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## A Matter of Class: The Impact of *Brown v. McLean* on Employee Discharge Cases

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2001]

A MATTER OF CLASS: THE IMPACT OF *BROWN v. McLEAN*  
ON EMPLOYEE DISCHARGE CASES

I. INTRODUCTION

“We have seen the enemy and sometimes he or she works [or worked] for us.”<sup>1</sup> This may be the attitude that many employers have towards their former (litigious) employees as current and former employees file an increasing number of employment discrimination claims each year.<sup>2</sup> Congress originally enacted Title VII of the Civil Rights Act of 1964<sup>3</sup> (Title VII) to eliminate discriminatory hiring procedures, which prevented minority workers from enjoying equal employment opportunities.<sup>4</sup> Today, however, the focus of Title VII has shifted from discriminatory hiring

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1. Pamela R. Johnson & Julie Indvik, *Rebels, Criticizers, Backstabbers, and Busybodies: Anger and Aggression at Work*, PUB. PERSONNEL MGMT., June 22, 2000, at 165.

2. See Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 660 (1998) (noting that employment discrimination suits constitute substantial part of all lawsuits); Johnson & Indvik, *supra* note 1, at 165 (stating that current or former employees file one out of every five lawsuits nationwide); United States EEOC, *Title VII of the Civil Rights Act of 1964 Charges FY 1992-FY 1999*, available at <http://www.eeoc.gov/stats/vii.html> (last modified Jan. 12, 2000) (noting that approximately 57,600 Title VII charges filed with EEOC in 1999 compared with 55,400 charges filed in 1992).

3. 42 U.S.C. § 2000e-2(a) (1995).

4. See 42 U.S.C. § 2000e-2(a) (1995) (noting that it is unlawful for employers to refuse to hire or discharge employee on basis of employee’s protected attributes). The statute states, in pertinent part:

(a) Employer Practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to 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.*

The legislative history of Title VII also indicates that Congress’ goal was to create equal employment opportunities. See H.R. REP. NO. 88-914, at 26 (1963), reprinted in 1964 U.S.C.A.N. 2391, 2401 (stating that Title VII’s purpose is to eliminate employment discrimination); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (noting that purpose of Title VII was to create equal employment opportunities); 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, 444 (1998) (noting purpose of Title VII); Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 61 (1999) (stating that Congress’ primary concern in enacting Title VII was “the relegation of Blacks to low-skill jobs”).

claims to discriminatory discharge claims.<sup>5</sup> Despite this dramatic shift, the United States Supreme Court has never established the prima facie elements that a plaintiff alleging discriminatory discharge must show.<sup>6</sup> As a result, a dispute has arisen among the federal circuit courts over the relevancy of a plaintiff's replacement identity within the prima facie framework for discriminatory discharge cases.<sup>7</sup>

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5. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983 (1991) ("[T]oday the vast majority of all litigation suits challenge discrimination in discharge. Although the authors and early architects of employment discrimination laws envisioned them as tools for opening employment opportunities to blacks, women, and other minorities, this is no longer their primary use."); see also Kenneth R. Gilberg, *Employers Must Protect Their Companies Against Employee Lawsuits*, SUPERVISION, Nov. 1, 1992, at 12 (noting increasing numbers of employees file wrongful discharge suits against their former employers).

6. See Elizabeth Clack-Freeman, Comment, *Title VII and Plaintiff's Replacement: A Prima Facie Consideration*, 50 BAYLOR L. REV. 463, 469 (1998) (stating that Court has never addressed what plaintiffs in discriminatory discharge cases must show so circuit courts had to define prima facie elements for discharge cases). The Supreme Court also established the proper order and allocation of proof for discriminatory hiring cases in *McDonnell Douglas Corp. v. Green*. See 411 U.S. at 802-04 (establishing burden-shifting system for employment discrimination cases). For a further discussion of the burden-shifting system, see *infra* notes 32-37 and accompanying text. The first step of the three-step system requires a plaintiff to establish a prima facie case of discrimination. See *McDonnell Douglas*, 411 U.S. at 802 (creating four elements of prima facie case). Although all federal courts have adopted the burden-shifting system and the prima facie case for discriminatory discharge claims, some courts have modified the prima facie elements. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 261-62 (David A. Cathcart & R. Lawrence Ashe, Jr. eds., 2d ed. Supp. 1989) (noting that courts apply burden-shifting system to discriminatory discharge claims but modify elements of prima facie case). In particular, courts tend to change the fourth element of the prima facie case, in which the Supreme Court required a plaintiff alleging discriminatory hiring to show that the employer continued to seek applicants to fill the plaintiff's position. See *McDonnell Douglas*, 411 U.S. at 802 (requiring plaintiffs in discriminatory hiring cases to show employer sought replacement); see also 3 EMPLOYMENT DISCRIMINATION COORDINATOR ¶ 37, at 115 (2000) [hereinafter EMPLOYMENT] (noting courts have developed differing views on fourth element).

7. See Clack-Freeman, *supra* note 6, at 490 ("Federal circuit courts continue to wrestle with discharge cases where the plaintiff has been replaced by someone from within his protected class."). Federal circuit courts have developed varying views regarding the replacement requirement. Compare *Lowry v. Bedford County Sch. Bd.*, No. 98-1165, 1999 WL 507137, at \*2 (4th Cir. July 19, 1999) (affirming grant of summary judgment because plaintiff failed to show non-class replacement), with *Kendrick v. Penske Transp. Serv., Inc.*, 220 F.3d 1220, 1229 (10th Cir. 2000) (requiring plaintiff to show only that position was not eliminated after discharge). In *Kendrick*, the United States Court of Appeals for the Tenth Circuit noted that the Supreme Court has yet to address the relevancy of a replacement's identity. See *Kendrick*, 220 F.3d at 1227 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 528 n.1 (1993) (Souter, J., dissenting)); see also Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2245 (1995) (stating Court did not "attempt to give any meaningful guidance as to how the specification of the required prima facie proof would be determined for cases with other facts").

In *McDonnell Douglas Corp. v. Green*,<sup>8</sup> the United States Supreme Court established the elements of a prima facie case, which a plaintiff alleging discriminatory hiring must show.<sup>9</sup> In the absence of the Supreme Court's guidance, however, courts have encountered difficulties in applying this framework to discriminatory discharge claims.<sup>10</sup> For example, in *Brown v. McLean*,<sup>11</sup> the United States Court of Appeals for the Fourth Circuit found that to establish a prima facie case of discriminatory discharge, plaintiffs must show that their employers replaced them with individuals from outside of their protected class ("non-class replacement").<sup>12</sup> Other federal courts, however, have expressly rejected this requirement, finding that this strict approach does not take into account employers who, attempting to avoid a discrimination suit, replaced the plaintiff with an individual from within the plaintiff's protected class ("same-class replacement").<sup>13</sup> Several courts also have found that an employer may discharge an employee because the employee does not meet the employer's stereotypical image of a person from the employee's protected class.<sup>14</sup>

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8. 411 U.S. 792 (1973).

9. *See id.* at 802 (stating plaintiff must show four elements to establish prima facie case). The Supreme Court found that a plaintiff must show that he or she is a member of a protected class; that he or she applied for and was qualified for the job; that he or she was rejected and the position remained open and that the employer continued to seek applicants. *See id.* at 802 (listing elements of prima facie case of discriminatory hiring). Although the Supreme Court initially stated the first element as requiring the plaintiff to show that he or she is a racial minority, the prima facie case arises regardless of whether or not they are a member of a traditional minority group. *See* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL AND PRACTICE § 2.3 (1992) (stating that every person belongs to protected class).

10. *See* SCHLEI & GROSSMAN, *supra* note 6, at 261-62 (noting courts apply varying modifications of prima facie elements); Malamud, *supra* note 7, at 2245 (stating court did not give guidance for application of framework in other contexts); Clack-Freeman, *supra* note 6, at 469 (stating courts apply prima facie elements differently in discriminatory discharge cases); *see also* Perry v. Woodward, 199 F.3d 1126, 1138 (10th Cir. 1999) (examining varying applications of fourth element of prima facie framework in discriminatory discharge case); Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 354 (3d Cir. 1999) (noting varying interpretations of prima facie elements in discriminatory discharge cases).

11. 159 F.3d 898 (4th Cir. 1998).

12. *See id.* at 905-06 (holding failure to show non-class replacement precluded plaintiff from establishing prima facie case). For a further discussion of the Fourth Circuit's decision in *Brown*, *see infra* notes 100-11 and accompanying text.

13. *See, e.g.,* Pivrotto, 191 F.3d at 355 (stating employer may hire same-class employee to avoid discrimination suit); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1535 (11th Cir. 1984) (stating that employer may hire same-class replacement to evade discrimination suits); *see also* EMPLOYMENT, *supra* note 6, ¶ 37, at 115 (noting persuasiveness of argument that employers may hire same class replacement to avoid litigation).

14. *See, e.g.,* Perry, 199 F.3d at 1137 (stating non-class replacement requirement would preclude suits against "an employer who terminates a woman it negatively perceives as a 'feminist' and replaces her with a woman who is willing to be subordinate to her male co-workers or replaces an African-American with an African-American who is perceived to 'know his place'"); Pivrotto, 191 F.3d at 355

This Note discusses the federal courts' viewpoints on the relevancy of a plaintiff's replacement identity in establishing prima facie cases of discriminatory termination under Title VII.<sup>15</sup> Part II of this Note discusses the United States Supreme Court's development of the prima facie framework for discriminatory hiring cases and the federal courts' subsequent adaptation of that framework to discriminatory termination cases.<sup>16</sup> Part II also examines the varying circuit viewpoints on the relevancy of a plaintiff's replacement within this framework.<sup>17</sup> Part III discusses the relevant facts of the Fourth Circuit's decision in *Brown v. McLean*.<sup>18</sup> Part IV analyzes and critiques the Fourth Circuit's improperly reasoned holding in *Brown*.<sup>19</sup> Finally, Part V addresses the adverse impact of requiring a plaintiff to prove that his or her replacement came from outside the plaintiff's protected class.<sup>20</sup>

## II. BACKGROUND OF THE TITLE VII PRIMA FACIE CASE

### A. *The Civil Rights Act of 1964*

Congress adopted the Civil Rights Act of 1964 ("the Act") in response to persistent discrimination against minority groups in the United

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(rejecting non-replacement requirement because it precludes meritorious claims). In *Pivrotto*, the Third Circuit reasoned that

[a]n employer's failure to hire someone of a different class from the plaintiff, after the plaintiff's discharge, could be explained in many ways. . . . [A]n employer may act on gender-based stereotypes, firing women it perceives as not feminine enough (or as too feminine), or discharging women who are too aggressive while not doing the same to male employees.

*Id.*

Commentators also have noted that an employer's stereotypes may play an important role in discharge decisions. See, e.g., 1 CHARLES A. SULLIVAN, EMPLOYMENT DISCRIMINATION § 2.1 (2d ed. 1988) (stating employment decisions are often motivated by decision-makers' stereotypical attitudes); Hellen Hemphill & Ray Haines, *Confronting Discrimination in Your Workplace*, HR FOCUS, July 1, 1998, at S5 (noting prevalency of stereotypical attitudes).

15. For a discussion of the federal circuit courts' requirements regarding a plaintiff's replacement identity in Title VII discriminatory termination cases, see *infra* notes 38-85 and accompanying text.

16. For a discussion of the Supreme Court's development of the discriminatory hiring prima facie case, see *infra* notes 28-37 and accompanying text.

17. For a discussion of the federal courts' use of discriminatory hiring prima facie framework in Title VII discriminatory termination cases, see *infra* notes 38-85 and accompanying text.

18. For a discussion of the facts of *Brown*, see *infra* notes 86-99 and accompanying text.

19. For a discussion and analysis of the Fourth Circuit's reasoning in *Brown*, see *infra* notes 100-71 and accompanying text.

20. For a discussion of the possible consequences of requiring a plaintiff who alleges Title VII discriminatory termination to show that his or her replacement was from outside the plaintiff's protected class, see *infra* notes 172-82 and accompanying text.

States.<sup>21</sup> Title VII of the Act, which specifically prohibits discrimination in the employment arena, was primarily enacted to create equal employment opportunities for African-American workers.<sup>22</sup> Title VII not only endeavors to protect victims of discriminatory hiring procedures, it also protects

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21. See H.R. REP. NO. 88-914, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 (noting prevalence of discrimination against minority groups, particularly African Americans); see also Clack-Freeman, *supra* note 6, at 464 (“The Civil Rights Act of 1964 was passed in an attempt to bring the concept of equal rights into every spectrum of life.”). For a discussion of discrimination in the United States prior to the adoption of the Civil Rights Act, see ABRAHAM L. DAVIS & BARBARA LUCK GRAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* (1995).

22. See 42 U.S.C. § 2000e-2 (1995) (prohibiting employment discrimination); H.R. REP. NO. 88-914, at 25, *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 (stating that purpose of Title VII was “to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin”); 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey) (“The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them.”); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 210 (1993) (stating Congress stressed equal employment opportunity is basic right when passing Title VII); Onwuachi-Willig, *supra* note 4, at 60 (noting Congress’ primary purpose in enacting Title VII was to protect African-American workers from discrimination); see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202-03 (1979) (noting that Congress’ primary concern in enacting Title VII was to create equal employment opportunities for African Americans); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (stating purpose of Title VII was “to assure equality of employment opportunities and to eliminate discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971) (noting Congress never intended Title VII to proscribe discriminatory preference for any one group); Cunningham, *supra* note 4, at 444 (stating Title VII “was adopted as an attempt to address various persistent societal inequities”); Michael J. Zimmer & Charles A. Sullivan, *The Structure of Title VII Individual Disparate Treatment Litigation: Anderson v. City of Bessemer City, Inferences of Discrimination, and Burdens of Proof*, 9 HARV. WOMEN’S L.J. 25, 30 (1986) (stating Title VII was enacted to address discrimination against African American workers). For a general discussion of employment discrimination and congressional action prior to the adoption of Title VII, see generally PAUL BURSTEN, *DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL* 13-96 (1998).

In addition to Title VII, a plaintiff, claiming employment discrimination on the basis of the plaintiff’s race may allege a violation of 42 U.S.C. §§ 1981 and 1983. See 42 U.S.C. § 1981(a) (1981) (stating persons should have equal rights to contract within United States); 42 U.S.C. § 1983 (1981) (stating citizens have rights to bring action under federal laws). Section 1981 provides “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .” 42 U.S.C. § 1981(a). Section 1981 only covers race or ethnic discrimination, thus a plaintiff alleging a breach of an employment contract on the basis of his or her sex, religion or age cannot assert a claim under § 1981. See 42 U.S.C. § 1981(a) (stating that minorities have same rights as white citizens). Section 1983 does not create any rights, but rather is a vehicle for recovering a federal remedy for federally protected rights, such as those rights protected under § 1981. See 42 U.S.C. § 1983 (stating persons may bring action for deprivation of rights under federal laws). Section 1983 states:

employees from being discharged because of their race, religion, sex, color or national origin.<sup>23</sup>

An employer violates Title VII by treating an individual less favorably than persons who do not possess the individual's protected trait.<sup>24</sup> An employer also violates Title VII by implementing a policy that has a disparate impact on a group of people sharing a protected trait.<sup>25</sup> To state a claim of discriminatory termination successfully under Title VII, the plaintiff generally must prove disparate treatment by an employer.<sup>26</sup> Because Congress did not provide a statutory framework of proof for disparate treatment cases, the United States Supreme Court developed a framework in *McDonnell Douglas*.<sup>27</sup>

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Every person who, under color of any statute, ordinance, regulation, [or] custom . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law . . . .

*Id.*

The *McDonnell Douglas* burden-shifting and prima facie elements used in Title VII cases are also applicable to 42 U.S.C. § 1981 claims. See ANDREW J. RUZICHO ET AL., EMPLOYMENT DISCRIMINATION LITIGATION 2 (1989) (noting Title VII standards for proving discriminatory treatment are interchangeable with § 1981).

23. See 42 U.S.C. § 2000e-2(a) (stating that it is unlawful for employers to discharge employees because of race, sex, religion, color or national origin). In the past, most litigation involving Title VII attacked discrimination in hiring. See Donohue & Siegelman, *supra* note 5, at 984 (noting majority of past Title VII litigation involved discriminatory hiring). Today, however, the overwhelming majority of Title VII litigation involves discriminatory termination claims. See *id.* (noting shift in litigation from discriminatory hiring to discriminatory discharge cases); see also RUZICHO ET AL., *supra* note 22, at xv (noting increase in wrongful termination cases).

24. See RUZICHO ET AL., *supra* note 22, at 14 (stating Title VII may be violated by disparate treatment). The United States Supreme Court defined disparate treatment in *International Brotherhood of Teamsters v. United States*. See 431 U.S. 324, 335 n.15 (1977). The Court stated that disparate treatment occurs when “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” *Id.*; see also Cunningham, *supra* note 4, at 449 (defining disparate treatment); Drew S. Days, III, *Reality*, 31 SAN DIEGO L. REV. 169, 180 (1994) (same).

25. See RUZICHO ET AL., *supra* note 22, at 14 (stating Title VII may be violated by disparate impact). The Supreme Court defined disparate impact in *International Brotherhood of Teamsters v. United States*. See 431 U.S. at 334. The Court stated that disparate impact involves “employment practices that are facially neutral in their treatment but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” *Id.*; see also Cunningham, *supra* note 4, at 449 (defining disparate impact); Days, *supra* note 24, at 180 (same).

26. See PERRITT, *supra* note 9, § 2.3 (stating that Title VII plaintiffs usually prove discrimination using disparate treatment theory); SCHLEI & GROSSMAN, *supra* note 6, at 594 (noting overwhelming majority of discriminatory discharge claims are litigated under disparate treatment theory).

27. See Cunningham, *supra* note 4, at 450 (stating in *McDonnell Douglas* Supreme Court created series of three shifting-burdens-of-proof for determining whether plaintiff has suffered employment discrimination in absence of statutory framework); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (stat-

B. McDonnell Douglas Corp. v. Green: *Development of the Title VII Prima Facie Framework*

In *McDonnell Douglas*, the petitioner, McDonnell Douglas Corp., fired the respondent, a Black male, in an effort to reduce the company's total number of employees.<sup>28</sup> McDonnell Douglas subsequently advertised available positions for mechanics, the respondent's trade, and the respondent applied for re-employment.<sup>29</sup> After McDonnell Douglas refused to rehire the respondent, he sued McDonnell Douglas under Title VII, claiming that he had not been rehired because of his race.<sup>30</sup>

The United States Supreme Court granted certiorari in *McDonnell Douglas* to clarify the proper order and nature of proof in Title VII individual disparate treatment cases.<sup>31</sup> The Court held that a Title VII plaintiff has the initial burden of establishing a prima facie case of discrimination.<sup>32</sup> A plaintiff may fulfill this burden by showing:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>33</sup>

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ing in *McDonnell Douglas* Supreme Court developed order for presentation of proof in Title VII cases); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981) (noting Court set up allocations of proof and order of presentation of proof for Title VII cases in *McDonnell Douglas*); *McDonnell Douglas*, 411 U.S. at 802-04 (creating burden-shifting system for Title VII disparate treatment cases).

28. See *McDonnell Douglas*, 411 U.S. at 794-96 (stating facts of case). Following the respondent's discharge, the respondent protested that his discharge and McDonnell Douglas' hiring practices were racially motivated. See *id.* at 794. The respondent and other protestors illegally stalled cars on the road to McDonnell Douglas' plant, essentially blocking access to the plant. See *id.* The respondent also took part in a "lock-in," in which the respondent and other protestors placed a chain and padlock on the door to a McDonnell Douglas building, preventing employees from leaving. See *id.*

29. See *id.* at 796.

30. See *id.*

31. See *id.* at 798, 800 (noting same). For a further discussion of the Supreme Court's decision in *McDonnell Douglas*, see DAVIS & GRAHAM, *supra* note 21, at 240.

32. See *McDonnell Douglas*, 411 U.S. at 802; see also *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 153 (7th Cir. 1990) (stating that Title VII plaintiff has burden of proving employer discriminated against plaintiff "for a proscribed reason"); *Cunningham*, *supra* note 4, at 451 (stating that plaintiffs have initial burden of establishing prima facie case). In *Cumpiano*, the Seventh Circuit noted that the "critical determination in any Title VII suit is whether the complainant has proven by a fair preponderance of the evidence that an impermissible consideration . . . was a substantial motivating factor in the adverse employment decision." *Id.* at 155.

33. *McDonnell Douglas*, 411 U.S. at 802 (emphasis added). Courts have interpreted the first element, which required the plaintiff to show that he or she is a racial minority, as requiring the plaintiff to show that he or she belongs to a protected class. See, e.g., *Kendrick v. Penske Transp. Serv., Inc.*, 220 F.3d 1220, 1229



Further, the Court stated that, depending on a particular Title VII case's fact pattern, the framework might not be applicable.<sup>34</sup> Specifically developed for plaintiffs who lack direct evidence, the framework allows plaintiffs to present circumstantial evidence from which the court may infer discrimination.<sup>35</sup>

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to provide a nondiscriminatory reason for the employee's termination.<sup>36</sup> After the employer fulfills this burden the plaintiff must prove by a preponderance of the evidence that the employer's offered reasons were actually a pretext for discrimination and not the employer's true reasons for the plaintiff's discharge.<sup>37</sup>

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(10th Cir. 2000) (requiring plaintiff to show he or she belongs to protected class for first prima facie element); *Hogan v. Dixon*, No. 98-1161, 2000 WL 968054, at \*2 (7th Cir. May 25, 2000) (same); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000) (same); *Lowry v. Bedford County Sch. Bd.*, No. 98-1165, 1999 WL 507137, at \*2 (4th Cir. July 19, 1999) (same); see also PERRITT, *supra* note 9, § 2.3 (stating that every person belongs to protected class even if they are not traditional minority).

34. See *McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situation."); see also Malamud, *supra* note 7, at 2245 (stating Court did not give guidance for application of framework in other contexts). For a further discussion of the applicability of the prima facie framework to discriminatory discharge cases, see *infra* notes 38-85 and accompanying text.

35. See *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996) (stating Supreme Court developed *McDonnell Douglas* framework because plaintiffs rarely have direct evidence); *Cunningham*, *supra* note 4, at 451 (stating Supreme Court developed prima facie framework for situations where there is no direct evidence). Examples of direct evidence include a key decisionmaker's pattern of racial slurs or racist conduct. See RUZICHO ET AL., *supra* note 22, at 17 (listing examples of direct evidence). Direct evidence may also include testimony of an employer or an employer's written policy, which treats employees who possess certain protected attributes differently than other employees who do not possess the attribute. See *Job Discrimination*, in 45C AM. JUR. 2D § 2717 (1993) (noting possible examples of direct evidence in employment discrimination cases). As commentators have noted, plaintiffs usually depend on circumstantial evidence to show that an employer discriminated against them because "few discriminators announce their bias." RUZICHO ET AL., *supra* note 22, at 15.

36. See *McDonnell Douglas*, 411 U.S. at 802. In a later case, *Texas Department of Community Affairs v. Burdine*, the United States Supreme Court refined the burden-shifting system and stated that the employer does not have to persuade the court that the employer's actions were motivated by the reasons offered. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (explaining defendant's burden in employment discrimination cases). Instead, the employer only must "raise a genuine issue of fact as to whether it discriminated against the employer." *Id.*

37. See *McDonnell Douglas*, 411 U.S. at 804; see also *Burdine*, 450 U.S. at 252-53 (stating plaintiff must demonstrate employer's proffered reason was not true reason for employer's decision). In a later case, *St. Mary's Honor Center v. Hicks*, the United States Supreme Court stated that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). This interpretation of the final step in the bur-

C. *Adaptation of Framework to Discriminatory Discharge Cases*

Since the Supreme Court developed the prima facie framework in *McDonnell Douglas*, a dispute has arisen in the federal courts over the proper application of the framework in discriminatory discharge cases.<sup>38</sup> Some commentators believe that this disagreement exists because the Supreme Court developed the framework in the context of a discriminatory hiring case and specifically allowed for flexibility in the application of the framework.<sup>39</sup> In particular, courts disagree over the interpretation of the framework's fourth element, in which the Supreme Court required plaintiffs in discriminatory hiring cases to show that "the position remained open and the employer continued to seek applicants from persons of [the] complainant's qualifications."<sup>40</sup> In particular, the discrepancy centers on whether a plaintiff must show non-class replacement to establish a prima facie case of discriminatory discharge.<sup>41</sup> As Justice Souter recog-

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den-shifting system, however, has caused much controversy over what the Supreme Court meant by indicating that disbelief of the employer's reasons may be enough to prove intentional discrimination. See Chin & Golinsky, *supra* note 2, at 666 (noting criticism and controversy following Court's decision in *Hicks*).

38. See Clack-Freeman, *supra* note 6, at 469 (explaining circuit courts varied in adaptation of prima facie framework to discriminatory discharge cases); see also *Job Discrimination*, in 45B AM. JUR. 2D § 1076 (1993) (examining differences in how courts view necessity of replacement requirement in Title VII prima facie cases). For a further discussion of the courts' adaptation of the *McDonnell Douglas* framework to discriminatory discharge cases, see *infra* notes 39-85 and accompanying text.

39. See Malamud, *supra* note 7, at 2245 (questioning whether *McDonnell Douglas* framework applies to discriminatory discharge cases); see also Clack-Freeman, *supra* note 6, at 469 (stating that circuit courts defined discriminatory discharge prima facie elements in absence of Supreme Court's guidance). In her article, Malamud noted the ambiguity created by the Court when it stated that the framework was to be flexible. See Malamud, *supra* note 7, at 2245 (stating Court did not address how framework should be applied to Title VII cases). Malamud states:

The Court did not . . . attempt to give any meaningful guidance as to how the specification of the required prima facie proof would be determined for cases with other facts—or even any guidance about what it meant for the "facts" to vary. Was the proof requirement set forth in *McDonnell Douglas* to apply to all failure-to-hire cases, with other standards to apply to cases involving discharges, promotions, and so on? . . . As a result *McDonnell Douglas* created a 'prima facie case' with a fixed legal consequence in litigation but the actual strength of the inferences that can be drawn from the prima facie case vary depending on the strength of the evidence that supports it.

*Id.* at 2245-46.

40. *McDonnell Douglas*, 411 U.S. at 802; see also *Perry v. Woodward*, 199 F.3d 1126, 1138-39 (10th Cir. 1999) (examining other courts' approaches to replacement requirement); *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 354 n.6 (3d Cir. 1999) (noting courts have adopted differing approaches to fourth element); *EMPLOYMENT*, *supra* note 6, ¶ 37, at 115 (noting courts' have differing views of fourth element in discriminatory discharge cases).

41. Compare *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998) (modifying framework to require plaintiff to show replacement outside protected class), with *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir. 1985) (requiring plaintiff to show em-

nized in *St. Mary's Honor Center v. Hicks*,<sup>42</sup> the Court has never specifically addressed whether the identity of a plaintiff's replacement is a relevant consideration in Title VII discriminatory termination cases.<sup>43</sup> Therefore, the courts have developed varying rules concerning a plaintiff's replacement.<sup>44</sup>

Some courts simply apply the *McDonnell Douglas* framework without modifying the fourth element.<sup>45</sup> Other circuits, however, require plaintiffs to show non-class replacement and will automatically preclude plaintiffs from establishing a prima facie case if this burden is not met.<sup>46</sup> Still other circuits list non-class replacement as a required element, but allow plaintiffs to overcome this requirement by showing additional evidence of discrimination.<sup>47</sup>

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ployer continued to seek replacement after plaintiff's discharge). Compare *Kendrick v. Penske Transp. Serv., Inc.*, 220 F.3d 1220, 1227 (10th Cir. 2000) (stating plaintiffs must show only that position was not eliminated), with *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426-27 (5th Cir. 2000) (stating plaintiff who does not show non-class replacement but provides additional evidence is not precluded from establishing prima facie case).

42. 509 U.S. 502 (1993).

43. See *Hicks*, 509 U.S. at 528 n.1 (Souter, J., dissenting) (stating, "This court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material"); see also *Kendrick*, 220 F.3d at 1227 (noting Supreme Court has not considered relevancy of plaintiff's replacements in discriminatory discharge cases); *Perry*, 199 F.3d at 1136 (recognizing that Supreme Court has not adopted requirement that plaintiff show replacement was from outside protected class).

44. For a discussion of the federal courts' treatment of the replacement requirement in Title VII discriminatory discharge cases, see *infra* notes 47-85 and accompanying text.

45. See, e.g., *Perry*, 199 F.3d at 1139 (noting that requiring plaintiff to show employer continued to seek applicants is superior standard to those followed in other courts); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996) (requiring plaintiff to show that replacement continued to perform plaintiff's work after plaintiff's discharge); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986) (requiring plaintiff to show employer attempted to fill plaintiff's job with replacement); *Meiri*, 759 F.2d at 996 (requiring plaintiff to show employer sought replacement for plaintiff); see also *Clack-Freeman*, *supra* note 6, at 470 (stating that majority of circuits adopted *McDonnell Douglas* framework without changing elements); *EMPLOYMENT*, *supra* note 6, ¶ 37, at 115 (noting several circuits hold that establishment of prima facie case does not depend on plaintiff's replacement). For a further discussion of circuits applying the *McDonnell Douglas* prima facie elements without alteration, see *infra* notes 48-68 and accompanying text.

46. See *Lowry v. Bedford County Sch. Bd.*, 98-1165, 1999 WL 507137, at \*2 (4th Cir. 1999) (requiring plaintiff to show position filled by person outside protected class); *Brown*, 159 F.3d at 905 (precluding establishment of prima facie case because plaintiff failed to show non-class replacement); see also *EMPLOYMENT*, *supra* note 6, ¶ 37, at 115 (noting Fourth Circuit requires plaintiff to show non-class replacement). For a further discussion of the Fourth Circuit's decision in *Brown*, see *infra* notes 100-71 and accompanying text.

47. See, e.g., *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (stating non-class replacement is not necessary); *Williams v. Trader Publ'g Co.*, 218 F.3d 481, 485 (5th Cir. 2000) (finding non-class replacement is not essential to establish prima facie case); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534

### 1. Courts Holding Plaintiff's Replacement Irrelevant

The federal courts that have adopted the *McDonnell Douglas* prima facie framework without modification do not require plaintiffs to show non-class replacement.<sup>48</sup> Instead, these courts usually require the plaintiff to show that their position remained open and the employer continued to seek a replacement.<sup>49</sup>

For example, the United States Court of Appeals for the Third Circuit adopted this approach in *Pivrotto v. Innovative Systems, Inc.*,<sup>50</sup> holding that a plaintiff does not have to show non-class replacement.<sup>51</sup> The Third Cir-

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(11th Cir. 1984) (same); see also EMPLOYMENT, *supra* note 6, ¶ 37, at 115 (noting some courts hold that non-class replacement is not necessary if other factors raise inference of discrimination); Clack-Freeman, *supra* note 6, at 473-74 (stating some courts articulate fourth element as requiring plaintiff to show non-class replacement but noting that these courts do not apply requirement strictly).

48. See *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 353 (3d Cir. 1999) (stating that most circuits that have addressed the issue have found plaintiff is not required to prove that plaintiff was replaced by someone outside of protected class); see, e.g., *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 155 (1st Cir. 1990) (stating plaintiff can fulfill fourth prong without showing replacement possessed protected attribute); see also EMPLOYMENT, *supra* note 6, ¶ 37, at 115 (stating that several circuits have found that "Title VII case does not hinge on the plaintiff's replacement coming from outside the protected class").

49. See, e.g., *Sengupta*, 804 F.2d at 1075 (requiring plaintiff to show "that his employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills"); *Meiri*, 759 F.2d at 996 (requiring plaintiff to show employer continued to seek applicants to fill position); see also Clack-Freeman, *supra* note 6, at 470 (stating that courts' simply adopting framework that requires plaintiff to show employer continued to seek replacement); cf. *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996) (stating plaintiff must prove discharge occurred under circumstances from which inference of discrimination based on membership in class can be drawn).

The United States Court of Appeals for the First Circuit has also held that a plaintiff must only show that the employer continued to seek applicants to fill the plaintiff's position. See *Smith*, 76 F.3d at 421 (stating plaintiff must show that "a comparably qualified person" continued to perform plaintiff's work after his or her discharge); *Bina v. Providence Coll.*, 39 F.3d 21, 24-25 (1st Cir. 1994) (agreeing with district court's ruling that plaintiff may establish prima facie showing of discriminatory discharge by showing "position was filled by someone outside the protected group, or that 'the employer had a continued need for someone to perform the same work after [the complainant] left'"); *Pagano v. Frank*, 983 F.2d 343, 348 n.7 (1st Cir. 1993) (noting plaintiff must only show employer sought replacement of "roughly equivalent qualifications"); *Cumpiano*, 902 F.2d at 153 (stating plaintiff must show "employer sought someone of roughly equivalent qualifications to perform substantially the same work"); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 899 (1st Cir. 1988) (stating plaintiff only must show that "employer sought someone to perform the same work after he or she left").

50. 191 F.3d 344 (3d Cir. 1999).

51. See *id.*, at 357 (holding Title VII plaintiff does not have to show replacement was outside protected class). The Third Circuit reasoned that requiring a replacement to be outside the plaintiff's protected class would be inconsistent with the Supreme Court's holding in *McDonnell Douglas*. See *id.* at 351 (stating that requiring non-class replacement would not be consistent with Supreme Court's reasoning in *McDonnell Douglas*). The Third Circuit reasoned that if the Supreme Court believed non-class replacement was essential, the Court would not have re-

cuit relied, in part, on the United States Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*<sup>52</sup> In *O'Connor*, the Supreme Court found that a plaintiff who alleges age discrimination under the Age Discrimination in Employment Act ("ADEA") is not required to show non-class replacement.<sup>53</sup> The Supreme Court reasoned that the ADEA protects individuals from discrimination, not classes of people.<sup>54</sup> Thus, ADEA plaintiffs must show only that they "lost out" because of their age, not because of their membership within the ADEA's protected class.<sup>55</sup>

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quired the plaintiff in *McDonnell Douglas* to show that the employer hired a white person. *See id.* (finding non-class replacement not required).

52. 517 U.S. 308 (1996). In *O'Connor*, a fifty-six year-old plaintiff brought an action under the ADEA, alleging that his employer had discharged him because of his age and replaced him with a forty-year-old individual. *See id.* at 309. The United States Court of Appeals for the Fourth Circuit found that plaintiff had failed to establish a prima facie case because the employer replaced the plaintiff with a forty-year-old individual, a person who was within the plaintiff's protected class under the ADEA. *See id.* at 310 (discussing disposition of case in Fourth Circuit). For a discussion of the ADEA, see *infra* note 53.

53. *See O'Connor*, 517 U.S. at 312 (reversing Fourth Circuit's decision and holding that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case"). The ADEA protects employees from employment discrimination on the basis of age. *See* 29 U.S.C. § 623(a)(1) (1994). Section 623(a)(1) provides that "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.* Although the ADEA prohibits discrimination on the basis of age, the ADEA only protects those people who are forty years of age or older. *See* 29 U.S.C. § 631(a) (1994) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."). For a further discussion of the ADEA, see generally Annotation, *Construction and Application of Age Discrimination in Employment Act of 1967* (29 U.S.C.A. §§ 621 *et seq.*), 24 A.L.R. FED. 808 (1975).

54. *See O'Connor*, 517 U.S. at 312-13 (reasoning that ADEA protects persons not classes).

55. *See id.* at 312 (rejecting consideration of plaintiff's replacement in ADEA cases). Prior to the Supreme Court's decision in *O'Connor*, the federal courts were sharply divided over whether a plaintiff in an age discrimination case had to show that his or her replacement was from outside of the plaintiff's protected class. *See* Guy D. Chappel III, *O'Connor v. Consolidated Coin Caterers Corp.: Broadening the Scope of Age Discrimination Claims Under the ADEA*, 20 AM. J. TRIAL ADVOC. 211, 211-12 (1996) (recognizing circuit split over whether plaintiff alleging age discrimination had to show replacement was under age forty); *see also* Bernard Mower, *Age Discrimination: Supreme Court Agrees to Clarify Age Discrimination Elements of Proof*, 1995 DAILY LAB. REP. 219 (noting Supreme Court granted certiorari to determine whether ADEA plaintiff must show non-class replacement). The Court, however, clarified that the ADEA prohibits age discrimination and does not prohibit discrimination against employees who are aged forty and older. *See O'Connor*, 517 U.S. at 312 (reasoning plaintiff's replacement is irrelevant). In particular, the Court stated "[t]he fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out because of his age." *Id.*

The Third Circuit adopted the Supreme Court's reasoning in *O'Connor* and found that the reasoning applied equally to Title VII cases.<sup>56</sup> In addition, the Third Circuit stated that an employer may treat a female employee differently than similarly situated male employees, but may still replace the female employee with another female.<sup>57</sup> Furthermore, the Third Circuit reasoned that an employer might hire someone from within the plaintiff's protected class to avoid a discrimination suit.<sup>58</sup>

The United States Court of Appeals for the Second Circuit also simply adopted the *McDonnell Douglas* framework for discriminatory discharge cases.<sup>59</sup> In *Meiri v. Dacon*,<sup>60</sup> the Second Circuit reasoned that requiring a plaintiff to show non-class replacement was "at odds with the policies underlying Title VII."<sup>61</sup> Subsequently, the Second Circuit has defined the fourth element even more liberally, requiring the plaintiff to show "that his discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class."<sup>62</sup>

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56. See *Pivrotto*, 191 F.3d at 354-55 (finding guidance in *O'Connor* decision). The Third Circuit analogized *Pivrotto*'s case to *O'Connor* and found that as long as the plaintiff "loses out" because of his or her protected attribute, the plaintiff's replacement is irrelevant. See *id.* at 355 (analogizing case to *O'Connor*).

57. See *id.* at 353-54 (noting that replacement from within protected class does not necessarily mean plaintiff was not treated differently from employees from outside plaintiff's protected class). The Third Circuit reasoned that employers may discharge an employee due to gender-based stereotypes. See *id.* at 355 (noting employer may fire women who are too aggressive but may not fire men who are aggressive).

58. See *id.* (noting some employers may hire individual from within protected class to defeat discrimination suit); accord *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1535 (11th Cir. 1984) (noting employer may have hired same class replacement to avoid suit).

59. See *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir. 1985) (adopting *McDonnell Douglas* framework without modification for discriminatory discharge cases). In *Meiri*, the Second Circuit stated "the appropriate inquiry should be whether the employer continued to seek applicants to fill the position." *Id.* at 995; cf. *Chertkova v. Conn. Gen. Life Ins.*, 92 F.3d 81, 91 (2d Cir. 1996) (finding prima facie case may be established in variety of ways). In *Chertkova*, the Second Circuit stated that a plaintiff may fulfill the fourth element of the *McDonnell Douglas* framework by showing the employer continued to seek applicants to fulfill the position or by showing that "preferential treatment [was] given to employees outside the protected class" or by presenting "actions or remarks made by decision makers that could be viewed as reflecting a discriminatory animus." *Id.* For a discussion of the Second Circuit's subsequent interpretation of the fourth prong, see *infra* notes 61-62 and accompanying text.

60. 759 F.2d 989 (2d Cir. 1985).

61. *Id.* at 996. The *Meiri* court stated that the *McDonnell Douglas* elements of proof "were not intended to be 'rigid, mechanized or ritualistic.' Rather, they were intended only to promote the general principle that a Title VII plaintiff must carry the initial burden of offering evidence adequate to 'raise[ ] an inference of discrimination.'" *Id.* (citations omitted) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

62. *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). The Second Circuit stated that a plaintiff could raise an inference of discrimination under the fourth prong by showing: (1) the employer continued to seek applicants

The United States Court of Appeals for the Tenth Circuit reached a similar conclusion in its most recent case addressing the issue, *Kendrick v. Penske Transportation Services, Inc.*<sup>63</sup> In *Kendrick*, the Tenth Circuit found that a plaintiff must show only that the employer did not eliminate the plaintiff's position after the plaintiff's termination.<sup>64</sup> To reach this conclusion, the Tenth Circuit relied on its reasoning in *Perry v. Woodward*.<sup>65</sup> In *Perry*, the Tenth Circuit explicitly rejected consideration of a plaintiff's

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for the plaintiff's position; (2) the employer criticized the plaintiff's performance in ethnically degrading terms; (3) the employer made "invidious comments about others in the employee's protected group;" (4) the employer treated non-group members more favorably; (5) the sequence of events leading to the discharge was discriminatory; or (6) the timing of the discharge was discriminatory. *Id.* This interpretation of the fourth element appears to be controlling precedent within the Second Circuit. *See, e.g., Chertkova*, 92 F.3d at 91 (2d Cir. 1996) (stating that under fourth element plaintiff must show discharge occurred under circumstances giving rise to inference of discrimination); *McKeever v. N.Y. Medical Coll.*, No. 96-7066, 1999 WL 179376, at \*9 (S.D.N.Y. Mar. 31, 1999) (same); *Badrinath v. Dreyfus Serv. Corp.*, No. 96-2016, 1998 WL 813412, at \*2 (E.D.N.Y. June 30, 1998) (same); *Ivaniuc v. Hauer Knitting Mills, Inc.*, No. 94-5909, 1998 WL 57077, at \*3 (E.D.N.Y. Feb. 5, 1998) (same); *Pappy v. S. Beach Psych. Ctr.*, No. 92-CV-5565, 1996 WL 1088901, at \*2 (E.D.N.Y. Nov. 20, 1996) (same); *Cianfrano v. Babbitt*, 851 F. Supp. 41, 45 (N.D.N.Y. Apr. 28, 1994) (same). *But see Budde v. H&K Distrib. Co.*, No. 99-9449, 2000 WL 900204, at \*1 (2d Cir. June 29, 2000) (listing fourth element as requiring plaintiff to show that person not in protected class replaced plaintiff although element was not at issue); *Lawson v. Getty Terminals Corp.*, 866 F. Supp. 793, 800 (S.D.N.Y. 1994) (stating plaintiff may satisfy fourth element by showing that individuals from outside protected class either replaced plaintiff or were retained when plaintiff was terminated); *see also Chin & Golinsky, supra* note 2, at 663-64 ("Today, most Second Circuit decisions frame the fourth element as requiring the plaintiff to have suffered the adverse employment action under circumstances giving rise to an inference of discrimination.").

63. 220 F.3d 1220 (10th Cir. 2000).

64. *See id.* at 1227 (stating plaintiffs must show position was not eliminated). Before reaching this conclusion, the court examined Tenth Circuit precedent, which addressed the issue of a plaintiff's replacement. *See id.* at 1227-29 (addressing Tenth Circuit precedent). The court noted that early holdings did not require the plaintiff to show non-class replacement. *See id.* at 1227 (same). The court also noted that some Tenth Circuit decisions listed the fourth prong as requiring the plaintiff to show that the plaintiff's replacement was of non-protected status. *See id.* at 1228 (recognizing different standard applied in some cases). The Tenth Circuit distinguished these decisions as dicta and, thus, not controlling precedent within the circuit. *See id.* at 1228 (characterizing requirement as dicta). The Tenth Circuit, however, did not address or distinguish its recent holding in *Toth v. Gates Rubber Co.*, No. 99-1017, 2000 WL 796068 (10th Cir. July 21, 2000). In *Toth*, the Tenth Circuit stated that a plaintiff may fulfill the fourth prong of *McDonnell Douglas* by showing: (1) treatment which was less favorable than treatment afforded to similarly situated employees; (2) replacement by someone outside the protected class; or (3) the position was not eliminated. *See id.* at \*7 & n.7 (listing requirements for fourth prong). The *Toth* court, however, found that the Yugoslavian plaintiff, who had alleged that her employer discharged her based on her national origin and/or gender, had established a prima facie showing of discriminatory discharge because her employer replaced her with an Anglo male. *See id.* at \*5, \*7 (stating plaintiff's allegations and finding plaintiff satisfied fourth element by showing she was replaced with Anglo male).

65. 199 F.3d 1126 (10th Cir. 1999).

replacement as unfairly precluding suits by plaintiffs who may have legitimate claims.<sup>66</sup> The Tenth Circuit also rejected another common approach that requires plaintiffs to present additional evidence that leads to an inference of discrimination.<sup>67</sup> The Tenth Circuit reasoned that this approach resulted in too much uncertainty for the district courts and for the parties.<sup>68</sup>

## 2. *Non-Class Replacement Is Not Essential if Additional Evidence Is Present*

Several federal courts list non-class replacement as an essential element of the framework, but have held that a plaintiff's failure to show non-class replacement does not automatically preclude establishment of a prima facie case.<sup>69</sup> Instead, these courts consider additional evidence

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66. *See id.* at 1137 (stating strict replacement requirement would preclude meritorious suits). The Tenth Circuit reasoned that an inflexible rule would preclude suits against employers who hire and fire minority employees in an attempt to prevent them from vesting in employment benefits or developing a track record to qualify for promotion . . . [and] would also preclude a suit against an employer who terminates a woman it negatively perceives as a 'feminist' and replaces her with a woman who is willing to be subordinate to her male co-workers or replaces an African-American with an African-American who is perceived to 'know his place.'

*Id.*

67. *See id.* at 1139 (finding that approach requiring plaintiffs to present additional evidence of discrimination is inferior). For a further discussion of this approach, which requires additional evidence of discrimination when replacement is from the same class as the plaintiff, see *infra* notes 69-80 and accompanying text.

68. *See Perry*, 199 U.S. at 1139 (finding requirement of additional evidence is too uncertain). The Tenth Circuit noted that courts adopting this approach have not explained what types of additional evidence would be sufficient to raise an inference of discrimination. *See id.* (noting courts have not provided examples of sufficient evidence). The Tenth Circuit found that this lack of guidance created too much uncertainty. *See id.* (rejecting requirement of additional evidence).

69. *See Clack-Freeman*, *supra* note 6, at 473-74 (stating that some courts articulate fourth element as requiring plaintiff to show outside replacement but do not strictly enforce this element); *see, e.g., Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158-59 (7th Cir. 1996) (stating plaintiff may be able to show discharge was result of protected attribute although employer hired same class replacement).

The United States Court of Appeals for the Fifth Circuit adopted this approach. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 485 (5th Cir. 2000) (stating replacement with non-member of protected class is not essential to establishment of discriminatory discharge prima facie case); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426-27 (5th Cir. 2000) (holding that replacement with member of same protected class is outcome-determinative if plaintiff does not present other evidence of discriminatory intent); *Nieto v. L&H Packaging Co.*, 108 F.3d 621, 624 n.7 (5th Cir. 1997) (stating that replacement with member of same protected class does not preclude establishment of prima facie case of Title VII discriminatory discharge); *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982) (noting that replacement by member of protected class does not negate possibility that discharge was motivated by discrimination); *Jones v. W. Geophysical Co. of Am.*, 669 F.2d 280, 284 (5th Cir. 1982) (stating replacement of a minority employee with non-minority is not only way to create inference of discriminatory intent); *Marks v. Prattco, Inc.*, 607 F.2d 1153, 1155 (5th Cir. 1979) (finding black employees established prima facie case of discriminatory termination because em-



from which discriminatory intent can be inferred.<sup>70</sup>

The United States Court of Appeals for the Seventh Circuit adopted this approach in *Carson v. Bethlehem Steel Corp.*<sup>71</sup> The court reasoned that the ultimate question in discriminatory discharge cases is “whether the plaintiff has established a logical reason to believe that the decision rests on a legally forbidden ground.”<sup>72</sup> Thus, the court held that the fact that a plaintiff’s replacement is of “another race, sex, or age” may raise an infer-

ployer replaced plaintiffs with white employees); *see also* Clack-Freeman, *supra* note 6, at 473-76 (noting Fifth Circuit does not preclude establishment of prima facie when plaintiff was replaced by member of plaintiff’s protected class). *But see* Singh v. Shoney’s, Inc., 64 F.3d 217, 219 (5th Cir. 1995) (finding white female failed to establish prima facie case of discriminatory discharge based on race because white female replaced her); Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990) (stating plaintiff must show that other employees who were non-members of plaintiff’s protected class remained in similar positions).

The United States Court of Appeals for the Eighth Circuit also appears to have adopted this interpretation. *See* Davenport v. Riverview Gardens Sch. Dist., 30 F.3d 940, 945 (8th Cir. 1994) (stating plaintiff must demonstrate that discharge occurred in circumstances which allow court to infer discrimination); Walker v. St. Anthony’s Med. Ctr., 881 F.2d 554, 558 (8th Cir. 1989) (same). In *Walker*, the Eighth Circuit stated that plaintiffs who are replaced by members of their protected class may still be able to establish that they were the “object[s] of impermissible discrimination.” *Id.* The Eighth Circuit further reasoned that “the sex of [the plaintiff’s] replacement, although a relevant consideration, is not necessarily a determinative factor in answer to either the initial inquiry of whether she established a prima facie case or the ultimate inquiry of whether she was the victim of discrimination.” *Id.*

70. *See* EMPLOYMENT, *supra* note 6, ¶ 37, at 115 (stating that plaintiff’s replacement is “a fact that must be considered in determining whether the claimant’s ultimate burden of persuasion of intentional discrimination has been sustained, rather than whether a prima facie case has been established”); Clack-Freeman, *supra* note 6, at 478 (stating that these circuits consider the plaintiff’s replacement in plaintiff’s “overall attempt to prove discriminatory intent”); *see also* Perry, 199 F.3d at 1139 (stating that some circuits allow a plaintiff to establish prima facie if additional facts are shown from which inference of discrimination can be shown).

71. 82 F.3d 157 (7th Cir. 1996).

72. *Id.* at 159. The Seventh Circuit further stated that “[a]n employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement.” *Id.* at 158-59. In reaching this conclusion, the Seventh Circuit relied on the Court’s decision in *O’Connor*. *See id.* (examining *O’Connor*). The Seventh Circuit found that the Supreme Court’s reasoning that “laws against discrimination protect persons, not classes” is equally applicable to the Civil Rights Act of 1964. *Id.* The Seventh Circuit utilized a hypothetical situation to demonstrate *O’Connor*’s applicability in Title VII cases:

Suppose an employer evaluates its staff yearly and retains black workers who are in the top quarter of its labor force, but keeps any white in the top half. A black employee ranked in the 60th percentile of the staff according to supervisors’ evaluations is let go, while all white employees similarly situated are retained. This is race discrimination, which the employer cannot purge by hiring another person of the same race later.

*Id.*

ence of discrimination, but non-class replacement is “neither sufficient or necessary.”<sup>73</sup>

The United States Court of Appeals for the Eleventh Circuit also has held that a same-class replacement does not automatically preclude a plaintiff from establishing a prima facie case.<sup>74</sup> The Eleventh Circuit originally adopted this approach in a discriminatory hiring case, *Howard v. Roadway Express, Inc.*<sup>75</sup> In *Howard*, Roadway Express refused to hire the plaintiff, a black man and former part-time employee of the company, for permanent employment.<sup>76</sup> The following year, Roadway Express hired a black man to fill the position for which the plaintiff had applied.<sup>77</sup> The Eleventh Circuit found that the plaintiff was not precluded from establishing a prima facie case, reasoning that plaintiffs can raise an inference of discrimination in other ways.<sup>78</sup> The *Howard* court indicated that there might be an inference of discrimination because of a substantial lapse of time between the plaintiff’s application and the subsequent hiring.<sup>79</sup> In addition, the *Howard* court stated that because Roadway hired a same-class replacement after the plaintiff filed a complaint with the Equal Employment Opportunities Commission, the hiring could have been motivated by the filing of the complaint, and thus, discrimination could still be inferred.<sup>80</sup>

### 3. Courts Considering Non-Class Replacement an Essential Element

A small minority of federal courts have adopted a strict approach to the consideration of a plaintiff’s replacement identity.<sup>81</sup> In these courts, the plaintiff is automatically precluded from establishing a prima facie

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73. *Id.* at 519; see also *Williams v. Trader Publ’g Co.*, 218 F.3d 481, 485 (5th Cir. 2000) (“[I]t is well settled that, although replacement with a non-member of the protected class is evidence of discriminatory intent, it is not essential to the establishment of a prima facie case under Title VII.”).

74. See, e.g., *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1521 (11th Cir. 1995) (stating plaintiff must show replacement outside protected class under fourth element but finding “prima facie case is not wholly dependant upon meeting the fourth requirement of the *McDonnell Douglas* test”).

75. 726 F.2d 1529 (11th Cir. 1984).

76. See *id.*, at 1534 (describing facts of case).

77. See *id.*

78. See *id.* (“[P]roof that the employer replaced the fired minority employee with a non-minority employee is not the only way to create such an inference [of unlawful discrimination].” (quoting *Jones v. Western Geophysical Co. of Am.*, 669 F.2d 280, 284 (5th Cir. 1982))).

79. See *Howard*, 726 F.2d at 1535 (noting “the lapse of eleven months would significantly diminish the reliability of the subsequent hiring as an indicator of Roadway Express’ intent at the time it rejected [the plaintiff’s] application”).

80. See *id.* (stating inference of discrimination cannot be ruled out based on circumstances of case).

81. See, e.g., *Lowry v. Bedford County Sch. Bd.*, No. 98-1165, 1999 WL 507137, at \*2 (4th Cir. 1999) (requiring plaintiff to show position filled by person outside protected class); *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998) (precluding establishment of prima facie case because plaintiff failed to show non-class replace-

case of discriminatory termination if the plaintiff fails to show that his or her replacement is from outside of the plaintiff's protected class.<sup>82</sup> The United States District Court for the District of Columbia adopted this reasoning in *Klein v. Derwinski*.<sup>83</sup> In that case, the United States District Court for the District of Columbia stated that an employee alleging discriminatory discharge must show that a person from outside the employee's protected class filled the employee's position, or that an employee from outside the protected class with comparable experience was not terminated.<sup>84</sup> The United States Court of Appeals for the Fourth Circuit adopted a similar requirement in *Brown v. McLean*.<sup>85</sup>

### III. FACTUAL AND PROCEDURAL HISTORY OF *BROWN V. MCLEAN*

According to the Fourth Circuit's opinion in *Brown*, the plaintiff, Ronald A. Brown, a white male, was employed as the City of Baltimore's Administrator of Telephone Facilities.<sup>86</sup> On December 3, 1991, Jacqueline F. McLean, a black female, took office as the City of Baltimore's Comptroller and Brown's supervisor.<sup>87</sup> Upon taking office, McLean criticized the lack

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ment); *Klein v. Derwinski*, 869 F. Supp. 4, 7 (D.D.C. 1994) (requiring plaintiff to show non-class replacement).

82. See, e.g., *Brown*, 159 F.3d at 905 (stating that plaintiff failed to establish prima facie case because plaintiff could not show non-class replacement); *Loury*, 1999 WL 507137, at \*2 (finding that plaintiff did not establish prima facie case because plaintiff failed to show non-class replacement); see also Clack-Freeman, *supra* note 6, at 479-80 (stating that in United States District Court for the District of Columbia, plaintiffs who fail to show non-class replacement are precluded from establishing prima facie case).

83. 869 F. Supp. 4 (D.D.C. 1994).

84. See *id.* at 4 (stating criteria for establishing prima facie case of religious discrimination). In *Klein*, a Jewish employee alleged that her employer, the Department of Veteran Affairs, had terminated her based on her religion. See *id.* at 5-8. The court noted that the *McDonnell Douglas* prima facie case had been adapted for use in discriminatory termination cases and stated that under the fourth prong of the framework the plaintiff must prove that "she was either replaced by a person not in the protected class, or such a person with comparable qualifications and work records was not terminated." *Id.* at 7; see also *Simens v. Reno*, 960 F. Supp. 6, 8 (D.D.C. 1997) (holding plaintiff must show replacement outside protected class in disparate treatment cases). After the plaintiff's discharge, another Jewish employee took over the responsibilities of the plaintiff's position; thus the court found that the plaintiff failed to show that someone outside of her protected class filled the position. See *Klein*, 869 F. Supp. at 8 (finding plaintiff did not meet her burden under *McDonnell Douglas* prima facie framework). In addition, the court noted that the plaintiff had failed to allege that her employer had refused to fire a non-Jewish person who held a similar position as the plaintiff and who had a similar work performance as the plaintiff. See *id.* at 8-10 (same).

85. For a further discussion of the Fourth Circuit's holding in *Brown*, see *infra* notes 100-71 and accompanying text.

86. See *Brown*, 159 F.3d at 900 (stating facts of case). As the Administrator of Telephone Facilities, Brown was responsible for directing the city government's telephone services. See *id.*

87. See *id.*

of diversity in the office.<sup>88</sup> In particular, McLean complained that the office portraits were exclusively of white males and had the portraits removed from the office.<sup>89</sup>

On December 18, 1991, McLean's transition team issued a report suggesting that the municipal post office and telephone department be combined into one department under one manager's supervision.<sup>90</sup> McLean sent the recommendation to Baltimore's Board of Estimates, of which McLean was a voting member.<sup>91</sup> On May 13, 1992, the Board of Estimates issued its budget recommendations, which included eliminating Brown's position and adding a new position: the Director of Communications Services.<sup>92</sup>

On May 24, 1992, Brown received a letter from McLean, informing him that his position was being eliminated.<sup>93</sup> On July 1, 1992, Rochelle Young, a black man, was provisionally appointed and, subsequently permanently hired, to fill the newly created Director of Communications Services position.<sup>94</sup>

On February 7, 1995, Brown filed suit in the United States District Court for the District of Maryland against McLean, the Mayor and the City of Baltimore under Title VII.<sup>95</sup> Brown claimed that his position had been

88. *See id.* (stating facts of case).

89. *See id.*

90. *See id.* (noting transition team's recommendations). The report stated that "the restructuring would 'use present personnel on board' and [would] 'take maximum advantage of proven personnel capabilities.'" *Id.* at 901.

91. *See id.* at 901.

92. *See id.*

93. *See id.* The letter stated that the elimination of Brown's position was not Brown's fault and stated that the position was being eliminated based on McLean's transition team's recommendations. *See id.* (noting contents of termination letter).

94. *See id.* (stating Young was provisionally appointed to newly created position and began working in Brown's old office). Prior to Brown's departure, Brown met with McLean for an exit interview, during which time Brown told McLean that he was going to apply for the Director of Communications Services position. *See id.* The Baltimore City Regulations require that any person, whose position is abolished, be placed on a re-employment list for a position that "most nearly approximate[s] the position abolished." *Id.* Under the Baltimore City Regulations, a person on the re-employment list takes priority over any other person who may apply for the position. *See id.* (describing city regulations). Brown, however, was not placed on the list for the Director of Communications Services position. *See id.* (stating there is conflicting evidence about why Brown was not placed on re-employment list for Director of Communications Services position). Instead, Brown was placed on the re-employment list for the position of Telephone Supervisor, for which there was no vacancy. *See id.* The Telephone Supervisor is a working telephone operator, which requires a high school education, whereas Brown had an M.B.A. and no experience as a switchboard operator. *See id.* The Director of Communications Services position was advertised in the newspaper, but Brown never applied for the position. *See id.* (stating there was open application process for position).

95. *See id.* at 898, 901 (recounting disposition of case).

eliminated and he had been discharged because of his gender.<sup>96</sup> The district court granted the defendant's motion for summary judgment on Brown's claim of discriminatory discharge based on gender.<sup>97</sup> The district court reasoned that because a male filled the Director of Communications Services position, Brown had not been a victim of gender discrimination.<sup>98</sup>

Brown appealed the court's decision and requested that the United States Court of Appeals for the Fourth Circuit find that the district court erred in granting summary judgment against him on his gender discrimination charge.<sup>99</sup>

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96. *See id.* at 898, 901 (noting claims in district court). Brown also alleged a violation of his equal protection rights under 42 U.S.C. §§ 1981 and 1983, as well as race discrimination under Title VII. *See id.* at 901. The district court also granted the defendants' motion for summary judgment on the claim of unlawful discrimination in the elimination of Brown's position. *See id.* 901-02. The court refused to grant summary judgment on Brown's failure to hire claim, finding that there was a genuine question of material fact that Brown was not hired because of his race. *See id.* The court denied Brown's motion for summary judgment in which Brown had argued that the city's affirmative action claim constituted a race and gender based employment policy in violation of Title VII and the Fourteenth Amendment. *See id.* The case went to trial on Brown's Title VII failure-to-hire claim and on Brown's § 1981 and § 1983 claims against the city. *See id.* at 902. The court granted the city's motion for judgment as a matter of law, finding that Brown had not produced sufficient evidence that there was a violation of § 1981 and § 1983, and that Brown did not establish a prima facie case of race discrimination. *See id.*

97. *See id.* at 901-02 (noting disposition of case in district court). The defendants also claimed that the plaintiff had not been unlawfully discriminated against by the elimination of his position as the Administrator of Telephone Facilities. *See id.* The district court granted summary judgment in favor of the defendants on this claim. *See id.* The defendants also claimed that they were entitled to summary judgment based on the plaintiff's inability to show that he was not hired for the Director of Communications Services because of his race. *See id.* The district court refused to grant summary judgment on this claim, finding that the plaintiff had established a genuine issue of material fact that he was not hired for the position because of his race. *See id.* (noting district court's ruling on failure to re-hire claim).

98. *See id.* (recounting district court's reasoning).

99. *See id.* at 905 (noting basis for appeal). On appeal, the Fourth Circuit also affirmed the district court's finding that Brown had not established a prima facie case of failure-to-hire and affirmed the denial of partial summary judgment on Brown's claim that the city's affirmative action plan constituted a race or gender-based employment policy. *See id.* (noting circuit ruling). The dissent, however, argued that the district court's grant of summary judgment on Brown's Title VII race discrimination claim should be reversed. *See id.* at 906. In support of its argument, the dissent provided additional evidence indicating discrimination, further noting that by the time McLean left office there were no Caucasians and only one male working in the Comptroller's office. *See id.* at 906-08 (stating additional facts).

IV. ANALYSIS OF THE FOURTH CIRCUIT'S HOLDING IN *BROWN V. McLEAN*A. *Narrative Analysis*1. *Requiring Replacement Outside Protected Class*

The Fourth Circuit initiated review of Brown's gender discrimination claim by stating that "[i]n order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position was ultimately filled by someone not a member of the protected class."<sup>100</sup> In reaching this proposition, the court cited the Supreme Court's decision in *Hicks*, as well as the district court's decision in *Klein*, as examples of cases in which courts required plaintiffs to show non-class replacements.<sup>101</sup>

2. *The Fourth Circuit Notes There Are Exceptions*

The Fourth Circuit, however, noted that there were three distinct exceptions to the non-class requirement.<sup>102</sup> First, the court listed the Supreme Court's decision in *O'Connor* as an exception.<sup>103</sup> The Fourth Circuit stated that age discrimination cases like *O'Connor*, in which an employer replaces the plaintiff with a significantly younger person from within the plaintiff's protected class are exceptions to the replacement requirement.<sup>104</sup> The Fourth Circuit, however, did not address this exception in its analysis of Brown's claim.<sup>105</sup>

The second exception the Fourth Circuit discussed was cases in which there has been a significant length of time between the plaintiff's application for employment and the employer's hiring of another individual within the same protected class.<sup>106</sup> In support of this exception, the Fourth Circuit noted the Eleventh Circuit's decision in *Howard*, in which the Eleventh Circuit stated that a significant period of time between the employer's rejection of the plaintiff and the employer's subsequent hiring of a same-class replacement does not eliminate an inference of discrimina-

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100. *Id.* at 905.

101. *See id.* at 905 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Klein v. Derwinski*, 869 F. Supp. 4, 7 (D.D.C. 1994)).

102. *See id.* at 905 (stating that courts have noted exceptions in limited situations). In *Hicks*, the Supreme Court noted that the petitioners were not challenging the district court's finding that the respondent established a prima facie showing by proving that a white man ultimately filled the respondent's position. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (stating that establishment of prima facie case was not being questioned).

103. *See Brown*, 159 F.3d at 905 (citing *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) (listing exceptions to non-class requirement)).

104. *See id.* at 905 (stating that courts may find exceptions where employers replace plaintiffs with younger persons within same class).

105. *See id.* at 906 (finding none of exceptions were applicable and beginning analysis with second exception).

106. *See id.* (finding that significant lapse of time between application and rehiring decision would create exception to non-class replacement requirement).

tion.<sup>107</sup> In addressing this exception, the Fourth Circuit reasoned that even if Brown had applied for the Director of Communications Services position, the length of time between Brown's application and the city's hiring of another male would not have been significant enough to place Brown within the second exception.<sup>108</sup>

The final exception that the Fourth Circuit noted was an employer's hiring of a same-class replacement that is intended to mask the employer's discrimination against the plaintiff.<sup>109</sup> The Fourth Circuit examined this exception and found that Brown had not presented any evidence that indicated that the city intended to disguise gender discrimination against Brown by hiring another male.<sup>110</sup> Thus, the Fourth Circuit found that Brown failed to establish a prima facie showing of discriminatory discharge and affirmed the district court's grant of motion for summary judgment.<sup>111</sup>

### B. Critical Analysis

The Fourth Circuit's holding in *Brown* is inconsistent with the conclusions reached by all other federal circuit courts that have addressed the issue.<sup>112</sup> The court's inconsistent holding may stem from the manner in which the court analyzed Brown's claim.<sup>113</sup> The court set forth a rule stating that the plaintiff must show his employer hired a non-class replace-

107. See *id.* (citing *Howard v. Roadway Express, Inc.*, 726 F.2d 1529 (11th Cir. 1984)). For a further discussion of the Eleventh Circuit's decision in *Howard*, see *supra* notes 75-80 and accompanying text.

108. See *Brown*, 159 F.3d at 906 ("Even if Brown had applied for the DCS position, the city hired another male for the position at the same time that Brown would have been considered for the position.").

109. See *id.* at 905 (noting an exception to non-class replacement requirement is created "where the employer's hiring of another person within the protected class is calculated to disguise its act of discrimination toward the plaintiff").

110. See *id.* at 906 (stating that evidence presented was not sufficient to establish that city was attempting to mask discrimination by hiring another male).

111. See *id.* at 906.

112. Compare *Brown*, 159 F.3d at 905 (requiring plaintiff to show non-class replacement), with *Williams v. Trader Publ'g Co.*, 218 F.3d 481, 485 (5th Cir. 2000) (finding non-class replacement is not essential to establish prima facie case), *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (stating non-class replacement is not necessary), *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996) (requiring plaintiff to simply show replacement continued to perform plaintiff's work after plaintiff's discharge), *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986) (requiring plaintiffs to show simply that employer sought replacement for plaintiff), *Meiri v. Dacon*, 759 F.2d 989, 996 (2d Cir. 1985) (requiring plaintiffs to show employer sought replacement for plaintiff), and *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534 (11th Cir. 1984) (finding non-class replacement is not necessary).

113. For a further discussion of the Fourth Circuit's analysis in *Brown*, see *infra* notes 118-71 and accompanying text.

ment and then listed three exceptions to the rule.<sup>114</sup> Although the court cited specific cases to support the rule and its exceptions, the court did not analyze the reasoning in these cases.<sup>115</sup> In addition, unlike other federal circuit courts, the Fourth Circuit did not address the purpose of Title VII and the purpose of the prima facie case.<sup>116</sup> As a result, the court reached an inconsistent result.<sup>117</sup>

1. *Development of Non-Class Replacement Requirement Rests on Possibly Flawed Reasoning*

The Fourth Circuit erroneously cited the Supreme Court's decision in *Hicks* as providing the applicable law for interpretation of the fourth element of the prima facie framework.<sup>118</sup> In particular, the Fourth Circuit cited *Hicks* as requiring Title VII plaintiffs to show non-class replacement.<sup>119</sup> The Supreme Court in *Hicks*, however, did not address whether a plaintiff must show non-class replacement because the plaintiff's establishment of a prima facie case was not at issue in *Hicks*.<sup>120</sup> In fact, the dissent in *Hicks* expressly stated that the Supreme Court has never addressed the relevancy of a plaintiff's replacement in the context of a discriminatory discharge case.<sup>121</sup> Therefore, the Fourth Circuit's reliance on

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114. See *Brown*, 159 F.3d at 905 (stating that plaintiff must show non-class replacement to establish prima facie case and stating that there are three exceptions to the requirement).

115. See *id.* at 905-06 (citing other federal circuit cases as examples of Fourth Circuit's list of exceptions, but not analyzing reasoning of these cases).

116. See *id.* at 905-06 (failing to address underlying policy and purpose of prima facie case and of Title VII). Federal circuit courts that have addressed the purposes of Title VII and of the Title VII prima facie cases have adopted more lenient approaches than the Fourth Circuit's strict non-class replacement requirement. See, e.g., *Meiri*, 759 F.2d at 996 (noting purpose of Title VII and prima facie case and adopting *McDonnell Douglas* framework in its original form). In *Meiri*, the Second Circuit stated that the non-class replacement requirement was "at odds with the policies underlying Title VII." *Id.* The court further noted the flexibility of the prima facie elements. See *id.* (stating that prima facie elements were not intended to be applied rigidly).

117. For a further discussion of the inconsistency of the Fourth Circuit's holding, see *infra* notes 118-71 and accompanying text.

118. See *Brown*, 159 F.3d at 905 ("In order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class." (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993))).

119. See *Brown*, 159 F.3d at 905 (citing *Hicks* as requiring plaintiff to show non-class replacement requirement).

120. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (stating "[p]etitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case"). After noting that the plaintiff's establishment of a prima facie case was not at issue, the Court proceeded to quote the district court's prima facie elements. See *id.* In the district court's opinion, it stated the fourth element as "the position remained open and was ultimately filled by a white man." *Id.*

121. See *Hicks*, 509 U.S. at 528 n.1 (1993) (Souter, J., dissenting) ("This court has not directly addressed the question whether the personal characteristics of



*Hicks* resulted in the application of an improper standard to Brown's discriminatory discharge claim.<sup>122</sup>

The Fourth Circuit also cited the district court's holding in *Klein* as supporting the replacement requirement.<sup>123</sup> Although the district court did hold that a plaintiff must show non-class replacement, the court's holding directly conflicts with the approaches adopted by all federal circuit courts of appeal that have addressed the issue.<sup>124</sup> For example, some federal courts—including the Second, Tenth and Third Circuits—do not look at a plaintiff's replacement, but instead require a plaintiff to show either that the employer continued to seek a replacement for the plaintiff, or that the discharge occurred in circumstances giving rise to an inference of discrimination.<sup>125</sup> Other circuits that have addressed the issue do consider a plaintiff's replacement, but unlike the *Klein* court, these circuit courts do not preclude a plaintiff who fails to show non-class replacement from establishing a prima facie case if the plaintiff can provide other evidence of discrimination.<sup>126</sup> Thus, although the Fourth Circuit correctly cited *Klein* as imposing a strict replacement requirement on Title VII plaintiffs attempting to establish a prima facie case of discrimination resulting from their termination, the Fourth Circuit's reliance on *Klein* caused the court to adopt an approach that varies from the approaches adopted by all other circuit courts.<sup>127</sup>

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someone chosen to replace a Title VII plaintiff are material, and this issue is not before us today.”).

122. For a discussion of the Fourth Circuit's erroneous reliance on *Hicks*, see *supra* notes 118-21 and accompanying text.

123. See *Brown*, 159 F.3d at 905 (citing *Klein* in support of non-class replacement requirement).

124. Compare *Klein v. Derwinski*, 869 F. Supp. 4, 7 (D.D.C. 1994) (requiring plaintiff to show non-class replacement), and *Simens v. Reno*, 960 F. Supp. 6, 8 (D.D.C. 1997) (same), with *Kendrick v. Penske Transp. Serv. Corp.*, 220 F.3d 1220, 1228 (10th Cir. 2000) (holding plaintiff must show employer did not eliminate position after plaintiff's discharge), *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 153 (1st Cir. 1990) (finding plaintiff must show only employer sought replacement), and *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 355 (3d Cir. 1999) (holding replacement requirement is “inconsistent with Title VII”).

125. See, e.g., *Kendrick*, 220 F.3d at 1229 (stating plaintiff must raise inference of discrimination to establish prima facie case of discriminatory discharge); *Pivrotto*, 191 F.3d at 356 (requiring plaintiff to show circumstances that give rise to inference of discrimination in order to establish prima facie case of discriminatory discharge); *Meiri v. Dacon*, 759 F.2d 989, 996 (2d Cir. 1985) (requiring plaintiffs to show employer sought replacement for plaintiff).

126. See, e.g., *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426-27 (5th Cir. 2000) (holding that same-class replacement is outcome-determinative if plaintiff does not present other evidence of discriminatory intent); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (stating plaintiff may be able to show that discharge was result of protected attribute although employer hired same-class replacement); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534 (stating that non-class replacement is not only way to establish prima facie case).

127. See *Klein*, 869 F. Supp. 4, 7 (D.D.C. 1994) (requiring plaintiff to show non-class replacement to establish prima facie case). But see *Clack-Freeman*, *supra*

## 2. *Misapplied Reasoning Leads to Flawed List of Exceptions*

Another example of the Fourth Circuit's misguidance is its interpretation of the list of exceptions.<sup>128</sup> First, the court incorrectly applied the Supreme Court's *O'Connor* decision as a unique exception for age discrimination cases.<sup>129</sup> Because the Supreme Court's decision in *O'Connor* involved the ADEA, not Title VII, other circuit courts that have examined the decision in the context of Title VII do not view it as an exception to the replacement requirement.<sup>130</sup> Instead, many federal courts rely on the decision as supporting the proposition that Title VII protects individuals from discrimination, but does not protect classes of people from discrimination.<sup>131</sup> Thus, these courts rely on *O'Connor* in arguing that a plaintiff's replacement should not be the sole criteria in determining whether a plaintiff has established a prima facie showing of discriminatory termination.<sup>132</sup> For example, the Third Circuit in *Pivrotto* argued that the Supreme Court's reasoning in *O'Connor* applied equally to Title VII and stated that a Title VII plaintiff must show that he or she "lost out" because of a protected trait.<sup>133</sup> Additionally, in *Carson*, the Seventh Circuit relied

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note 6, at 469 (stating most courts either simply adopted *McDonnell Douglas* framework or do not strictly enforce non-class replacement requirement); *see also Perry*, 199 F.3d at 1138-39 (summarizing circuits' adoption of lenient approach to replacement requirement). In examining other circuits' approaches to the replacement requirement the Tenth Circuit found:

Several circuits . . . have held that a plaintiff can satisfy the prima facie burden without proving that the position was filled by an individual who does not share the protected attribute. Some circuits have concluded only that a plaintiff is not precluded from meeting the prima facie burden by an inability to demonstrate that the replacement employee does not share [his or] her protected attribute.

*Id.*

128. For a critique of the Fourth Circuit's list exceptions, see *infra* notes 129-59 and accompanying text.

129. *See Brown v. McLean*, 159 F.3d 898, 905 9th Cir. 1998) (citing *O'Connor* as example of age discrimination exception).

130. *See, e.g., Pivrotto*, 191 F.3d at 355 (examining *O'Connor* decision and using it to support argument in Title VII discriminatory discharge case); *Carson*, 82 F.3d at 158 (same).

131. *See Pivrotto*, 191 F.3d at 355 (stating *O'Connor* reasoning applies in gender and race context); *Carson*, 82 F.3d at 158 (stating discrimination laws protect people not classes).

132. *See Pivrotto*, 191 F.3d at 355 (stating that Supreme Court's reasoning "applies equally in gender or race context: 'The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant [to the prima facie case], so long as [s]he has lost out because of [her gender]'" (quoting *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996))); *Carson*, 82 F.3d at 158 (stating that Supreme Court's reasoning is equally applicable to Title VII discriminatory discharge cases).

133. *See Pivrotto*, 191 F.3d at 355 (rejecting non-class replacement requirement after examining and adopting *O'Connor* reasoning). The Third Circuit found that proof of discrimination should not be limited to fact that plaintiff was or was not replaced by someone from outside his or her protected class. *See id.* (rejecting strict non-class replacement requirement).

on the Supreme Court's reasoning that "[l]aws against discrimination protect persons, not classes" to find that Title VII plaintiffs are not required to show non-class replacement.<sup>134</sup>

If the Fourth Circuit had applied the Supreme Court's reasoning as the Third Circuit did in *Pivrotto* or as the Seventh Circuit did in *Carson*, the Fourth Circuit may have held that a plaintiff's replacement is an irrelevant consideration in the establishment of a prima facie case of discriminatory discharge.<sup>135</sup> Because the Fourth Circuit classified *O'Connor* as an exception to the replacement requirement for ADEA cases, its reasoning is inconsistent with the reasoning of courts that have addressed the same issue.<sup>136</sup> As a result, the Fourth Circuit has made it more difficult for plaintiffs in the Fourth Circuit to overcome a motion for summary judgment.<sup>137</sup>

Furthermore, the Fourth Circuit's classification of the Eleventh Circuit's decision in *Howard* is also flawed.<sup>138</sup> The Eleventh Circuit in *Howard* adopted the requirement that the plaintiff must show only "circumstances which give rise to an inference of discrimination."<sup>139</sup> Once the Eleventh Circuit found the plaintiff had established an inference of discrimination, the court examined facts that may act to rule out an established inference of discrimination, including the length of time between the plaintiff's application for employment and the hiring of a replacement.<sup>140</sup> Therefore, the Eleventh Circuit treated the lapse of time not as an exception to the replacement requirement, but as evidence that may be considered while determining if an inference of discrimination was improperly drawn.<sup>141</sup>

134. *Carson*, 82 F.3d at 158.

135. See *Pivrotto*, 191 F.3d at 355 (stating that Supreme Court's reasoning "applies equally to in gender or race context: The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant to the prima facie case, so long as she has lost out because of her gender"); *Carson*, 82 F.3d at 158 (stating that Supreme Court's reasoning is equally applicable to Title VII discriminatory discharge cases).

136. Compare *Brown v. McLean*, 159 F.3d 898, 905 (9th Cir. 1998) (stating age discrimination cases are exceptions to non-class replacement requirement), with *Pivrotto*, 191 F.3d at 355 (applying *O'Connor* reasoning to Title VII cases and rejecting non-class replacement requirement), and *Carson*, 82 F.3d at 158 (same).

137. See *Brown*, 159 F.3d at 906 (affirming grant of summary judgment because plaintiff failed to show non-class replacement).

138. For a discussion of the Fourth Circuit's flawed reliance on the Eleventh Circuit's holding in *Howard*, see *infra* notes 139-46 and accompanying text.

139. *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534 (11th Cir. 1984) (quoting *Jones v. W. Geophysical Co. of Am.*, 669 F.2d 280, 284 (5th Cir. 1982); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

140. See *Howard*, 726 F.2d at 1535 (determining whether lapse of time and hiring after EEOC filing eliminates inference of discrimination).

141. Compare *id.* (stating "[t]he hiring . . . would scarcely rule out the inference of discrimination in connection with the earlier denial of *Howard's* application"), with *Brown*, 159 F.3d at 905 (stating that generally plaintiffs must show non-class replacement but exception exists where there is significant time between employment application and hiring of replacement).

The Fourth Circuit in *Brown*, however, applied opposite reasoning of the Eleventh Circuit's reasoning in *Howard*.<sup>142</sup> By stating that a plaintiff must meet the replacement requirement before a prima facie case of discrimination could be established, the Fourth Circuit limited the situations from which discrimination could be inferred.<sup>143</sup> Thus, unlike the Eleventh Circuit, the Fourth Circuit began its decision by assuming discrimination could not be inferred in *Brown's* case.<sup>144</sup> Then, instead of examining the lapse of time to determine if an inference of discrimination could be "eliminated," as the Eleventh Circuit did in *Howard*, the Fourth Circuit looked at the lapse of time to see if an inference of discrimination could be "drawn."<sup>145</sup> Therefore, the Fourth Circuit erred in applying the Eleventh Circuit's reasoning in *Howard*.<sup>146</sup>

The Fourth Circuit also misapplied several circuit courts' reasoning that employers may hire another individual from within the protected class to disguise discrimination against the plaintiff.<sup>147</sup> Federal circuit courts that have addressed this possibility have relied on it to support arguments that a plaintiff's replacement should not be considered in determining whether a plaintiff has established a prima facie showing of discrimination.<sup>148</sup> For example, in *Pivrotto*, the Third Circuit argued that

142. For a comparison of the Fourth Circuit's reasoning and the Eleventh Circuit's reasoning, see *infra* notes 143-46 and accompanying text.

143. See *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 355 (3d Cir. 1999) ("We can find no justification for limiting the proof necessary to create this inference [of discrimination] to the potentially irrelevant and only marginally probative fact that she was (or was not) replaced by a man.").

144. See *Brown*, 159 F.3d at 905 (stating plaintiffs must show they were replaced by someone outside their protected class to make out prima facie case of discriminatory discharge).

145. Compare *id.* at 905-06 (stating that there are three exceptions to non-class replacement rule and examining length of time to determine if exception could be drawn), with *Howard*, 726 F.2d at 1535 (stating that lapse of time would scarcely eradicate pre-existing inference of discrimination).

146. For a discussion of the Fourth Circuit's application of *Howard's* lapse of time argument, see *supra* notes 138-45 and accompanying text.

147. See *Brown*, 159 F.2d at 905 (stating that exception may occur when employers hire individuals from protected class to mask discrimination against plaintiff). For a further discussion of the Fourth Circuit's misapplication of the argument that an employer may hire a same-class replacement to avoid a lawsuit, see *infra* notes 148-53 and accompanying text.

148. See, e.g., *Perry v. Woodward*, 199 F.3d 1126, 1137 (10th Cir. 1999) (stating inflexible rule would preclude suits by employees whose employers replaced them with protected class member to avoid law suit); *Pivrotto*, 191 F.3d at 355 (noting employer may replace plaintiff with member of protected class to avoid lawsuit); *Howard*, 726 F.2d at 1535 (recognizing hiring after claim filed with EEOC cannot rule out inference of discrimination).

The Third Circuit stated the fact that a plaintiff is replaced by someone within the plaintiff's protected class can be explained in many ways. See *Pivrotto*, 191 F.3d at 355 (rejecting replacement requirement on basis that replacement within class does not necessarily indicate that employer did not discriminate). Therefore, the Third Circuit held that it would be inconsistent with Title VII to make a plaintiff meet the replacement requirement. See *id.* (same). The Third Circuit, however,

an employer might hire a replacement from within the plaintiff's protected class to hide an act of discrimination and thus avoid a lawsuit.<sup>149</sup> In addition, the Eleventh Circuit reasoned that the employer in *Howard* may have hired a same-class replacement to avoid a discrimination suit.<sup>150</sup> These circuits, however, did not recognize that a plaintiff must prove that the employer replaced the plaintiff with a member of the plaintiff's protected class to avoid a lawsuit.<sup>151</sup> In contrast, the Fourth Circuit treats this argument as something that the plaintiff must prove before a plaintiff's replacement becomes irrelevant.<sup>152</sup> Thus, the Fourth Circuit's requirement of proof of the employer's intent to mask discrimination creates a higher obstacle for plaintiffs to overcome in the prima facie stage than that which is applied in other circuit courts.<sup>153</sup>

The Fourth Circuit failed to recognize other situations in which a plaintiff may have a meritorious claim of discrimination even though the employer hired a same-class replacement.<sup>154</sup> For example, both the Third and Tenth Circuits identified situations where an employer may discharge an employee based on the employers' stereotypical images of the employees' protected class.<sup>155</sup> This possibility prompted the Third and Tenth Circuits to adopt a lenient approach to the plaintiff's burden at the prima facie stage.<sup>156</sup> Under a lenient approach like that adopted in the Tenth and Second Circuits, plaintiffs who have meritorious claims are able to survive a motion for summary judgment and the burden shifts to the em-

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stated, "The fact that a female plaintiff claiming gender discrimination was replaced by another woman might have some evidentiary force, and it would be prudent for a plaintiff in this situation to counter (or explain) such evidence." *Id.*

149. See *Pivrotto*, 191 F.3d at 355 (noting that employers may replace plaintiffs with members of plaintiffs' protected class to avoid discrimination suit).

150. See *Howard*, 726 F.2d at 1535 (recognizing hiring after claim filed with EEOC cannot rule out inference of discrimination).

151. See *Pivrotto*, 191 F.3d at 355 (failing to recognize that plaintiff must prove that employer hired same-class replacement); *Howard*, 726 F.2d at 1535 (same).

152. See *Brown*, 159 F.3d at 905-06 (finding employer did not replace Brown with protected individual to hide discrimination). The Fourth Circuit stated, "Brown has [not] presented any evidence that the city's hiring of a male for the DCS position was designed to hide discrimination against Brown on the basis of his gender." *Id.* at 906.

153. See McGinley, *supra* note 22, at 229 (noting that courts apply de minimis burden on plaintiffs during prima facie stage).

154. See *Brown*, 159 F.3d at 905-06 (failing to discuss situations in which plaintiffs may have meritorious claims and are replaced by individual from within protected class).

155. See *Perry v. Woodward*, 199 F.3d 1126, 1137 (10th Cir. 1999) (stating that employers may fire women who they believe are feminists or fire African-Americans who do not "know their place"); *Pivrotto*, 191 F.3d at 355 (stating employers may discharge employees who do not meet employers' stereotypical image).

156. See *Perry*, 199 F.3d at 1137 (rejecting strict replacement requirement because it would preclude meritorious claims); *Pivrotto*, 191 F.3d at 355 (remarking because of situations in which employers discriminate against plaintiffs but still hire same-class replacement for plaintiff, it is inconsistent with Title VII to require plaintiff to show non-class replacement).

ployer to present reasons for the plaintiff's discharge.<sup>157</sup> In the Fourth Circuit, however, plaintiffs that have meritorious claims, but are replaced by an individual from their protected class, would not be able to survive a motion for summary judgment.<sup>158</sup> Thus, the Fourth Circuit's failure to consider the possibility that plaintiffs may be discriminated against despite the fact that their employers hired a same-class replacement results in the unjust dismissal of otherwise meritorious claims.<sup>159</sup>

### 3. *Failure to Address Underlying Policy Possibly Undermines Decision*

Furthermore, in reaching its conclusion, the Fourth Circuit failed to consider the purpose of the prima facie case, which is to "eliminate the most obvious, lawful reasons for the defendant's action."<sup>160</sup> For example, in *Perry*, the Tenth Circuit examined the purpose of the prima facie case and found that an inference of discrimination is raised when a plaintiff eliminates the two most common reasons for termination: "lack of qualification or the elimination of the job."<sup>161</sup> Federal courts, including the Tenth Circuit in *Perry*, also have noted that elimination of the plaintiff's position does not prevent a plaintiff from establishing a prima facie case.<sup>162</sup> Thus, if the Fourth Circuit had applied the reasoning of the Tenth Circuit and of other federal courts, *Brown's* claim would have most likely survived the city's motion for summary judgment by simply showing that the city sought applicants for the Director of Communications Services position.<sup>163</sup>

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157. See, e.g., *Perry*, 199 F.3d at 1140 (stating that after plaintiffs raise inference of discrimination burden shifts to employer to dispel inference of discrimination).

158. See, e.g., *Pivrotto*, 191 F.3d at 355 (listing examples where plaintiffs may have meritorious claims but are replaced by members of their protected class); *McGinley*, *supra* note 22, at 229 (stating plaintiff's burden at prima facie stage was intended to be de minimis but courts tend to use prima facie case to defeat plaintiffs' claims).

159. For a discussion of the Fourth Circuit's failure to recognize situations in which plaintiffs may have meritorious claims, but are replaced by someone from the plaintiff's protected class, see *supra* notes 154-58 and accompanying text.

160. *Pivrotto*, 191 F.3d at 351. In *Pivrotto*, the Third Circuit stated that requiring a plaintiff to show non-class replacement did not eliminate common, lawful reasons for the plaintiff's discharge. See *id.* (stating that requiring plaintiff to show man replaced her did not eliminate common, lawful reasons for discharge). The Third Circuit distinguished situations in which a plaintiff could not prove that he or she was qualified for the position and stated that in these situations the plaintiff's case should fail because the plaintiff failed to eliminate a lawful reason for the discharge. See *id.* (distinguishing failure to show qualification for job from failure to show non-class replacement).

161. See *Perry*, 199 F.3d at 1140.

162. See *id.* at 1140 n.10 (noting elimination of job does not necessarily eliminate discrimination claim); accord *Meiri v. Dacon*, 759 F.2d 989, 996 (2d Cir. 1985) (stating that elimination of position should not prevent plaintiff from establishing prima facie case).

163. See generally *Clack-Freeman*, *supra* note 6, at 486 (noting that simply applying *McDonnell Douglas* framework to Title VII cases would allow discriminatory discharge claims to survive summary judgment).

In addition, the Fourth Circuit did not address the manner in which the prima facie elements were intended to be applied.<sup>164</sup> As the Second Circuit recognized in *Meiri*, the elements of proof in an employment discrimination case “were not intended to be ‘rigid, mechanized or ritualistic.’”<sup>165</sup> Instead, the elements of proof were only intended to make the plaintiff “carry the initial burden of offering evidence adequate to ‘raise[ ] an inference of discrimination.’”<sup>166</sup> Additionally, courts have recognized that a plaintiff’s burden at the prima facie stage is de minimis.<sup>167</sup> Circuit courts that have addressed the flexibility of the prima facie case and the plaintiff’s de minimis burden have tended to adopt a more lenient approach than the strict approach that the Fourth Circuit applies.<sup>168</sup> The Fourth Circuit’s adoption of a rigid rule that plaintiffs must show non-class replacement contravenes the purpose of the prima facie case.<sup>169</sup> If the Fourth Circuit would have applied a more lenient approach like other circuit courts, Brown may have been able to establish a prima facie case by showing that the city sought a replacement.<sup>170</sup> Then Brown would have met his de minimis burden, and the burden would have shifted to the

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A simple adaptation of the McDonnell Douglas elements in the discharge arena serves the purposes originally envisioned by the [Supreme] Court, by protecting claims with merit from automatic dismissal, while allowing claims based on thin evidence to be later disposed of at stage three, where the ultimate issue of discrimination is considered.

*Id.*

164. See *Brown v. McLean*, 159 F.3d 898, 905-06 (4th Cir. 1998) (failing to address purpose of prima facie case).

165. *Meiri v. Dacon*, 759 F.2d 989, 996 (2d Cir. 1985) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

166. *Meiri*, 759 F.2d at 996 (quoting *Furnco*, 438 U.S. at 577).

167. See *id.* at 996 (noting that prima facie elements were only intended to make plaintiff carry initial burden and were not intended to be inflexible); see also Clack-Freeman, *supra* note 6, at 486 (stating that Supreme Court did not intend plaintiff’s “prima facie burden to be onerous”).

168. See, e.g., *Perry v. Woodward*, 199 F.3d 1126, 1137 (10th Cir. 1999) (“The imposition of the inflexible rule . . . is untenable because it could result in the dismissal of meritorious claims.”); *Meiri*, 759 F.2d at 996 (noting flexibility of prima facie elements and finding that plaintiff must only raise inference of discrimination).

169. See generally *Meiri*, 759 F.2d at 996 (stating that because elements of proof were intended to be flexible, imposition of non-class replacement requirement on plaintiffs contravenes policies underlying Title VII).

170. See, e.g., *Perry*, 199 F.3d at 1139 (noting that requiring plaintiff to show employer continued to seek applicants is superior standard to those followed in other courts); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996) (requiring plaintiff to show replacement continued to perform plaintiff’s work after plaintiff’s discharge); *Meiri*, 759 F.2d at 996 (requiring plaintiffs to show employer sought replacement for plaintiff); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986) (requiring plaintiffs to show employer sought replacement for plaintiff).

defendants to provide a non-discriminatory reason for Brown's termination.<sup>171</sup>

#### V. IMPACT OF FOURTH CIRCUIT'S DECISION IN *BROWN v. McLEAN*

Although the Fourth Circuit treated Brown's discriminatory discharge claim as a minor and insignificant contention, the court created a precedent for its application in subsequent discriminatory discharge cases.<sup>172</sup> The Fourth Circuit's holding in *Brown*, however, is vastly inconsistent with recent federal decisions.<sup>173</sup> In fact, the Fourth Circuit is the only federal circuit court of appeals to adopt a strict approach, which automatically precludes a plaintiff from establishing a prima facie case of discriminatory discharge if the plaintiff fails to show non-class replacement.<sup>174</sup> The result is an unequal and inconsistent application of Title VII among federal circuit courts.<sup>175</sup> This inconsistency will hopefully prompt the Supreme Court to clarify the proper elements of the discriminatory discharge prima facie case.<sup>176</sup>

Furthermore, by adopting a strict view of the fourth element of the *McDonnell Douglas* framework, the Fourth Circuit may be precluding plaintiffs who have meritorious claims from obtaining a just result.<sup>177</sup> Many circuits have recognized that an employer may have discriminated against the plaintiff even though the employer replaced the plaintiff with a member of the plaintiff's protected class.<sup>178</sup> This recognition is consistent with

171. See Clack-Freeman, *supra* note 6, at 486 (stating that simple adaptation of prima facie elements allows plaintiffs to survive motion for summary judgment and burden then shifts to defendant).

172. See, e.g., Lowry v. Bedford County Sch. Bd., No. 98-1165, 1999 WL 507137, at \*2 (4th Cir. July 19, 1999) (applying *Brown* holding to discriminatory discharge prima facie case).

173. See, e.g., Kendrick v. Penske Transp. Serv. Corp., 220 F.3d 1229 (10th Cir. 2000) (adopting lenient approach to replacement requirement); Perry, 199 F.3d at 1138 (same); Pivrotto v. Innovative Sys., Inc., 199 F.3d 344, 355 (3d Cir. 1999) (same).

174. See Pivrotto, 199 F.3d at 354 n.6 (noting that Fourth Circuit is only federal circuit court of appeals to adopt strict non-class replacement approach).

175. See Clack-Freeman, *supra* note 6, at 487 (noting confusion for litigants of varying approaches to prima facie case).

176. See, e.g., O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 309 (1996) (granting certiorari to determine whether ADEA plaintiff must show non-class replacement); Chappel, *supra* note 55, at 211-12 (noting split among circuits over replacement requirement in ADEA cases prior to Supreme Court's decision in *O'Connor*); see also Clack-Freeman, *supra* note 6, at 487-88 (noting confusion among circuits and within circuits over replacement requirement in Title VII discriminatory discharge cases).

177. See, e.g., Perry, 199 F.3d at 1137 (stating that employers may fire women who they believe are feminists or fire African-Americans who do not "know their place"); Pivrotto, 191 F.3d at 355 (stating employers may discharge employees who do not meet employers' stereotypical image).

178. For a discussion of circuits that recognize that plaintiffs may be dismissed although they have meritorious claims, see *supra* notes 153-59 and accompanying text.



the plaintiff's de minimis burden at the prima facie stage.<sup>179</sup> The Fourth Circuit's approach, however, raises the bar that plaintiffs must overcome to survive a defendant's motion for summary judgment.<sup>180</sup> In the Fourth Circuit, and in courts adopting the Fourth Circuit's approach, plaintiffs who may have been discriminated against but who were replaced by a member of their protected class will be excluded from having their day in court.<sup>181</sup> This result contravenes the underlying purpose of Title VII—to protect individuals from employment discrimination.<sup>182</sup>

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179. For a discussion of the underlying policies of the prima facie case, see *supra* notes 160-71 and accompanying text.

180. See McGinley, *supra* note 22, at 229 (stating burden at prima facie stage was intended to be de minimis but courts of appeals now use prima facie stage to defeat plaintiffs' claims).

181. *Contra* Clack-Freeman, *supra* note 6, at 491 (stating that lenient approach protects claims with merit from automatic dismissal).

182. See 42 U.S.C. § 2000e-2(a) (1995) (prohibiting discrimination in employment arena which is based on sex, religion, race, color and national origin).