiff, just as with the traditional prima facie case.[124] Furthermore, this approach is not as rigid as the "background circumstances" test. The test does not require plaintiffs to mold their evidence into specific categories in order to establish a prima facie case against the employer. Finally, the test does not necessitate that plaintiffs show, at the prima facie level, that it is the "unusual employer who discriminates against the

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[121] *Id.* (alteration in original) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

[122] *See id.* After holding that the plaintiff had presented a prima facie case using this new method, the court then went on to review the second and third steps in the *McDonnell Douglas* burden-shifting framework. *See id.* at 165–67.

[123] The Fourth Circuit Court of Appeals set down a similar test in a case involving racial discrimination against a black man. *See* Holmes v. Bevilacqua, 794 F.2d 142, 146 (4th Cir. 1986). The court required that the plaintiff, who alleged disparate treatment, either present

> direct evidence of discrimination or by indirect evidence whose cumulative probative force, apart from the presumption's operation, would suffice under the controlling standard to support as a reasonable probability the inference that but for the plaintiff's race he would have been promoted. Without such evidence, the claimant must resort to the *McDonnell Douglas* presumption with all of its ensuing complexities.

Id. (citation and footnote omitted). The court in *Notari v. Denver Water Department*, 971 F.2d 585, 590 (10th Cir. 1992), adopted the *Holmes* test as an alternative to the "background circumstances" test. *See* McKeever, *supra* note 3, at 446–47. The *Mills* court adopted, but did not apply, an alternative to the "background circumstances" test that is similar to the *Holmes/Notari* approach. *See Mills*, 171 F.3d at 457 (noting that reverse discrimination plaintiffs may make out a prima facie case by " 'establish[ing] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground' " (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996))).

[124] *See Furnco*, 438 U.S. at 577 (noting that the focus of the prima facie case is "whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin' "). The test for reverse discrimination plaintiffs focuses on the same inquiry at the prima facie level. *See Iadimarco*, 190 F.3d at 163.

majority."[125] To require such proof at the prima facie level creates another hurdle for reverse discrimination plaintiffs, which is contrary to Title VII and United States Supreme Court precedent.

CONCLUSION

In *McDonnell Douglas*, the Supreme Court set forth the three-part framework used to analyze employment discrimination claims brought under Title VII. This framework includes a requirement that the plaintiff establish membership in a racial minority. When majority plaintiffs began to bring reverse discrimination actions, the federal courts split on how to alter the *McDonnell Douglas* framework. A majority of the courts adopted the "background circumstances" test to deal with the reverse discrimination problem.

The *Mills* court erred in adopting the "background circumstances" test as a resolution to the reverse discrimination problem. The "background circumstances" test improperly places a higher burden on reverse discrimination plaintiffs than is required at the prima facie level of the traditional *McDonnell Douglas* framework. By placing a higher burden on reverse discrimination plaintiffs at this level, the test undermines the underlying purposes of the prima facie case and the burden-shifting framework. Additionally, this heightened burden violates the intent behind the neutral language in Title VII.

A better solution of the reverse discrimination problem is to require reverse discrimination plaintiffs to present "sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff

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[125] Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981). The court in *Mills* agreed with this presumption. *See Mills*, 171 F.3d at 456–57. The *Collins* court attacked the use of such a presumption in a Title VII analysis, stating that "[t]he *Parker* requirement only protects the 'unusual employer who discriminates against the majority;' employers who do not make employment decisions based on impermissible factors are already adequately protected from frivolous claims by the *McDonnell Douglas-Burdine* framework." Collins v. School Dist., 727 F. Supp. 1318, 1322 (W.D. Mo. 1990). The court in *Iadimarco* also attacked the requirement that plaintiffs establish this presumption at the prima facie level. *See Iadimarco*, 190 F.3d at 161 (noting that such a showing would more likely be relevant as evidence in the pretext stage of the framework). The *Parker* court's presumption, if ever proper, is no longer valid. *See* Black, *supra* note 5, at 350–51 (noting that "[t]he assumption that an employer generally does not discriminate against majority class members is therefore no longer valid").

'less favorably than others because of [his or her] race, color, religion, sex, or national origin' " to establish a prima facie case.[126] This approach does not require a reverse discrimination plaintiff to prove more than is required by the traditional *McDonnell Douglas* test. Also, by not requiring more of reverse discrimination plaintiffs, the neutral language of Title VII is not violated.

Resolution of this problem is essential in order for reverse discrimination plaintiffs to determine the types of evidence that must be produced to succeed in employment discrimination actions. Until the Supreme Court addresses the subject, courts should adopt a test for reverse discrimination plaintiffs that does not discriminate by eliminating the benefits of the *McDonnell Douglas* burden-shifting framework.

[126] *Iadimarco*, 190 F.3d at 163.