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Rhodes v. Guiberson Oil Tools: The Fifth Circuit's Approach to Pretext Evidence in Employment Discrimination

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I. INTRODUCTION

In *Rhodes v. Guiberson Oil Tools*,[1] the plaintiff was employed at the defendant's company for twenty-five years before being discharged due to a reduction in the work force. The plaintiff was told that the company would consider rehiring him should its needs change.[2] Within two months of the plaintiff's discharge, however, the defendant hired a younger person to do the same job as the plaintiff.[3] The plaintiff filed suit under the Age Discrimination in Employment Act (ADEA),[4] alleging that the reason for his discharge was intentional discrimination based on his age.[5]

The district court, in a jury trial, found for the plaintiff on the basis that the defendant had intentionally discriminated against him because of his age. The defendant appealed to the United States Court of Appeals for the Fifth Circuit on the ground that the jury verdict was not supported by sufficient evidence. A divided panel of the Fifth Circuit agreed with the defendant's sufficiency argument and reversed the jury verdict. The court, however, later agreed to review en banc its decision concerning sufficiency of the evidence.[6] *Held*:

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1. 75 F.3d 989 (5th Cir. 1996) (en banc).
2. *Id.* at 991-92.
3. *Id.* at 992.
4. 29 U.S.C. § 621-634 (1994).
5. *Rhodes*, 75 F.3d at 992.
6. *Id.* at 992. The case of Rhodes v. Guiberson Oil Tools was heard before both the U.S. District Court for the Eastern District of Louisiana and the Fifth Circuit Court of Appeals on several occasions. This note focuses on the decision of the Fifth Circuit when rehearing the case en banc, 75 F.3d 989 (5th Cir. 1996). However, throughout the note, there will be several references to the original panel decision of the Fifth Circuit, 39 F.3d 537 (5th Cir. 1994).

Rhodes was evaluated under the *McDonnell Douglas* framework, which is a jurisprudential method, developed by the Supreme Court, to evaluate disparate treatment employment discrimination suits involving circumstantial evidence. Therefore, this note will necessarily be limited to employment discrimination cases brought under the disparate treatment theory. The *McDonnell Douglas* framework has been applied to suits filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e)-2000(h)-6 (1994) (McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) (creating what became known as the *McDonnell Douglas* framework and applying it to Title VII discrimination suits)), the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (1994) (Bodenheimer v. PPG Indust., Inc., 5 F.3d 955 (5th Cir. 1996) (applying the *McDonnell Douglas* framework to ADEA cases)), the Fair Housing Act, 42 U.S.C. § 3601-3631 (1994) (Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996) (applying the *McDonnell Douglas* framework to FHA cases)), and the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (1994) (Daigle v. Liberty Life Ins. Co., 70 F.3d 394 (5th Cir. 1995) (applying the *McDonnell Douglas* framework to ADA cases)).

It is important to distinguish between the disparate treatment theory of proving employment discrimination and the disparate impact theory. The disparate treatment theory focuses on intentional discrimination against employees by their employer based on some protected characteristic, while the

> [A] jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons [for the employment decision] was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which the plaintiff complains.[7]

According to the Fifth Circuit, a plaintiff in a disparate treatment employment discrimination suit involving circumstantial evidence can survive a defendant's motion challenging the sufficiency of the evidence if the evidence presented creates a question of fact as to the accuracy of the reasons offered by the defendant for the employment decision and the jury can reasonably infer the employment decision was motivated by discriminatory intent.

There are two major objectives of this note. The first is to explain what an employee who files an employment discrimination suit in the Fifth Circuit must prove in order to survive a defendant's motion challenging the sufficiency of the evidence so that the issue of intentional discrimination becomes a question for the trier of fact.[8] The second is to explain how adopting this standard of proof affects employment discrimination law in the Fifth Circuit. Thus, it will be necessary to: (1) examine how the Supreme Court has developed the law concerning employment discrimination; (2) evaluate the role that evidence of an employer's lack of truthfulness regarding its employment decision plays in determining the existence of intentional discrimination and the approaches taken by the courts to this evidence; (3) examine Supreme Court jurisprudence concerning these approaches and determine what guidance, if any, it provides; and (4) evaluate how the Fifth Circuit, in *Rhodes*, defined its approach for determining what a plaintiff must prove to survive a defendant's motion challenging sufficiency of the evidence.

II. PRIOR JURISPRUDENCE

A. *Development of the* McDonnell Douglas *Framework*

In 1973, the Supreme Court, in *McDonnell Douglas Corp. v. Green*,[9] announced a general framework based on a "pretext theory" to be followed by courts evaluating employment discrimination suits when the plaintiff had only

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disparate impact theory focuses on a statistical analysis of employment decisions to prove discriminatory practices. *See infra* text accompanying notes 9-22 for further discussion of the *McDonnell Douglas* framework.

7. *Rhodes*, 75 F.3d at 994.

8. A sufficiency-of-the-evidence challenge is made in the form of a motion for summary judgment and/or a motion for judgment as a matter of law.

9. 411 U.S. 792, 93 S. Ct. 1817 (1973).

circumstantial evidence with which to prove his claim. This framework was later clarified in *Texas Department of Community Affairs v. Burdine*,[10] and *St. Mary's Honor Center v. Hicks*.[11] These cases provide the backdrop against which the United States Court of Appeals for the Fifth Circuit decided *Rhodes v. Guiberson Oil Tools*.

The facts surrounding the Supreme Court's decision in *McDonnell Douglas Corp. v. Green* are representative of many employment discrimination suits. The plaintiff, a black man, was laid off due to a reduction in the defendant company's work force. Less than a year later, the defendant began accepting applications for the job previously performed by the plaintiff. The plaintiff applied for this job and was rejected.[12] Plaintiff filed suit claiming he was unlawfully discriminated against because of his race.[13]

The Court in *McDonnell Douglas* established a three-tiered framework which governs the shifting of the burden of production[14] in employment discrimination suits based solely on circumstantial evidence of intentional discrimination. At the first stage, the plaintiff has the burden of establishing a prima facie case of discrimination. A prima facie case is established by showing: (1) the plaintiff is a member of a protected group; (2) the plaintiff applied for and was qualified for a job for which the employer was seeking applications; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.[15] By establishing a prima facie case, the employee creates a presumption of intentional discrimination on the part of the employer.[16]

Assuming the plaintiff establishes a prima facie case, the inquiry proceeds to the second stage of the *McDonnell Douglas* framework. At this stage the

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10. 450 U.S. 248, 101 S. Ct. 1089 (1981).

11. 509 U.S. 502, 113 S. Ct. 2742 (1993).

12. Plaintiff, after being laid off, participated in a "stall in" where he and several others parked their cars in the road leading to the defendant's plant thereby preventing the plant workers from coming to and going from work. Plaintiff also participated in a "lock in" where he and several others chained and padlocked the door to one of the plant buildings thereby preventing the plant workers from entering and exiting the building. Defendant stated that his reason for not rehiring plaintiff was his participation in the "stall in" and "lock in."

13. *McDonnell Douglas*, 411 U.S. at 793-96, 93 S. Ct. at 1820-21.

14. "Burden of production" refers to the duty imposed on a party to provide sufficient evidence concerning a particular aspect of the litigation. Under the *McDonnell Douglas* framework, this burden shifts between the plaintiff and the defendant depending on the particular stage in the proceeding. *See infra* text accompanying notes 48-53 for further discussion on burden of production.

15. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824.

16. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981). Applying these principles to the facts in *McDonnell Douglas*, the plaintiff established a prima facie case. He was able to demonstrate that the defendant knew he was in a protected class (i.e., he was black); that the defendant was seeking applications for a job for which he was qualified; that he applied and was rejected by the defendant; and that the defendant continued to seek applications from persons with qualifications similar to those of the plaintiff. By establishing a prima facie case, a presumption of intentional discrimination was created in the plaintiff's favor.

burden of production shifts to the defendant to set forth "reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action."[17] If the defendant carries this burden of production (regardless of its persuasiveness), the presumption of intentional discrimination, previously created in the plaintiff's favor, is overcome and drops from the case.[18]

Once the defendant satisfies its burden of production at the second stage of the inquiry, the court must ascertain whether any questions of fact remain for the trier of fact to consider.[19] No question of fact remains and the plaintiff is entitled to judgment as a matter of law if, based on the evidence presented, any rational person would have to find the plaintiff established a prima facie case of intentional discrimination, and the defendant failed to meet its burden of production.[20] If, however, the defendant fails to meet its burden of production but reasonable minds could differ as to whether the plaintiff established a prima facie case of intentional discrimination by a preponderance of the evidence, a question of fact remains for the trier of fact.[21] If the plaintiff has established a prima facie case and the defendant has met its burden of production, the inquiry moves to the final stage of the *McDonnell Douglas* framework.

In the third stage or "pretext stage," the plaintiff is given the opportunity to prove by a preponderance of the evidence that the "legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[22] It is this stage of the *McDonnell Douglas* framework that has created confusion in judicial interpretation and on which this paper focuses.

B. *Subsequent Interpretation of the Third Stage of the* McDonnell Douglas *Framework*

The *McDonnell Douglas* framework was important because it provided the courts with a vehicle through which they could fairly analyze employment discrimination suits based solely on circumstantial evidence. While the framework provided a workable solution to this problem,[23] federal appellate

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17. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 2747 (1993) (emphasis in original). *See also Burdine*, 450 U.S. at 254-55, 101 S. Ct. at 1094-95 (establishing this principle).

18. *Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749. *See also Burdine*, 450 U.S. at 255, 101 S. Ct. at 1094-95. Applying the principles from the second stage of the framework to the facts in *McDonnell Douglas*, the defendant offered the plaintiff's participation in the "stall in" and the "lock in" as its reason for not rehiring the plaintiff. The Court in *McDonnell Douglas* said this explanation was sufficient to overcome the presumption established at the first stage.

19. *Hicks*, 509 U.S. at 509, 113 S. Ct. at 2748.

20. *Id.* at 509, 113 S. Ct. at 2748.

21. *Id.* at 509-10, 113 S. Ct. at 2748.

22. *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093.

23. *See* Rhodes v. Guiberson Oil Tools, 75 F.3d. 989, 993 (5th Cir. 1996) (en banc) (because of the lack of direct evidence in employment discrimination suits, the courts needed a way to fairly analyze circumstantial evidence).

courts were divided over certain aspects of its application. One of the principal areas of division concerned how courts should evaluate the "pretext stage" of the *McDonnell Douglas* framework to determine whether the plaintiff has produced enough evidence to survive a defendant's motion challenging the sufficiency of the evidence.

An explanation by the defendant is considered a "pretext" if the trier of fact finds it to be an inaccurate statement of the motivation for the action. As applied to employment discrimination suits, pretext does not refer to a situation in which an employer is wrong in its assessment of the facts; i.e., whether an employee was a good worker. Rather, it concerns an employer who, whether knowingly or unknowingly (e.g., employer offers the testimony of the decision-maker believing it to be true), offers an incorrect explanation of his motive for making a decision regarding an employee.[24] The courts and commentators have developed three varying approaches based on "pretext" when that term is considered in the context of the third stage of the *McDonnell Douglas* framework. These three approaches are commonly referred to as "pretext-only," "pretext-plus," and a middle-ground approach, which treats pretext as permitting an inference of intentional discrimination.[25]

1. Pretext-Only

The pretext-only approach is based on the premise that as long as the employee produces sufficient evidence from which it can be determined that the employer's explanation for the adverse employment decision is untrue, the finder

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24. *See Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095.

25. Pretext-only and pretext-plus are terms of art first used by Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57 (1991), to articulate the manner in which a plaintiff may meet his burden of production by circumstantial evidence under the "pretext theory" so as to survive a defendant's motion challenging the sufficiency of the evidence. The middle ground approach has received much greater attention as a result of the Court's decision in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) (*see infra* text accompanying notes 54-61). While these terms originally applied only to the plaintiff's *burden of production* to test sufficiency of the evidence at the third stage of the *McDonnell Douglas* framework, courts have sometimes used them to refer instead to the plaintiff's overall *burden of persuasion*. This has resulted in much confusion among the courts.

In an attempt to alleviate some of this confusion, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995), redefines these terms as they apply to the plaintiff's burden of production in order to survive a defendant's motion challenging sufficiency of the evidence. She begins with the assumption that a plaintiff must offer "combined evidence" of intentional discrimination, which is evidence sufficient to (1) establish a prima facie case; and (2) show that the defendant's reasons were pretextual. She then defines three possible methods of evaluating pretext evidence: (1) "judgment for the plaintiff always permitted," which is analogous to the pretext-only approach; (2) "judgment for the plaintiff sometimes permitted," which is analogous to a later-developed permissive inference approach; and (3) "judgment for the defendant required," which is analogous to the pretext-plus approach.

of fact may make a reasonable inference that intentional discrimination was the true reason.[26] Thus, the only target for a sufficiency challenge is the plaintiff's evidence of pretext, and not the trier of fact's decision regarding the ultimate issue of intentional discrimination. Because of this permissible inference, the employee is not required to make an affirmative showing of intentional discrimination by direct evidence. Rather, indirect or circumstantial evidence that the employer's decision was made to promote a discriminatory agenda is all that is required.[27] Therefore, the plaintiff would survive the defendant's motion for summary judgment and/or judgment as a matter of law by producing sufficient evidence to make out a prima facie case and sufficient evidence of pretext.[28]

The rationale behind the pretext-only approach is that it is reasonable for the trier of fact to infer that the employer's motive in offering an untrue explanation for his actions is to conceal a discriminatory agenda.[29] This position also has jurisprudential support from the Court in *Burdine* when it stated that at the third stage of the *McDonnell Douglas* framework, the employee's burden of proving pretext "merges with the ultimate burden of persuading the court that [the employee] has been the victim of intentional discrimination."[30] "This merged burden, however, may be carried in one of two ways: the plaintiff may prove discrimination 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'"[31]

2. Pretext-Plus

Courts that adopt the pretext-plus approach require the plaintiff to make a dual showing at the pretext stage in order to defeat the defendant's motion challenging the sufficiency of the evidence. Not only must a plaintiff in a pretext-plus jurisdiction prove that the legitimate, nondiscriminatory reason

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26. Jody H. Odell, Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and Its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251, 1258-59 (1994).

27. Lanctot, *supra* note 25, at 64.

28. Malamud's equivalent of the pretext-only standard is defined as "judgment for the plaintiff is always permitted." This theory is predicated on the idea that "combined evidence" is always sufficient for the factfinder to infer intentional discrimination; thus, the plaintiff can, as a matter of law, defeat a motion for summary judgment. Malamud, *supra* note 25, at 2306.

29. Lanctot, *supra* note 25, at 114.

30. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981).

31. Odell, *supra* note 26, at 1259 (quoting *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095). Based on the facts in *McDonnell Douglas*, a plaintiff in a pretext-only jurisdiction, in order to overcome a defendant's motion for summary judgment and/or judgment as a matter of law, must produce sufficient evidence that the defendant's stated reason for not hiring him—i.e., because plaintiff participated in the "stall in" and "lock in"—was untrue.

offered by the defendant for the adverse employment decision was pretextual, but he must also produce sufficient evidence that the real reason for the decision was intentional discrimination.[32]

The pretext-plus standard is based on the theory that it is improper to allow the trier of fact to infer that discrimination was the true motivation for the employment decision merely by producing sufficient evidence that the employer's reason was untrue.[33] There may have been other lawful or unlawful, but still not discriminatory, motivating forces, such as poor business judgment or arbitrary behavior, which would justify the employer's decision.[34] An employer's decision to offer a pretextual explanation for his action rather than admit that he made a poor business decision is not enough by itself to support a finding of intentional discrimination. Consequently, it is unfair to allow the inference of intentional discrimination based solely on a showing that the employer's proffered reason was pretextual.[35]

3. Permissive Inference

The permissive inference approach has received increased attention as a result of the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*.[36] Under this approach, the factfinder is permitted to infer intentional discrimination when the plaintiff establishes a prima facie case and creates a fact issue as to

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32. Odell, *supra* note 26, at 1258. Malamud's equivalent of the pretext-plus standard is termed "judgment for the defendant required." Under this approach "combined evidence" without additional proof of intentional discrimination is never sufficient for the plaintiff to defeat the defendant's motion for summary judgment or judgment as a matter of law. Malamud, *supra* note 25, at 2306.

33. Lanctot, *supra* note 25, at 68.

34. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993) (The fact that an employer acts unlawfully in making an employment decision does not necessarily mean he violates a law designed to protect an employee from discrimination based on a specific characteristic unless that specific characteristic was the basis for the discrimination).

35. Odell, *supra* note 26, at 1250-60. One commentator suggests that the pretext-plus standard is adopted by courts because of their disbelief that employment discrimination is prevalent in the workplace. Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 Conn. L. Rev. 997, 1023 (1994). Thus, courts following this approach distrust a proxy or indirect method of proving discrimination. Another suggested reason is that the decision to adopt pretext-plus is made out of fear that by allowing the employee's burden of production to be less burdensome (i.e., adopting pretext-only), the quantity of employment discrimination litigation would be greatly increased. Lanctot, *supra* note 25, at 69.

Based on the facts in *McDonnell Douglas*, to survive a defendant's motion challenging the sufficiency of the evidence, the plaintiff, in a pretext-plus jurisdiction, would have to produce sufficient evidence that the defendant's reason for not rehiring him was pretextual, and also that the true reason he was not rehired was the defendant's intent to discriminate against him because he was black.

36. 509 U.S. 502, 113 S. Ct. 2742 (1993). *See* Michael J. Lambert, St. Mary's Honor Center v. Hicks: *The "Pretext-Maybe" Approach*, 29 New Eng. L. Rev. 163 (1994) (first to apply the term "pretext-maybe" to the decision in *Hicks*); Odell, *supra* note 26, at 1269 (defining the middle ground approach as "permissive inference" in the context of *Hicks*).

whether the employer's nondiscriminatory reasons were false. That inference, however, must be supported by sufficient evidence so that the inference is reasonable. Under this approach, the inference of discrimination is sometimes, but not always, permitted on the basis of pretext evidence.[37]

C. St. Mary's Honor Center v. Hicks

1. Facts and Holding of Hicks

Prior to the Supreme Court decision in *St. Mary's Honor Center v. Hicks*, a majority of the courts of appeal had adopted the pretext-only approach as the appropriate method for evaluating employment discrimination suits. This majority included the Court of Appeals for the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits.[38] The pretext-plus approach was adopted by the First, Fourth, Seventh, and Eleventh Circuits.[39] Because of this split among the circuits over what approach was to be taken to the pretext inquiry, many employment lawyers felt that the issue would be

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37. Malamud, *supra* note 25, at 2306. Professor Malamud refers to the permissive inference standard as, "judgment for the plaintiff sometimes permitted." The problem with the permissive inference approach is that it does not provide an adequate standard from which a plaintiff or defendant can predict results. Assume that a plaintiff establishes a prima facie case and that the employer's explanation for its action was untrue. In a pretext-only jurisdiction, a plaintiff with this evidence knows it should be sufficient to support a finding of intentional discrimination and thus would get the case to the factfinder. Alternatively, a plaintiff with this evidence in pretext-plus jurisdiction would know that this should not be sufficient to support a finding of intentional discrimination. A plaintiff in a permissive inference jurisdiction with this evidence would have no guarantee whether or not this evidence was sufficient to support a finding of intentional discrimination.

Applying the facts in *McDonnell Douglas* to a plaintiff's burden of production in a "permissive inference" jurisdiction, the plaintiff must produce sufficient evidence that the defendant's reason for not rehiring him was pretextual. Based on this evidence and the prima facie case, the trier of fact may be able to infer that intentional discrimination was the true reason.

38. Lanctot, *supra* note 25, at 71-75 nn.46-53 (citing the following cases as the leading case for each respective circuit: Second, Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988); Third, Chipollini v. Spencer Gifts, Inc., 814 F.3d 893 (3d Cir.) (en banc), *cert. dismissed*, 483 U.S. 1052, 108 S. Ct. 26 (1987); Fifth, Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633 (5th Cir. 1985); Sixth, Tye v. Board of Educ., 811 F.2d 315 (6th Cir.), *cert. denied*, 484 U.S. 924, 108 S. Ct. 285 (1987); Eighth, MacDissi v. Valmont Indus., 856 F.2d 1054 (8th Cir. 1988); Ninth, Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985), *modified*, 784 F.2d 1407 (1986); Tenth, Drake v. City of Fort Collins, 927 F.2d 1156 (10th Cir. 1991); District of Columbia, Bishopp v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986)).

39. Lanctot, *supra* note 25, at 82-86 nn.92-96 (citing the following cases as the leading case for each respective circuit: First, White v. Vathally, 732 F.2d 1037 (1st Cir. 1984); Fourth, Duke v. Uniroyal, Inc., 928 F.2d 1413 (4th Cir. 1991); Seventh, North v. Madison Area Ass'n for Retarded Citizens-Developmental Ctrs. Corp., 844 F.2d 401 (7th Cir. 1988); Eleventh, Sparks v. Pilot Freight Carriers, 830 F.2d 977 (11th Cir. 1987)).

resolved by the Supreme Court in *Hicks*.[40] Whether this resolution actually occurred is subject to differing opinions.[41]

St. Mary's Honor Center v. Hicks involved a Title VII discriminatory discharge claim that was supported by only circumstantial evidence of intentional discrimination. Melvin Hicks, a black man, was hired in 1978 as a correctional officer at St. Mary's Honor Center, a state-run halfway house. Two years later St. Mary's promoted him to shift commander. As a result of supervisory changes in 1983, Hicks' immediate supervisor was removed and replaced by John Powell. Before these changes, Hicks' employment record at St. Mary's had been "satisfactory." Subsequent to these changes, however, Hicks was disciplined repeatedly, suspended, and later demoted for failure to control his subordinates. He was eventually discharged after threatening Powell during an argument.[42]

Hicks filed suit in the United States District Court for the Eastern District of Missouri alleging violations of Title VII of the Civil Rights Act of 1964. The district court, in a bench trial,[43] made the following findings of facts: (1) St. Mary's reasons for discharging Hicks were pretextual; but (2) Hicks failed to prove intentional discrimination was the true reason. Because of Hicks' failure to prove intentional discrimination, the district court found in favor of St. Mary's on the ground that Hicks had failed to meet his burden of persuasion. Hicks appealed this decision to the Court of Appeals for the Eighth Circuit, asserting that a finding of pretext entitled him to judgment as a matter of law.[44] Agreeing with Hicks, the Eighth Circuit set aside the verdict of the district court on the grounds that "once [Hicks] proved all of [St. Mary's] proffered reasons for the adverse employment action to be pretextual, [Hicks] was entitled to judgment as a matter of law."[45] St. Mary's appealed this decision to the Supreme Court.

The United States Supreme Court, in a 5-4 decision with the majority opinion written by Justice Scalia, rejected the reasoning of the Eighth Circuit. The Court held that in order for a plaintiff to prevail in an employment discrimination suit, he must satisfy his ultimate burden of persuasion, which is to prove intentional discrimination.[46] Intentional discrimination cannot be proven unless the defendant's explanation for the employment decision is shown

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40. Daniel Grossman, *The Pretext Burden After* St. Mary's Honor Center v. Hicks, 24 Colo. Law 2349, 2349 (1995).

41. *Developments in the Law: Employment Discrimination, Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579, 1593 (1996).

42. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 504-06, 113 S. Ct. 2742, 2746 (1993).

43. This suit was filed before the enactment of the Civil Rights Act of 1991, which allows jury trials in employment discrimination suits. The 1991 Act allows jury trials if the plaintiff is seeking compensatory or punitive damages. 42 U.S.C. § 1981(a)(c) (1994).

44. St. Mary's Honor Ctr. v. Hicks, 970 F.2d 487, 488 (8th Cir. 1992).

45. *Hicks*, 509 U.S. at 508, 113 S. Ct. at 2748 (quoting St. Mary's Honor Ctr. v. Hicks, 970 F.2d 487, 492 (8th Cir. 1992)).

46. *Hicks*, 509 U.S. at 514, 113 S. Ct. at 2751.

to be a "pretext for discrimination." To prove "pretext for discrimination," the employee must prove: (1) that the defendant's explanation for its employment decision was pretextual; and (2) that discrimination was the true reason.[47]

2. *Burden of Persuasion vs. Burden of Production*

The holding in *Hicks* governs the situation in which a party questions whether the employee has carried his burden of persuasion, but it does not address the question of what constitutes sufficient evidence for the plaintiff to meet his burden of production at the third stage of the *McDonnell Douglas* framework (i.e. what the plaintiff must show at the third stage of the *McDonnell Douglas* framework in order to survive a defendant's motion challenging the sufficiency of the evidence). The difference between "burden of persuasion" and "burden of production" is central to understanding the problem which was later faced by the Fifth Circuit in *Rhodes* and understanding why *Hicks* did not resolve the issue in *Rhodes*.

The burden of persuasion refers to the overall findings that must be made by the trier of fact in order for the plaintiff to prevail in the suit.[48] To meet the burden of persuasion, the plaintiff must show that the defendant intentionally discriminated against him. This issue was addressed in *Hicks* because in that case, it was the plaintiff, not the defendant, moving for judgment notwithstanding the verdict. In order for a plaintiff to be entitled to summary judgment or judgment as a matter of law, he must not only meet the sufficiency of the evidence requirements involved in his burden of production but must also satisfy his overall burden of persuasion, which is proving intentional discrimination.[49] For a court to award a plaintiff summary judgment or judgment as a matter of law, the plaintiff must prove intentional discrimination by such evidence that it would be unreasonable for a trier of fact to conclude otherwise. Because granting this motion takes the overall question in the case away from the trier of fact, this is necessarily a substantial burden.[50] However, before this finding can be made, the plaintiff and defendant must meet their respective burdens of production within the context of the *McDonnell Douglas* framework.[51]

The "burden of production" relates to the requirement that the plaintiff produce sufficient evidence which would justify a verdict in his favor.[52] Sufficient evidence is a matter to be decided by the court and not the trier of fact.[53] "The court will not submit a case to the jury unless it decides as an

47. *Id.* at 515, 113 S. Ct. at 2752.

48. Fleming James, Jr. et al., Civil Procedure § 4.14, at 214 (4th ed. 1992).

49. *Id.* § 4.14, at 214-215.

50. *Id.*

51. *See supra* text accompanying notes 9-22 for discussion of the *McDonnell Douglas* framework.

52. James, *supra* note 48, § 7.14, at 339-40.

53. *Id.* § 7.19, at 357.

initial matter that the proponent has proven each of the propositions essential to the claim by *sufficient evidence* to justify or warrant *a finding in the proponent's favor* . . . ."[54] Essentially, "burden of persuasion" refers to the quantity and quality of evidence a plaintiff must provide to prevail in the suit, while "burden of production" refers to how much evidence a plaintiff must have to present a question of fact to the factfinder.[55] Put differently, burden of persuasion deals with the weight of the evidence, whereas burden of production deals with the sufficiency of the evidence.

3. Hicks' *Dictum Regarding Sufficiency of the Evidence*

While the holding of the Court in *Hicks* addressed burden of persuasion and weight of the evidence under the *McDonnell Douglas* analysis, the Court also addressed, in dictum, the plaintiff's burden of producing sufficient evidence.[56] The Court articulated the following method by which the plaintiff may satisfy the requirement of proving "pretext for discrimination" through circumstantial evidence:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . .[57]

This statement, however, appears to contradict a later statement in which the Court defines "pretext for discrimination" as requiring the employee to show "*both* that the reason was false, *and* that discrimination was the real reason."[58] These two statements, while seemingly contradictory, are resolved by the Court when viewed in the proper context. In order to prove intentional discrimination and thereby carry his ultimate burden of persuasion, the plaintiff must establish his prima facie case, establish that the defendant's explanation was pretextual, and establish that the true reason was intentional discrimination. Evidence of the

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54. *Id.*

55. The burden of persuasion (i.e., proving intentional discrimination) will always be on the plaintiff. This does not, however, mean that all burdens of persuasion will always be on the plaintiff. For example, in the case of proving affirmative defenses, the burden of persuasion is on the defendant.

56. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993). This statement and the statement following it are dictum because they relate to a test for sufficiency of the evidence which was not the issue before the Court. The question before the Court dealt solely with what a plaintiff must prove to satisfy the burden of persuasion of intentional discrimination and not whether that showing was supported by sufficient evidence.

57. *Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749. This statement by the Court in *Hicks* will hereafter be referred to as the "permissive inference" language.

58. *Id.* at 515, 113 S. Ct. at 2752.

plaintiff's prima facie case and of pretext may be sufficient to allow the trier of fact to find intentional discrimination, but this finding must actually occur and the jury is not *required* to make such a finding merely because there was sufficient evidence.[59]

In *Hicks*, the trier of fact had specifically found that St. Mary's did not intentionally discriminate against Hicks. Therefore, Hicks had failed to meet his burden of persuasion. On appeal, the only question before the Court was whether the burden of persuasion could be carried by the plaintiff merely by proving pretext. According to the Supreme Court, the answer to this question is clearly no. In the words of the Court, "We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.*"[60]

4. Justice Souter's Dissent

Justice Souter, writing for four Justices in dissent in *Hicks*, defined the plaintiff's burden of persuasion under the *McDonnell Douglas* framework differently. He adopted the approach articulated by the Court earlier in *Burdine* in that once the employer offers his nondiscriminatory reasons, the employee may prove the ultimate fact of intentional discrimination either through direct evidence or "indirectly by showing that the employer's proffered explanation is unworthy of credence."[61]

The basis for Justice Souter's argument is that the purpose of requiring the employer to articulate nondiscriminatory reasons for the employment decision is to narrow the scope of the remaining issues that the plaintiff must address in order to prove intentional discrimination.[62] Under his analysis, once the employee has shown the employer's reasons to be untrue, the employee has

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59. *Id.* at 511 n.4, 113 S. Ct. at 2749 n.4 (Justice Scalia attempts to resolve these statements in a footnote where he states that "even though rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*").

60. *Id.* at 514, 113 S. Ct. at 2751. *See also id.* at 515, 113 S. Ct. at 2751 (explaining that merely proving the employer's reasons for the employment action were "not believable" can not act as a substitute for a finding of intentional discrimination).

61. *Id.* at 541, 113 S. Ct. at 2765 (Souter, J., dissenting) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981)). Justice Scalia in the second part of his majority opinion admits this language is clearly expressed in *Burdine* but dismisses it as dictum and an "inadvertence" on the part of the Court in that case. *Hicks*, 509 U.S. at 517-18, 113 S. Ct. at 2752-53. It is interesting to note that Justice Scalia, in his majority opinion, cites with approval the Court's earlier decision in United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478 (1983), for its characterization of the pretext inquiry. *Hicks*, 509 U.S. at 518-19, 113 S. Ct. at 2753 ("[W]hatever doubt *Burdine* might have created was eliminated by *Aikens*."). However, as Justice Souter points out, the Court in *Aikens* "quoted with approval the passage that the majority's opinion dismissed as an 'inadvertence.'" Odell, *supra* note 26, at 1267 (citing *Hicks*, 509 U.S. at 541-42, 113 S. Ct. at 2765 (Souter, J., dissenting)).

62. *Hicks*, 509 U.S. at 530, 113 S. Ct. at 2759 (Souter, J., dissenting).

proven intentional discrimination. This is clearly an example of pretext-only analysis as applied to the *burden of persuasion*. Justice Souter stated that the employee should not be punished by the employer's decision not to provide a truthful explanation for the employment action regardless of the employer's probable embarrassment, even if the decision would not constitute actionable employment discrimination.[63] More importantly, Justice Souter predicted that even though the case was about *burden of persuasion*, courts would inevitably look to *Hicks* to provide an answer to the question of *burden of production*. He believed that in doing so, courts would construe the majority's approach as advocating a "pretext-plus" analysis of pretext evidence and necessarily result in many summary judgments for employers.[64]

III. *RHODES V. GUIBERSON OIL TOOLS*

In early 1996, the Fifth Circuit, on rehearing en banc, decided *Rhodes v. Guiberson Oil Tools*.[65] The case involved a salesman, Rhodes, who began working for Dresser Industries in 1955. Because of the downturn in the oil industry in the mid 1980s and to avoid being laid off, Rhodes transferred to Compac, another division of Dresser, which later became Guiberson Oil Tools. Seven months after his transfer, Rhodes, who was fifty-six years old at the time, was discharged by Guiberson Oil Tools. As the reason for this decision, Guiberson stated that Rhodes was discharged because of a reduction in work force, and that it would consider hiring him back. Guiberson, however, later hired a forty-two year old to do the same job as Rhodes within two months of Rhodes' discharge.[66]

Rhodes sued Guiberson Oil Tools under the Age Discrimination in Employment Act[67] in the United States District Court for the Eastern District of Louisiana.[68] A jury found that Rhodes was discharged because of his age, but that Guiberson Oil Tools had not willfully violated the ADEA.[69] Guiberson appealed the verdict on the ground that the district court erred in not granting its motion for a directed verdict or its motion for judgment notwithstanding the verdict, which both challenged the sufficiency of the evidence.[70]

A three-judge panel of the Fifth Circuit, in a 2-1 decision, reversed the district court's judgment on the ground that it was not supported by sufficient

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63. *Id.* at 527-28, 113 S. Ct. at 2758 (Souter, J., dissenting).

64. *Id.* at 535-36, 113 S. Ct. at 2762 (Souter, J., dissenting).

65. 75 F.3d 989 (5th Cir. 1996) (en banc).

66. *Id.* at 991-92.

67. 29 U.S.C. §§ 621-634 (1994).

68. The parties agreed to have the issue of liability heard before a jury and to have the remaining issues decided by a magistrate judge.

69. *Rhodes*, 75 F.3d at 992. The remedy for age discrimination in employment is backpay. If it is determined that the age discrimination is willful, there is a penalty of liquidated damages which is backpay times two. 29 U.S.C. § 626(b) (1994).

70. Guiberson Oil Tools also appealed on the ground that the damages were excessive. Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 539 (5th Cir. 1994).

evidence. The Fifth Circuit panel held that a plaintiff's burden of production at the pretext stage of the *McDonnell Douglas* framework consists not only of sufficient evidence that the defendant's reason was untrue, but also of sufficient evidence that discrimination was the true reason for the termination.[71] The court found that Rhodes had not produced sufficient evidence to support a finding of intentional discrimination and reversed the district court's decision denying Guiberson Oil Tools' motions for a directed verdict and judgment notwithstanding the verdict.[72]

It was the decision of the Supreme Court in *St. Mary's Honor Center v. Hicks* that prompted the Fifth Circuit to reconsider en banc its panel decision in *Rhodes*, even though *Hicks* was decided prior to that panel decision.[73] On rehearing, the issue before the court in *Rhodes* was what type of evidence constitutes sufficient evidence so that the plaintiff, by meeting his burden of production, can overcome a defendant's motion challenging the sufficiency of the evidence and have the issue of intentional discrimination left for the trier of fact.[74] Although the Fifth Circuit granted rehearing en banc to reconsider its decision in *Rhodes* in light of *St. Mary's Honor Center v. Hicks*, the court, recognizing the different context in which the question of pretext was presented in the two cases, found that *Hicks* provided no categorical answer to the question of sufficiency of the evidence.[75]

A. Judges Davis and Duhe's Majority Opinion

The majority in *Rhodes* did not find the holding in *Hicks* controlling because that case dealt with the burden of persuasion, not production. The Fifth Circuit did, however, rely on the "permissive inference" language which was dictum in *Hicks*,[76] and held that:

> [A] jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's

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71. *Id.*

72. *Id.* at 545.

73. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (en banc).

74. The court noted that motions for summary judgment and motions for judgment as a matter of law are both resolved under the same test announced in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc), because both involve the issue of sufficiency of the evidence. *Rhodes*, 75 F.3d at 993.

75. *Hicks* involved the plaintiff's burden of persuasion in order to sustain his own motion for judgment as a matter of law so that the issue of intentional discrimination would *not* be left to the trier of fact to decide. The issue was not whether there was sufficient evidence to support a finding of intentional discrimination but whether a finding of pretext, by itself was enough to entitle the plaintiff to judgment as a matter of law. In contrast, *Rhodes* involved a finding of intentional discrimination being challenged by a defendant on the ground that the plaintiff had not satisfied his burden of production by producing sufficient evidence.

76. *See supra* text accompanying note 57 for "permissive inference" language.

> stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [discrimination] was a determinative factor in the actions of which [the] plaintiff complains.[77]

Although the court stated that, "ordinarily," verdicts based on the "permissive inference" language will be supported by sufficient evidence, this will not always be the case.[78] To determine whether sufficient evidence is present in a particular case, the factfinder's decision to infer intentional discrimination will be subjected to the court's "traditional sufficiency-of-the-evidence analysis."[79] Acknowledging that what constitutes sufficient evidence of intentional discrimination will vary from case to case, the court identified several hypothetical situations to illustrate the application of the *Rhodes* standard. "A jury may be able to infer discriminatory intent in an appropriate case from substantial evidence that the employer's proffered reasons are false."[80] Alternatively, if the plaintiff's evidence of a prima facie case and pretext is not "substantial," it would not be reasonable for a jury to infer intentional discrimination.[81] Because of the generality in which these examples are stated, they do not provide practical guidelines for future suits in which the *Rhodes* standard is applied.

By subjecting the trier of fact's decision to infer intentional discrimination from evidence of pretext to the general sufficiency of the evidence scrutiny, the Fifth Circuit rejected the pretext-only and pretext-plus rules in favor of the permissive inference approach. Under the approach adopted by the Fifth Circuit, a court must not only evaluate the employee's showing of pretext for sufficiency of the evidence to determine if he has met his burden of production at the third stage of the inquiry, but must also test the plaintiff's evidence as a whole to determine whether he has proven intentional discrimination by evidence that is sufficient to warrant an inference of intentional discrimination.

B. Judge Garza's Special Concurrence

Judge Garza, who specially concurred in the opinion, specifically challenged the majority's determination that evidence which supports an inference of intentional discrimination under *Hicks* is subject to the Fifth Circuit's traditional

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77. *Rhodes*, 75 F.3d at 994.

78. *Id.* at 993 ("It is unclear . . . whether the Court intended that in all such cases in which an inference of discrimination is permitted a verdict of discrimination is necessarily supported by sufficient evidence.").

79. *Id.* at 993. The Fifth Circuit decision in Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), *overruled on other grounds by* Gautreaux v. Sourlock Marine, Inc., No. 95-30250, 30272, 1997 WL 87755 (5th Cir. Feb. 20, 1997), outlines this circuit's test for a sufficiency-of-the-evidence challenge made in motions for summary judgment and/or motions for judgment as a matter of law. The *Boeing* test requires there to be "a conflict in substantial evidence to create a jury question."

80. *Rhodes*, 75 F.3d at 994.

81. *Id.* at 994.

sufficiency of the evidence standard.[82] Unlike the majority in *Rhodes*, who characterized the "permissive inference" language of *Hicks* as ambiguous, Judge Garza found it to be "very clear."[83] While "[t]he ultimate issue in [employment discrimination] cases is whether the defendant intentionally discriminated against the plaintiff,"[84] the trier of fact may infer intentional discrimination if the employee provides sufficient evidence of a prima facie case and pretext.[85] Consequently, evidence which is sufficient to allow the factfinder to draw an inference of intentional discrimination (i.e., sufficient evidence of a prima facie case and pretext) will always satisfy the sufficiency-of-the-evidence requirement.[86]

Judge Garza clearly adopts the pretext-only standard for evaluating the sufficiency of the evidence but reaches a conclusion regarding the permissive inference that is difficult to reconcile with traditionally accepted procedures for appellate review of judgments for sufficiency of the evidence. Under the approach advocated by Judge Garza, the sufficiency of the evidence inquiry, as it relates to the plaintiff's case, will only be appropriate at the first stage of the *McDonnell Douglas* framework where the plaintiff must establish a prima facie case for intentional discrimination. Judge Garza characterizes the pretext stage of the *McDonnell Douglas* framework as a credibility decision for the trier of fact, and as a credibility determination, he states that it would be impermissible to allow an appellate court to review the trier of fact's decision based on the Fifth Circuit's test for sufficiency of the evidence.[87] Under his analysis, the trier of fact's finding that the defendant's explanation for the employment decision was pretextual is not subject to review by an appellate court absent a finding of manifest error.[88] Therefore, should the plaintiff fail to produce sufficient evidence to establish a prima facie case, he will lose at the first stage, and the inquiry will not proceed. When the plaintiff does establish a prima facie case by sufficient evidence and the defendant meets his burden of production at the second stage, the only remaining issue is for the trier of fact to determine which party it believes, the plaintiff or the defendant.[89] Under Judge Garza's approach, once the ultimate issue of intentional discrimination becomes a question for the trier of fact, the determination made by the trier of fact cannot

82. *Id.* at 997 (Garza, J., specially concurring).

83. *Id.*

84. *Id.*

85. *Id.* (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993).

86. *Id.*

87. *Id.* at 998-99 (Garza, J., specially concurring) (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) (stating that it is not the court's responsibility to "weigh conflicting evidence and inferences, [nor] determine the credibility of witnesses")).

88. *Rhodes*, 75 F.3d at 999 (Garza, J., specially concurring) ("To the degree that we use *Boeing* as a vehicle to decide whether a jury's disbelief of the defendant is supported by sufficient evidence, we violate the spirit of the Supreme Court precedent and the letter of our own.").

89. *Id.* at 998 (Garza, J., specially concurring).

be reversed by an appellate court on the ground that the plaintiff did not produce sufficient evidence of pretext. Based on this conclusion, a reviewing court may never question the sufficiency of the evidence concerning the truth of the defendant's explanation for the employment decision once the trier of fact has decided this issue and chosen to infer intentional discrimination.[90]

It is true that a decision regarding the credibility of witnesses is a duty left for the trier of fact, but it is certainly within the province of the appellate court to determine whether the evidence provided by that witness is sufficient to support a finding that the defendant's explanation was untrue. Essentially, the trier of fact may believe whomever he chooses, but the evidence presented on the issue of pretext must still be sufficient to warrant a finding that the defendant's reason was untrue. It is important to note that the result adopted by Judge Garza regarding appellate review is not the necessary result of adopting the pretext-only approach, but rather arose out of his attempt to reconcile the Fifth Circuit's traditional approach to sufficiency of the evidence with the Supreme Court's proclamations in *Hicks*.

IV. APPLICATION OF *RHODES*

In the short time since the court's decision in *Rhodes*, the Fifth Circuit has had several occasions to apply its standard for sufficiency of the evidence in reviewing motions for summary judgment and motions for judgment as a matter of law. While the majority of these cases represent a straightforward application of the court's pronouncement that evidence of pretext is usually sufficient evidence for a plaintiff to survive challenges, a few have achieved the opposite result. The first such case is *Ontiveros v. Asarco Inc.*[91]

In *Ontiveros*, the Western District of Texas entered a judgment in favor of the plaintiff upon a jury verdict in a Title VII action based on discrimination because of national origin. The defendant moved for judgment as a matter of law, and the district court denied the motion. The Fifth Circuit, on appeal, considered the issue of whether the plaintiff had met his burden of producing sufficient evidence to support the inference of intentional discrimination made by the jury in the district court proceeding. The court assumed for argument's sake that the plaintiff had established sufficient evidence to prove *pretext*. It then proceeded to make a statement that, even given sufficient evidence of pretext, there was insufficient evidence to support the *inference of intentional discrimination*.[92] Unfortunately, the court failed to detail why it reached this conclusion or what a plaintiff in this situation would have to show in order to avoid a judgment as a matter of law. The

90. The result of Judge Garza's approach, when taken to its logical conclusion, is that an appellate court can review the evidence of pretext for sufficiency when the challenge comes before the issue is placed before the trier of fact, but that after the trier of fact finds pretext, this review for sufficiency may no longer take place.

91. 83 F.3d 732 (5th Cir. 1996).

92. *Id.* at 733.

court merely stated that this was the "very rare situation" that *Rhodes* contemplated when it refused to adopt the pretext-only standard for sufficiency of the evidence challenges made by a defendant.[93]

Judge Garza concurred in the result reached by the court. His concurrence was premised on the idea that the majority correctly applied the *Rhodes* standard, but that the *Rhodes* standard still represented a mistaken interpretation of *Hicks*. Judge Garza, quoting his concurrence in *Rhodes*, stated: "I fail to understand how the Court can logically conclude that a jury—that is 'permitted' to reach a specific inference through the focused Title VII framework at work in *Hicks*—could at the same time be acting outside the broad umbrella of 'reasonableness' established by [the Fifth Circuit's sufficiency test]."[94]

A similar result was reached by the Fifth Circuit in *Simms v. First Gibraltar Bank*.[95] *Simms* involved a white landlord who asserted violations of the Fair Housing Act (FHA)[96] when the defendant bank refused to issue a commitment letter to refinance an existing loan on his apartment complex.[97] A jury found in favor of Simms, the plaintiff, and awarded compensatory and punitive damages.[98] First Gibraltar, the defendant, appealed the judgment on the ground that the evidence presented was insufficient to support a jury verdict based on intentional discrimination.[99] Once again the Fifth Circuit was required to apply its decision in *Rhodes* to determine if a plaintiff could defeat a defendant's sufficiency of the evidence challenge to a jury finding of intentional discrimination.

The Fifth Circuit, applying the *Rhodes* standard, concluded that the plaintiff had satisfied the pretext requirement by creating a fact issue as to each of First Gibraltar's stated reasons for refusing to refinance the loan. The court, however, said that "a reasonable jury could not infer from the evidence as a whole that race was a significant factor in First Gibraltar's refusal to issue a commitment letter."[100] As in *Ontiveros*, the court reversed a judgment for the plaintiff, after finding that pretext was established, on the ground that the plaintiff failed to provide sufficient evidence that discrimination was the true motivation for the decision. It is apparent in *Simms* that the plaintiff fully established pretext by sufficient evidence.[101] In contrast, the court in *Ontiveros* merely assumed

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93. *Id.* at 734.

94. *Id.* (Garza, J., specially concurring) (quoting *Rhodes*, 75 F.3d at 998 n.2 (Garza, J., specially concurring)).

95. 83 F.3d 1546 (5th Cir. 1996).

96. *Id.* at 1556 ("The holding in *Rhodes* may be appropriately applied to this FHA case in which the question is whether the plaintiff presented sufficient evidence for the jury to make a reasonable inference that race motivated First Gibraltar's rejection of Simms' proposal.").

97. *Id.* at 1548.

98. The jury awarded Simms compensatory and punitive damages totalling over $3 million dollars. *Id.* at 1554.

99. *Id.*

100. *Id.* at 1557-58.

101. *Id.* at 1557 ("Simms' evidence satisfied Rhodes' first requirement by creating a fact issue as to whether each of First Gibraltar's stated reasons for refusal actually motivated First Gibraltar . . . .").

pretext was established for the sake of argument.[102] Noticeably absent from the opinion in *Simms* was the statement in *Rhodes* outlining the scenarios where evidence of pretext may support a factfinder's inference of discrimination when it is supported by substantial evidence.[103] The court in *Simms* clearly made this finding, but failed to uphold the jury's finding of intentional discrimination.

Under the approach advocated by Judge Garza in *Rhodes*, a different result would have been reached in both of these cases. Because he adopts the pretext-only approach, the trier of fact's decision to infer intentional discrimination would be upheld because the plaintiff produced sufficient evidence of pretext. Moreover, under Judge Garza's interpretation, the jury's determination would not be subject to sufficiency review. Therefore, the judgments for the plaintiffs in both cases would have been sustained.

V. ANALYSIS

A. Why the Fifth Circuit Should Have Adopted Pretext-Only

The decision of the Fifth Circuit in *Rhodes* carries with it significant implications not only for the method in which the *McDonnell Douglas* framework will be applied, but also for employment discrimination law as a whole. By adopting the "permissive inference" approach to the evaluation of the pretext issue, the court has made it more difficult for a plaintiff in this circuit to get his case before a jury than would be the case under a pretext-only approach.[104] A plaintiff faced with a defendant's motion for summary judgment and/or judgment as a matter of law must not only provide sufficient evidence that the employer's explanation for its employment decision was pretextual, but must also provide sufficient evidence from which the trier of fact can reasonably infer that intentional discrimination was the true reason.

The most important consequence of the decision in *Rhodes* is that it severely erodes a plaintiff's ability to prove intentional discrimination through circumstantial evidence. A plaintiff seeking to prove that he has been subjected to employment discrimination essentially has two methods through which he can establish his claim. The first requires the presentation of direct evidence that he was discriminated against by his employer. The second allows the plaintiff to present circumstantial evidence from which it could be reasonably inferred that he was discriminated against by his employer. It is frequently stated in employment discrimination opinions that very rarely will a plaintiff have a case

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102. Ontiveros v. Asarco Inc., 83 F.3d 732, 734 (5th Cir. 1996) ("[W]e assume *arguendo* that the evidence suffices to establish a fact question as to pretext.").

103. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc).

104. Also, even if the issue of intentional discrimination does become a question for the trier of fact, the plaintiff's case can still be subjected to a sufficiency-of-the-evidence challenge raised by a motion for a judgment as a matter of law after the trier of fact's determination.

in which there exists direct evidence of intentional discrimination.[105] It was for this reason that the Supreme Court developed the *McDonnell Douglas* framework to deal with cases in which direct evidence is not available. The Fifth Circuit's decision in *Rhodes*, however, seriously impedes the effectiveness of this second method of proving intentional discrimination. The most significant effect of adopting the permissive inference approach to pretext evidence is that an employee contemplating bringing suit for intentional discrimination proceeds with uncertainty as to whether the evidence he can produce will be sufficient to support an inference of intentional discrimination. The two most obvious examples of this lack of predictability are the Fifth Circuit's decisions in *Ontiveros* and *Simms* where the court found sufficient evidence of pretext but insufficient evidence to support the inference of intentional discrimination. These cases illustrate that unlike the pretext-only or pretext-plus approaches, the permissive inference approach is far from a bright-line rule as to what constitutes evidence sufficient to support an inference of intentional discrimination.

The major criticism of the pretext-only approach is that it will allow the trier of fact to find intentional discrimination based solely on its disbelief of the explanation provided by the employer. This criticism arises out of confusion as to the difference between a burden of persuasion and a burden of production, and is unfounded because of the Supreme Court's decision in *Hicks*. The Court in *Hicks* specifically held that an employee can not meet his burden of persuasion without proving intentional discrimination. Any approach a court may adopt, whether pretext-only, pretext-plus, or permissive inference, to evaluate the *sufficiency* of pretext evidence and, consequently, the plaintiff's *burden of production* at the third stage of the *McDonnell Douglas* framework does in no way act as a substitute for a plaintiff's duty to meet his overall *burden of persuasion*. Adopting a less burdensome approach such as pretext-only merely increases the likelihood that the issue of intentional discrimination will be decided by the trier of fact after all of the evidence is presented, rather than by a judge as a question of law.

B. *Adoption of Permissive Inference in* Rhodes *Does Not Mean* McDonnell Douglas *Should Be Abandoned*

This analysis begs the question that, if the permissive inference approach increases both the evidentiary burden of production and uncertainty of a plaintiff, thereby reducing the effectiveness of the *McDonnell Douglas* framework as a viable avenue for proving employment discrimination through circumstantial evidence, why use the framework? The simple answer is that if courts continue to apply a heightened approach to pretext evidence, the framework should be discarded.[106] However, this would not solve the problem. Because the

105. Price Waterhouse v. Hopkins, 490 U.S. 228, 271, 109 S. Ct. 1775, 1802 (1989).
106. Malamud, *supra* note 25, at 2236.

majority of employment discrimination suits involve only circumstantial evidence, a reasoned approach, containing necessary safeguards against frivolous complaints, such as the one offered by the Court in *McDonnell Douglas* and clarified in *Burdine* and *Hicks*, is an essential avenue of relief for plaintiffs who have been subjected to intentional discrimination.

In a theoretical sense, one could argue that because the permissive inference approach requires the trier of fact's decision to infer intentional discrimination to be supported by sufficient evidence, proving "pretext" by itself no longer means anything, and the *McDonnell Douglas* framework is, therefore, ineffective. This argument, however, is untrue. In *Rhodes*, the Fifth Circuit explicitly recognized that "ordinarily," a decision of the trier of fact to infer intentional discrimination, when that decision is based solely on the plaintiff's establishment of a prima facie case and pretext, will be supported by sufficient evidence.[107] The court here recognizes that in most cases what is essentially "pretext-only" evidence will be sufficient to support an inference of intentional discrimination. Therefore, the effectiveness of the *McDonnell Douglas* framework may be preserved, if not in legal theory, in practice within this circuit. Certainly, plaintiffs in employment discrimination cases prefer the pretext-only approach, but the *Rhodes* standard is unquestionably better than pretext-plus. *Rhodes* retains the target of pretext in employment discrimination cases with the assurance that plaintiffs who hit that target will "ordinarily" survive motions for summary judgment and judgment as a matter of law.

VI. CONCLUSION

The Fifth Circuit in *Rhodes v. Guiberson Oil Tools* stated that sufficient evidence of a prima facie case and of pretext would normally be sufficient to allow the trier of fact to infer intentional discrimination. If this statement plays out in practice within the Fifth Circuit, the *McDonnell Douglas* framework will continue to be a viable tool for proving employment discrimination through circumstantial evidence. While it is still probably too early to tell, results like those reached in *Ontiveros* and *Simms* raise questions as to the validity of the court's statement. Both *Ontiveros* and *Simms* exemplify the result which Justice Souter in *Hicks* and Judge Garza in *Rhodes* predicted would occur. In both cases, jury verdicts for the plaintiff were overturned because the appellate court did not find sufficient evidence of intentional discrimination notwithstanding sufficient evidence of pretext; a result the court said "ordinarily" would not occur.

St. Mary's Honor Center v. Hicks answers the question of what a plaintiff must prove in order to prevail in an employment discrimination suit. The plaintiff must establish a prima facie case of intentional discrimination, that the defendant's reason for the employment decision was untrue, and that the true

107. *Rhodes*, 75 F.3d at 993.

reason for the employment decision was intentional discrimination. The Fifth Circuit in *Rhodes*, recognizing that *Hicks* did not answer the question before it, applied dictum from *Hicks* to answer the question of what a plaintiff must produce at the third stage of the *McDonnell Douglas* framework in order to survive a defendant's motion challenging the sufficiency of the evidence. While it is clear from *Hicks* that a finding of intentional discrimination must be made by the trier of fact in order for the plaintiff to prevail, reading *Hicks* as requiring the plaintiff to produce sufficient evidence of intentional discrimination to meet his burden of production seriously undermines the "indirect" route of proving employment discrimination through circumstantial evidence. More importantly, the decision in *Rhodes* fails to provide an employee any guarantee that on the pretext evidence he presented, the question of intentional discrimination will at the very least become a question to be answered by the trier of fact.

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