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Richard J. Perry Jr.
Lindy Korn, LLC

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***FISHER AND JAMES HIJACK THE MCDONNELL
DOUGLAS PARADIGM, REWRITING DISCRIMINATION
LAW IN THE SECOND CIRCUIT: AN EXPLANATION FOR
THE HIGH RATE OF SUMMARY JUDGMENT IN
DISCRIMINATION LAWSUITS***

RICHARD J. PERRY, JR.[†]

It has long been recognized that employment discrimination plaintiffs suffer from an inordinately high rate of summary judgment.¹ As Judge Bennett has stated:

In my view, summary judgments are inappropriately granted in a shocking number of employment discrimination cases. This is hardly a new or novel view. Nearly 20 years ago, professor Ann McGinley recognized that the Trilogy had a “profound effect of increased use of summary judgment in defeating civil rights claims” and that “[t]his increased use of summary judgment to dispose of civil rights actions has deprived plaintiffs of the fairer,

[†] Richard J. Perry, Jr. is a senior attorney at the Law Offices of Lindy Korn, LLC, a firm in Buffalo, NY, focusing on representing employees in discrimination, employment disputes, sexual harassment, disability discrimination, wage-and-hour disputes, Family Medical Leave Act (FMLA) violations, and due process and other constitutional issues arising from public employment. Richard Perry graduated from University at Buffalo Law School in 2008. Prior to attending law school, he served in the US Army and Army National Guard for more than a decade as an intelligence analyst. He was commissioned as an officer in the US Army National Guard in 2005. Meanwhile, he achieved a B.A. from SUNY Empire State College in 2005. Richard has spent his professional career employing deductive reasoning and logic to analyze intelligence and evidence for sound, supportable conclusions. The author would like to thank Lindy Korn for her unwavering support and William F. Harper V. for reviewing drafts and edits in the creation of this article.

¹ “While federal plaintiffs bringing non-employment discrimination cases succeed in approximately fifty percent of cases, employment discrimination plaintiff succeeded only fifteen percent of cases.” Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 752 (2012-13).

more accurate decision-making assured by a fact finder's decision at trial."²

One reason for this, at least in the Second Circuit, is a trend to redefine the elements of the discrimination *prima facie* case and ultimately the term *prima facie* in the context of discrimination law. Activist judges in the Second Circuit appear to be motivated by dissatisfaction with the probative weight afforded to circumstantial evidence. These judges are hijacking the *McDonnell Douglas* paradigm, rewriting the law to the detriment of discrimination plaintiffs.

The primary culprit in this intellectual theft is the *Fisher v. Vassar College* decision.³ It plays the role of Frankenstein's Monster in this tragedy; an amalgamation of untenable concoctions that defy understood law. Playing the part of Dr. Frankenstein is *James v. New York Racing Association*,⁴ which grants *Fisher* an unnatural and false life after *Fisher* was abrogated by the Supreme Court in *Reeves v. Sanderson Plumbing*.⁵ These cases are cited again and again by courts in the Second Circuit to steal jury verdicts from plaintiffs and to prevent plaintiffs from presenting their case to a jury at all.

But there are other issues present as well. Courts, over the last 40 some odd years, have attempted to redefine the specific elements that make up a *prima facie* case. This "redefinition" heightens the evidentiary burden for plaintiffs to make out their *prima facie* cases while simultaneously recasting the *prima facie* case as 'de minimus.' Courts then take this to mean that *any* evidence offered to

² Mark W. Bennett, *Essay: From the "No Spittin', No Cussing and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendants Summary Judgment Affirmed Without Comment" Days: One Judges Four Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 708-09 (2012-13).

³ *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997). *Fisher* was a hotly contested en banc review with two dissents. As discussed below, the Supreme Court in *Reeves* clearly sided with the dissents reasoning. Nevertheless, a single panel in *James* specifically holds that they have reviewed *Fisher* in light of *Reeves* and find there to be no disagreement between the Circuit's jurisprudence and the Supreme Court's.

⁴ *James v. New York Racing Ass'n*, 233 F.3d 149 (2d Cir. 2000).

⁵ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

support a *prima facie* case of discrimination is intrinsically of little or no probative value. These courts are undermining the express purpose of *McDonnell Douglas* and Title VII.

The underlying problem leading to this flawed jurisprudence seems to be that courts, particularly this circuit, for the last two decades have forgotten the basic principles that the Supreme Court enunciated four decades ago in *McDonnell Douglas*.⁶ Starting with *McDonnell Douglas*, courts have time and again recognized that defendants who discriminate deliberately hide evidence of their discriminatory intent. This was the reason the *McDonnell Douglas* burden shifting process was created.⁷ But these newer cases appear to be founded on the activist judge's dissatisfaction with circumstantial evidence as proof.

Worse, *Fisher* and *James*, while paying lip service to the Supreme Court in generalities, in detail appear to deliberately ignore the teachings of *McDonnell Douglas*, *Burdine*, *Hicks* and *Reeves*; hand-waving away the legitimate presumption identified in *McDonnell Douglas* in favor of several implicit presumptions in favor of the defendants that find no support in any Supreme Court jurisprudence. The effect of *Fisher* through *James* is 'evidence of a *prima facie* case creates a presumption of discrimination, *but* if the employer articulates it legitimate nondiscriminatory reason for its actions, it implicitly creates a presumption of non-discrimination.' This is not the law the Supreme Court has enunciated. It is quite clear that the Second Circuit's activism must be brought to heel.

Because this flawed jurisprudence has completely ignored the bases and underpinnings of the *McDonnell Douglas* burden shifting scheme, is it necessary to reexamine each in some detail. The first section, below, will examine the *McDonnell Douglas* paradigm, covering the purpose of Title VII, the rarity of overt evidence of discrimination, the evidentiary standard for the *prima facie* case, the presumption created by the *prima facie* case and its meaning, the defendant's proffer of a legitimate nondiscriminatory reason (LNDR)

⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁷ *Id.*

for its actions and the methodology and the meaning of a showing of pretext.

The second section will examine the changing articulation of the elements of the *prima facie* case, at least within the Second Circuit, the *Fisher* majority's attempt to rewrite the definition of the term *prima facie* and the *James* panel's erroneous resurrection of *Fisher* after it was disposed of by the Supreme Court in *Reeves*.

The third section will offer some examples, some brief and some more thorough case studies, showing how *Reeves* and *James* have successfully hijacked *McDonnell Douglas prima facie* paradigm in the Second Circuit.

I. THE MCDONNELL DOUGLAS PARADIGM

A. Purpose of Title VII

Title VII was created to effectuate an important national policy⁸: the elimination of unlawful, arbitrary discrimination throughout the nation's workforce. The Supreme Court reiterates this initial premise at least three times in the body of its *McDonnell Douglas* decision.

"The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."⁹

"What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."¹⁰

⁸ See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy.").

⁹ *McDonnell Douglas Corp.*, 411 U.S. at 800.

¹⁰ *Id.* (internal quotation marks removed) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)).

And again “[t]here are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”¹¹

The Supreme Court finishes this premise with the statement that “[i]n the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”¹² In referencing “subtle” discrimination the Supreme Court is eluding to one of the greatest problems that discrimination plaintiffs face: employers who discriminate take pains to hide their discriminatory intent.

B. Factual Questions of Intent are Difficult to Prove

It is well recognized that questions fact about an individual’s intent are very difficult to know or prove. The Supreme Court used the following colorful description to illustrate the point in *Aikens*: “The state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.”¹³ And the ultimate burden that the Plaintiff in a disparate treatment discrimination case must show necessarily includes the discriminatory intent of the employer or the individual bad actors. But the defendants in discrimination case are usually disinclined to admit their discriminatory intent. So how should/can a plaintiff go about proving this elusive datum?

¹¹ *Id.* at 801.

¹² *Id.*

¹³ *Aikens*, 460 U.S. at 716-17 (internal quotations removed) (quoting *Eddington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885)).

C. Rarity of Overt Evidence of Discriminatory Intent

In 1963, it may have been legal to have openly discriminatory policies. A store might advertise for new employees with the caveat that blacks need not apply. Or a factory might enjoin its hiring department from considering females in employment. One could certainly imagine more offensively worded policies. However, once Title VII went into effect in 1964, employers with such facially discriminatory policies would lose as soon as lawsuits could be filed. So the policies disappeared effectively overnight. But, the discriminatory intent that drove those policies in the first place didn't magically cease to exist with the enactment of the federal law.

The Courts have recognized this fact again and again. In *Aikens* the Supreme Court stated "all courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . There will seldom be "eyewitness" testimony as to the employer's mental processes."¹⁴ This statement was reaffirmed by the Supreme Court in *Hicks*.¹⁵

After all, "[a]n employer who discriminates is unlikely to leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent."¹⁶ As the Second Circuit summarized succinctly in *Dister v. Cont. Group, Inc.*:

The allocation of burdens and imposition of presumptions in Title VII and ADEA cases recognizes the reality that direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide

¹⁴ *Aikens*, 460 U.S. at 716.

¹⁵ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) ("[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes." (internal quotation marks removed) (quoting *Aikens*, 460 U.S. at 716)).

¹⁶ *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir.1991).

it. Employers of a mind to act contrary to law seldom note such a motive in their employee's personnel dossier. Specific intent will only rarely be demonstrated by “smoking gun” proof, or by “‘eyewitness’ testimony as to the employer's mental processes.”¹⁷

And again, in *Chambers*, the Second Circuit reiterated “the fact that [e]mployers are rarely so cooperative as to include a notation in the personnel file that their actions are motivated by factors expressly forbidden by law.”¹⁸

Thus, the premise that employers who discriminate actively hide their discriminatory intent is well established. This leaves courts and discrimination plaintiffs then faced with a problem. How to effectuate this important national policy in light of the fact that discriminating employers deliberately hide evidence of their efforts to flaunt the law?

This question was answered by the Supreme Court in *McDonnell Douglas*.

D. The Evidentiary Requirements Necessary to Meet the *Prima Facie* Burden

Acknowledging the preceding points; the important purpose of Title VII (and affiliated statutes like the ADA and ADEA); the usual difficulty in proving intent; and the rarity of overt evidence of discriminatory intent, the Supreme Court in *McDonnell Douglas* created a scheme of evidentiary burden shifting that would enable a discrimination plaintiff to prove the ultimate question—that the employer subjected the employee to an adverse action because of the employer’s discriminatory intent—exclusively through circumstantial evidence.

¹⁷ *Dister v. Cont. Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) (internal citations omitted).

¹⁸ *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (internal quotation removed) (quoting *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989)).

This purpose has been acknowledged again and again by the Supreme Court. As Justice O'Connor put it, "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."¹⁹ The Supreme Court in *Burdine* explained "In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."²⁰

Under *McDonnell Douglas*, a plaintiff does not have a heavy burden to raise an inference of discrimination. The Supreme Court has described the evidentiary burden for a prima facie case as "not onerous."²¹ The elements recited in *McDonnell Douglas* itself were:

(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.²²

The court went on to recognize that "[t]he 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 situations."²³ Below, Section II below will deal with this concept in more detail, at least as far as identifying the dangers of imprecise articulations of the *McDonnell Douglas* prima facie case. It is important to analyze the elements themselves, since subsequent case law and commentary²⁴ ascribe

¹⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989).

²⁰ *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248 (1981).

²¹ *Id.* at 253.

²² *McDonnell Douglas Corp.*, 411 U.S. 792.

²³ *Id.* at 802, n. 13.

²⁴ The subsequent case law and commentary are largely the subject of Point II and Point III three below.

differing import and meaning both to the individual elements and the *prima facie* case as a whole.

From the language of *McDonnell Douglas*, the Court has clearly identified four elements in the *prima facie* case that Mr. Green made out.²⁵ The Court does not specifically say that there have to be four elements but lower courts have traditionally described *prima facie* cases as having four. This is not necessarily a correct analysis.

One of the problems with reading these *prima facie* elements and extrapolating a more generic set of *prima facie* elements is that these elements are laid out in chronological order. First comes the protected class, then the application and qualification for the job, then the refusal to hire and finally that the employer still needed the work to be done.

Described more generically and ignoring the chronological order of specific facts, the plaintiff 1) identified his protected class, 2) identified an adverse employment action that he suffered and 3) disposed of the most common reasons for the adverse employment action.

While this third element of generic articulation is not explicitly identified in the *McDonnell Douglas* articulation, the Supreme Court has said repeatedly that this is what they meant. It is perhaps most explicit in *Burdine*. “The *prima facie* case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff’s rejection.”²⁶ *Burdine* was citing a somewhat more convoluted statement from *Teamsters* which culminated with “Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.”²⁷

²⁵ *McDonnell Douglas Corp.*, 411 U.S. 792 (1973).

²⁶ *Burdine*, 450 U.S. at 253-54.

²⁷ “Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an

So, the elements of a *prima facie* case must be 1) identifying a protected class, 2) identifying adverse employment action, and 3) disposing of most common reasons for that adverse employment action.²⁸ In *McDonnell Douglas* this third element was split between two sub-elements and presented as four elements. The sub elements were that a) the employee had applied for and was qualified for the job and b) the employer was still seeking applicants for the job.²⁹ This is because the two most common (lawful) reasons for an employer to refuse to hire someone are because the applicant is not qualified or there are no vacancies in the work force.

So the employee must then prove that these two most common reasons are not true. This is most easily accomplished by proving the opposite: that a) the plaintiff was qualified to do the work and b) the employer was still seeking applicants. In doing so, the plaintiff eliminates the most common reasons for the adverse action and becomes entitled to an inference of discrimination.³⁰

These elements are applicable in termination cases as well. Though, as mentioned below in section two, some courts have articulated the *prima facie* elements as requiring a showing that the position was filled with someone outside the protected class this is incorrect. Even the Supreme Court described the formulation in this manner in *St. Mary's Honor Center*, though this was just a recitation of the lack of dispute on the point by the parties.³¹ The Dissent addresses this point specifically.

“The majority, following the courts below, mentions that Hicks's position was filled by a white male.” But “[t]his Court has

inference that the decision was a discriminatory one.” *Intl. Broth. of Teamsters v. United States*, 431 U.S. 324 (1977).

²⁸ *Burdine*, 450 U.S. at 253-54.

²⁹ *McDonnell Douglas Corp.*, 411 U.S. 792 (1973).

³⁰ *Intl. Broth. of Teamsters*, 431 U.S. at 358.

³¹ “Petitioners do not challenge the District Court’s finding that respondent satisfied the minimal requirements of such a *prima facie* case (set out in *McDonnell Douglas*, supra, at 802) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today.”³² And, other courts who have addressed the issue have declared it irrelevant, in keeping with the plain language of *McDonnell Douglas*.³³

And as an initial matter, (at trial is should be noted) the *prima facie* case will create a mandatory, rebuttable presumption that discrimination was indeed the real reason for the adverse action.³⁴

E. The *Prima Facie* Case is, by Definition, Sufficient to Allow an Inference of Discrimination

Before turning to the presumption of discrimination that arises out of a *prima facie* showing under *McDonnell Douglas*, it is necessary to examine the proposition that a *prima facie* case creates a permissible inference of discrimination as a juridical matter. This may seem superfluous, given that a *prima facie* case, by definition, raises an inference of the ultimate fact the case is designed to prove.³⁵ Unfortunately, as will be explored Section III, the Second

³² “The majority, following the courts below, mentions that Hicks’s position was filled by a white male. *Ante*, at 2747 (citing the District Court’s opinion); see 970 F.2d 487, 491, n. 7 (CA8 1992). This Court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today. Cf. *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 154-55 (CA1 1990) (identity of replacement is not relevant)” (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 527 n.1 (1993) (Souter, J., dissenting)).

³³ Furthermore, although certain courts— including the district court in this action —have required an employee, in making out a *prima facie* case, to demonstrate that she was replaced by a person outside the protected class, see *Lee v. Russell County Board of Education*, 684 F.2d 769, 773 [1996] (11th Cir. 1982); *Wade v. New York Telephone Co.*, 500 F. Supp. 1170, 1176 (S.D.N.Y. 1980), we believe such a standard is inappropriate and at odds with the policies underlying Title VII; *Meiri v. Dacon*, 759 F.2d 989, 995-96 (2d Cir. 1985).

³⁴ It is well to recall that *McDonnell Douglas v. Green* was an appeal from a trial verdict. Clearly the evidence offered in that matter survived to get to a jury.

³⁵ “Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” *Black’s Law Dictionary*, 9th Edition, pg. 638.

Circuit has purported to identify a new type of *prima facie* case, heretofore unknown and stemming from *McDonnell Douglas* and its progeny specifically for discrimination plaintiffs.

Nothing in Supreme Court jurisprudence identifies a third type of *prima facie* case, as in one that does not raise a permissible inference of discrimination. To the contrary, the Supreme Court's jurisprudence specifically states that *prima facie* cases are sufficient to create instances of discrimination.³⁶ "Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one."³⁷

More so, the Supreme Court in *Burdine* has specifically identified what definition of *prima facie* case it used in *McDonnell Douglas*.

The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.³⁸

The Supreme Court cites to Wigmore to identify the two types of *prima facie* case: 1) *prima facie* cases that raise rebuttable presumptions and 2) *prima facie* cases that raise permissible inferences. As the court specifically says "*McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense."³⁹

Turning to Wigmore, it is made plain that "The term 'Prima facie evidence' or 'Prima facie case' is used in two senses."⁴⁰ The

³⁶ Intl. Broth. of Teamsters, 431 U.S. at 358, 396.

³⁷ *Id.*

³⁸ *Burdine*, 450 U.S. at 254.

³⁹ *Id.*

⁴⁰ 9 J. Wigmore, Evidence § 2494 (3d ed. 1940).

‘two senses’ are presented in exactly the same order as the Supreme Court presented them. The first is where the party has “not only removed by *sufficient evidence* the duty of *producing evidence to get past the judge to the jury*, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence”⁴¹

The second is “Where the proponent, having fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case. This *sufficiency of evidence to go to the jury*... is also often referred to as a *prima facie* case”⁴² Wigmore then goes on to contrast this with admissible but insufficient evidence.

By definition, either of these two *prima facie* cases is sufficient to go to a jury. The first version has the added weight of a presumption, obligating the opposing party offer evidence in rebuttal. This first version is the version of the Supreme Court chose to employ in *McDonnell Douglas*.

This bears repeating: *by definition*, either of these two *prima facie* cases is sufficient to go to *a jury*. Yet, so very many discrimination plaintiffs with valid *prima facie* cases lose at summary judgment. In the Second Circuit, the reason for this appears to stem from two very flawed cases.

F. The Defendant’s LNDR

Having made out a *prima facie* case the plaintiff is initially entitled to judgment as a matter of law unless the defendant explains the reasons for the adverse employment action.⁴³ The mandatory judgment if the defendant remains silent is a compelling reason for the defendant to explain the reason for its decision. This is where the

⁴¹ *Id.*

⁴² *Id.*

⁴³ “Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.” *Burdine*, 450 U.S. 248.

defendant articulates a legitimate non-discriminatory reason (LNDR) for its actions.⁴⁴

In articulating this LNDR the defendant does not carry the burden of persuasion.⁴⁵ The defendant does, however, have an evidentiary *burden*. The defendant may not get by with nothing more than an allegation. To the contrary, the defendant is obligated to offer evidence that supports its LNDR. “The defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff’s rejection.”⁴⁶ Further, “an articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.”⁴⁷ And the evidence offered must be sufficient “to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”⁴⁸ So the defendant must meet its burden by entering into evidence facts, which support the identified LNDR and are sufficiently detailed that the plaintiff can test the asserted facts for evidence of pretext.

For example, a legitimate nondiscriminatory reason for terminating someone is that they were a bad employee i.e. poor work performance. Simply stating in a brief that the employee exhibited poor work performance does not articulate an LNDR. Nor should it. Poor work performance is a conclusory assertion. The employer has to identify the person or persons who made the decision and identify “with sufficient clarity” the underlying facts from which the decision-maker reached the conclusion.

What data indicated poor work performance? If the employer is silent on this issue, the plaintiff cannot test the supposedly legitimate non-discriminatory reason for pretext. Did the employee exhibit

⁴⁴ “The burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason.” *Hicks*, 509 U.S. 502 (citing *Burdine*, 450 U.S. at 254) (internal quotations omitted).

⁴⁵ “The defendant need not persuade the court that it was actually motivated by the proffered reasons.” *Burdine*, 450 U.S. at 254 (1981) (citing *Board of Trustees of Keene State College v. Sweeny*, 439 U.S. 24, 25 (1979)).

⁴⁶ *Id.* at 255

⁴⁷ *Burdine*, 450 U.S. at 256

⁴⁸ *Id.* at 255-56

chronic absenteeism? Chronic absenteeism could be a legitimate reason to terminate employee. But, if so, there should be time and attendance records to support this. The employer has to identify the data that it relied upon to reach its conclusions so that the plaintiff has an opportunity to evaluate the data to see, for instance, if individuals outside of the plaintiffs protected class who had similar absenteeism nonetheless retained their jobs. If the employer usually turns a blind eye to chronic absenteeism except for the plaintiff, this constitutes evidence of pretext, supporting the ultimate conclusion that the plaintiff was targeted because of a protected characteristic.⁴⁹

As *Burdine* instructs, it is only when the defendant has supported its alleged LNDR with evidence of “sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext” that the defendant will have met its burden. If the defendant doesn’t meet this burden it fails to rebut the presumption of the *prima facie* case.

But, even when the articulation is successful, meaning the defendant has met its burden; the defendant has only raised a triable question of fact.⁵⁰ That is, the plaintiff created a permissible inference of discrimination with the *prima facie* case. The *prima facie* case also, initially, created a mandatory presumption of discrimination. The defendant by meeting its burden in proffering an LNDR eliminated the *mandatory* presumption and created a *permissible* inference of nondiscrimination. This leaves two contradictory permissible inferences that the fact finder must choose between. The fact finder is entitled to choose which of these it believes⁵¹ “for the

⁴⁹ “Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the ‘stall-in’ were nevertheless retained or rehired.” *McDonnell Douglas Corp.*, 411 U.S. at 804-05.

⁵⁰ “The employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.” *Burdine*, 450 U.S. at 257.

⁵¹ “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.” *Hicks*, 509 U.S. at 511 (citing *Burdine* 450 U.S. at 254 (internal quotations omitted)).

burden-of-production determination necessarily *precedes* the credibility-assessment stage.”⁵²

It is at this point, i.e. at trial, that the plaintiff is given the opportunity to demonstrate the falsity of the LNDR either by showing facts that are offered are themselves false or by showing that even if the alleged facts are true, that they were not the real reason the employer chose to act as it did.⁵³

G. The Attack on the LNDR—Showing Pretext

It must be kept in mind, that there are two basic types of challenge to a proffered LNDR.⁵⁴ The first is whether or not the underlying facts that defendant offered in support of its reason are true. The second is whether, even if the underlying facts are true, the articulated reason was the ‘real’ reason. In other words, was their an ulterior motive?⁵⁵

Keeping with the example above, where the employer asserts poor work performance as the reason for the adverse action, the first challenge is to the underlying asserted facts: did the employee exhibit poor work performance? Was the employee actually absent? How often? What evidence did the employer offer to show the absenteeism? Did the employer offer regular business records? Are docu-

⁵² *Id.* at 509 (citing *Burdine* 450 U.S. at 254).

⁵³ “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.” *Burdine*, 450 U.S. at 256.

⁵⁴ “[T]wo questions—one objective and one subjective—must be decided. The first, objective question is whether the reason given by the employer is one that is legitimate under Title VII.” *Ricci v. Destafano*, 07-1428, 1 (U.S. 6-29-2009) (Alito, J., concurring).

⁵⁵ “If the reason provided by the employer is not legitimate on its face, the employer is liable. *Id.* at 509. The second, subjective question concerns the employer’s intent. If an employer offers a facially legitimate reason for its decision but it turns out that this explanation was just a pretext for discrimination, the employer is again liable. *See id.* at 510-512.” *Ricci v. Destafano*, 07-1428, 1 (U.S. 6-29-2009) (Alito, J., concurring).

ments created after the litigation started? Did the employer offer testimony in support of the alleged absenteeism?

The defendant has to offer sufficient detail, so that the plaintiff has an opportunity to attack the offered evidence. After all, the defendant could certainly fabricate a reason in order to save itself from liability.⁵⁶ In fact, such potential fabrication by defendant was a major concern of the dissent in *St. Mary's*. Even the majority acknowledged the danger stating “Perjury may purchase the defendant a chance at the factfinder.”⁵⁷ Disproving the alleged facts underlying the asserted reason is one method of showing pretext.

What is often missed at this point is that the plaintiff does not have to disprove the underlying facts. This second scenario was the one which obtained in *McDonnell Douglas*. There, there was no dispute that the plaintiff had engaged in at least some unlawful conduct against the employer.⁵⁸ The actual question was whether or not the unlawful conduct was the ‘real’ reason for the adverse action.⁵⁹

In essence, the court recognized that the employer could very well have been thinking ‘we need to bring some people back from layoff but we really don’t want to let that black guy, Green, back into the building . . . Wait, he was involved in that stall-in . . . We’ll just use that as the reason not to let him back.’ It is because of the possibility of this type of thinking, or something similar, that the Supreme Court went on to identify mechanics to be used in showing

⁵⁶ “A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff’s initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant’s explanation is pretextual. Indeed, there may be some cases where the plaintiff’s initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant’s explanation.” *Burdine*, 450 U.S. at 256.

⁵⁷ *Hicks*, 509 U.S. at 522.

⁵⁸ “Respondent admittedly had taken part in a carefully planned ‘stall-in,’ designed to tie up access to and egress from petitioner’s plant at a peak traffic hour.” *McDonnell Douglas Corp.*, 411 U.S. at 803.

⁵⁹ “While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent’s conduct as a pretext for the sort of discrimination prohibited by s 703(a)(1).” *Id.* at 804.

pretext, even where the underlying facts supporting the alleged reason were admitted.

The Supreme Court noted “especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the ‘stall-in’ were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.”⁶⁰ These types of individuals are usually called similarly situated comparators.

The Court then went on to identify several other factors that would be probative of pretext, such as defendant’s prior treatment of the plaintiff, defendant’s treatment of others within the protected class, defendant’s reaction to any complaints plaintiff might have brought, and statistical evidence.⁶¹

The court summarized this non-exhaustive list with the statement: “In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision.”⁶² In sum, there are a variety of ways that a plaintiff may attack a defendant’s LNDR. Any of them reinforce the plaintiff’s prima facie showing and allow for the fact finder to infer the answer to the ultimate question: that the defendant subjected the plaintiff to an adverse action for an unlawful discriminatory reason.

⁶⁰ *Id.*

⁶¹ “Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner’s treatment of respondent during his prior term of employment; petitioner’s reaction, if any, to respondent’s legitimate civil rights activities; and petitioner’s general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner’s employment policy and practice may be helpful to a determination of whether petitioner’s refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.” *Id.* at 804-05 (internal citations omitted).

⁶² *Id.*

H. The End State of *McDonnell Douglas*—What Goes to the Jury and What the Jury Can Do With It

The culmination of the evidentiary submissions under the *McDonnell Douglas* paradigm is a collection of evidence that is placed before the jury. The point is to marshal evidence for both sides. Since the plaintiff has the burden of proof, it is obliged to offer evidence to meet that burden. Under other circumstances, the defendant could decline to offer any evidence whatsoever. However, *McDonnell Douglas* demands that the defendant at least offer evidence that supports its explanation for its actions.

Obviously, the plaintiff will want to present the strongest case possible supporting an inference of discrimination. Just as obviously, the defendant will deny any wrongdoing. As described above, because of the usual paucity of evidence showing discrimination, the plaintiff will most likely have to rely on circumstantial evidence.

Clearly, the plaintiff believes that he or she was wronged and that unlawful discrimination was the reason for that wrong. Just as clearly, the defendant denies engaging in any sort of discriminatory conduct.

This is the ultimate question: did the defendant harm the plaintiff for an unlawful discriminatory reason?

The jury is presented at the outset with two choices:

- 1) Discrimination?
- 2) No discrimination?

The jury is also presented with several sets of evidence to help decide between these two choices.

The *prima facie* case is evidence that is sufficient to go to the jury. It raises a valid inference, one that the jury, if it is so inclined, may employ. That is, *if* a plaintiff identifies the protected class, identifies the adverse employment action and disposes of the most common reasons for the adverse action *then*: the jury is allowed to infer that discrimination was the reason for the adverse action. In other words, the reason for the adverse action was the protected classification. And, as an initial matter, that inference is mandatory,

creating a compelling reason for the employer to offer an explanation for its actions.

If the defendant offers an LNDR, then the mandatory presumption ceases. But it is only the presumption that ceases to exist. The permissible inference remains. This is a legitimate, discretionary inference that a fact finder may or may not choose to employ. Now, the jury is called upon to pick between the two possible choices: discrimination OR no discrimination.

To do this, the jury may infer discrimination from only the *prima facie* case. The jury may infer discrimination jointly from the *prima facie* case and their disbelief in the employers LNDR. The jury is also entitled to find that the *prima facie* case and their simple disbelief in the employer's proffered reason are still insufficient to convince them, but that other evidence offered by the plaintiff to show pretext (such as similarly situated comparators, statistical evidence, corporate culture, pejorative terms, etc.) did finally convince them that discrimination was the 'real' reason.

The jury may also decline to infer discrimination from the *prima facie* case. The jury could be swayed by the employer's LNDR into believing that no discrimination occurred. The jury is also entitled to find that the *prima facie* case and any showing of pretext are still insufficient to convince them that the discrimination was the 'real' reason for the adverse action. If there is no other evidence of record, the jury will decide against plaintiff.

But, because of the erroneous teachings of the Second Circuit, especially *Fisher* and *James*,⁶³ courts are refusing to allow juries to consider these cases at all. Summary judgment is being granted at a very high rate. Summary judgment dismissing discrimination cases is being granted in decisions that clearly show that the courts do not evaluate discrimination cases using the clear teachings of *McDonnell Douglas* and its progeny. These cases are citing to *Fisher* and *James* and their derivatives as justification for disposing of a perfectly sufficient discrimination case, frequently culminating

⁶³ *James*, 233 F.3d 149; *Fisher*, 114 F.3d at 1367.

in the statement that “no reasonable juror could find discrimination based on this evidence,” or words to that effect.

Thus a single judge, following erroneous teachings from the Second Circuit, substitutes his or her judgment for not only a panel of 12 jurors, but in fact of all potential jurors in the entire country. These rulings are engaging in metaphysics, asserting without any proof that it would be impossible to find 12 reasonable people in the entire country who would agree with the plaintiff’s evaluation of the evidence. This is done despite the fact that “The court’s role in deciding a motion for summary judgment ‘is to *identify* factual issues, *not to resolve them*.’”⁶⁴ A district judge’s ability to perceive the full spectrum of what reasonable jurors may or may not conclude is intrinsically suspect as the Second Circuit appropriately recognized in a sexual harassment context.⁶⁵

***Abdallah v. Napolitano*⁶⁶: A Case Study**

Consider the following case under the *McDonnell Douglas* paradigm outlined above:

A man, of Arab descent, was born in Tunisia and raised a Muslim. Later he converted to Christianity, immigrated to the United States, became a citizen, and found a job as an armed officer of the federal government. Allegedly, an informant for a federal counterterrorism task force stated that there was a Tunisian at a federal academy who had expressed interest in helping someone arrange for a fraudulent marriage.

The federal counterterrorism task force identified the only Tunisian in the academy at that time. The investigation was handed

⁶⁴ *Redd v. New York Div. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012) (citing *Jasco Tools, Inc. v. Dana Corp.*, 574 F.3d 129, 156 (2d Cir. 2009)).

⁶⁵ “Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.” *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

⁶⁶ *Abdallah v. Napolitano*, 909 F. Supp. 2d 196, 207 (W.D.N.Y. 2012) (reconsideration denied) (Feb. 22, 2013).

over to that department's internal investigative agency, to take lead. The agents then proceeded to interrogate the man – several times. The agents also interrogated his family members. These interrogations focused on his “path to citizenship,” his religion, how he met his wife, and whether or not he associated with others of Middle Eastern descent. During the investigation the man was subjected to a polygraph, compared to 9/11 terrorists, threatened with physical harm, and threatened with the loss of his family as well as prison time.⁶⁷

The government ultimately concluded it had no basis to charge the man with any crime, but the agents then compelled the man to sit for what is known as a “Kalkines” interview. The agents reported the man to be ‘uncooperative’ during this interview and the man was terminated from his employment as a matter of course with no opportunity to present his side of the story. There was no dispute that Mr. Abdallah was otherwise performing his duties satisfactorily. There was no dispute that the work Mr. Abdallah was doing still needed to be performed.

After being terminated, the agents involved then requested that the man to help them investigate a local grocery store owned by Arabs. They intimated that his cooperation would help him get his job back. The Government admitted or otherwise remained silent regarding all of these alleged facts.⁶⁸

⁶⁷ “The District Court judge sanitized these facts (in favor of the government) in his decision with the following list: (1) No one else from plaintiff’s FLETC class was questioned about Mr. Abdelqader (*see* Pltff. Exh. 9, pp. 111-12); (2) The agents directed their questions to plaintiff on the basis of his alleged association with other Arabs (*see* Pltff. Exh. 4, p. 79); (3) The agents asked plaintiff’s father-in-law about plaintiff’s religion (*see* Pltff. Exh. 2, p. 20); (4) Plaintiff was initially identified by the CS as a Tunisian CBP officer in Buffalo (*see id.* at 48); (5) SA Ford questioned plaintiff about his “path to citizenship” (Pltff. Exh. 4, p. 71); (6) Plaintiff testified at his deposition that, during the polygraph examination, SA Witham accused plaintiff of being a terrorist (Pltff. Exh. 3, p. 61); (7) After his discharge, ICE agents used plaintiff in an attempt to infiltrate Arab-owned grocery stores (Pltff. Exh. 4, pp. 83-84).” *Abdallah*, 909 F. Supp. 2d at 207.

⁶⁸ *Abdallah*, 909 F. Supp. 2d 196.

Is it reasonable to conclude that Mr. Abdallah was targeted for termination because of his race, national origin and/or religion?

First Step Prima Facie Case

Evaluating this evidence through the *McDonnell Douglas* methodology outlined above results in the following evidence supporting a *prima facie* case:

- **Protected Classes:** Arab, Muslim, Middle Eastern National Origin⁶⁹
- **Adverse Employment Action:** Termination
- **Dispose of the Most Common Reasons for the Adverse Action:** 1) poor work performance—defendant acknowledged that Mr. Abdallah was performing his duties satisfactorily, 2) work no longer being done—there was no dispute that the customs and border patrol duties performed by Mr. Abdallah continued even after termination.

This evidence makes out a *prima facie* case under *McDonnell Douglas*. Therefore, a factfinder is permitted to infer the ultimate question of discrimination this evidence.

Second Step LNDR

Defendant next proffered a supposedly legitimate nondiscriminatory reason for the termination. The reason offered was the ‘Kalkines’ interview and Mr. Abdallah’s alleged non-cooperation.⁷⁰

⁶⁹ For simplicity, race and ethnicity are here being viewed as effectively the same thing.

⁷⁰ The so-called *Kalkines* warning was created in the same vein as *Miranda* to obligate the Government to take certain steps before it could threaten an employee with the loss of employment for refusing to answer a question. *Kalkines v. U.S.*, 473 F.2d 1391, 1394 (Ct. Cl. Feb. 16, 1973). Specifically, if an employee refuses to answer a question on the grounds of Fifth Amendment immunity, then the government is forbidden from compelling an answer through the threat of termination of employment unless the government first advises the employee that they are granting him immunity from prosecution. *Id.*

The plaintiff did not accept that the articulation was sufficient for a variety of reasons.⁷¹ The operative point here being that the plaintiff raised serious questions about the legitimacy of the proffered LNDR. A jury would therefore have been entitled to reject the proffer, leaving the mandatory presumption in effect.

Attack on the LNDR

Even if the challenge of sufficiency was unsuccessful, there was ample evidence sufficient for an attack on the defendant's LNDR: similarly situated comparators—no one else was questioned about Mr. Abdallah; the agents questioning based on the plaintiff's association with other Arabs; the agents questioning about the veracity of his conversion to Christianity; the agents questioning about "his path to citizenship;" the physical and emotional threats; the direct comparison of Mr. Abdallah to the 9/11 terrorists. All of this evidence constitutes a valid attack on defendant's LNDR as well as supporting the ultimate inference of discrimination. There can be no doubt that the government would not have investigated, for example, Mr. Christiansen, a devout Mormon from Wisconsin on these charges.

There was also, as referenced above, each challenge as to the validity of the underlying facts of the supposed 'noncooperation' and whether or not 'noncooperation' was a legal reason to terminate the plaintiff.

Finally, there was evidence of the agents' ulterior motive. Emails showed that the agents expected Mr. Abdallah to be 'non-cooperative' in his interview. Those same emails also show that the agents expected him to be terminated for his 'noncooperation.' At least one email also stated that the agents were 'leaving the door open' for further contact with the plaintiff after he was terminated. The further contact was a request that the plaintiff infiltrate an Arab owned convenience store to become an informant on possible

⁷¹ Chief among them was that the government was unlawfully citing *Kalkines* to support a nonexistent duty to cooperate, rather than the actual duty to answer the *Kalkines* demands. *Id.*

terrorist activity. In so requesting, the agency implied that they might be able to get Mr. Abdallah his job back if he cooperated with this investigation.

A series of potential inferences arises from these facts. It is clear that the government began its investigation into plaintiff *because of* his race, national origin and religion. No matter how legitimate the investigation may have been when it was begun, the government abandoned it. However, the agents who conducted it then consulted with legal counsel and went back after Mr. Abdallah one more time for a ‘Kalkines’ interview. Because the agents clearly expected Mr. Abdallah to be non-cooperative—and consequently terminated—it is reasonable to infer that they *planned* to get Mr. Abdallah terminated in order to use him in their other investigation. Again, there can be no doubt that the government could not have used Mr. Christiansen, the devout Wisconsin Mormon in the same way. The inference this evidence supports is that the government did this to Mr. Abdallah *because of* his race, national origin and religion.

It should be clear that Mr. Abdallah had ample evidence supporting his claim of discrimination. The *McDonnell Douglas* analysis shows that Mr. Abdallah should have been able to present this evidence to a jury for adjudication. After all, this is far more evidence that Mr. Green had mustered against *McDonnell Douglas* in his case.

Mr. Abdallah’s case was dismissed in summary judgment.⁷²

Given the teachings of *McDonnell Douglas* outlined above, Mr. Abdallah clearly should have had his case adjudicated by a jury. So why did the court grant of summary judgment?

The answer is that the contemporary articulations of the *prima facie* elements are imprecise, compelling plaintiffs to ‘front-load’ all of their evidence into their *prima facie* case. This might not be fatal in and of itself, but a pair of fundamentally flawed Second Circuit decisions falsely teach the District Courts that a *prima facie* case is a little if any probative value.⁷³ This leads courts, as it did

⁷² *Abdallah*, 909 F. Supp. 2d at 207.

⁷³ “Such a limited *prima facie* case does not necessarily have much force in showing discrimination.” *Vassar Coll.*, 114 F.3d at 1336 (abrogated by *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)).

here, to dismiss any and all evidence raised in support of the *prima facie* case as *de minimis*,⁷⁴ ergo useless.

Thus the Court reasoned:

Applying these propositions to the record presented on summary judgment in this case, the court finds that plaintiff's minimal *prima facie* showing, combined with his failure to come forward with any evidence from which a fact finder could rationally conclude that CBP's stated reasons for discharging him were false, falls far short of the standards outlined in *Reeves*, *Fisher*, and *James* for requiring submission of the case to a jury.⁷⁵

The District Court relied on the teachings of *Fisher* and *James* to hold that a *prima facie* case is insufficient in and of itself to raise an inference of discrimination after the LNDR been articulated.⁷⁶ In doing so, the court falsely presumed that all evidence of

⁷⁴ BLACK'S LAW DICTIONARY 496 (9th ed. 2009) (defined as "of a fact or thing so insignificant that a court may overlook it in deciding an issue or a case").

⁷⁵ *Abdallah*, 909 F. Supp. 2d at 209-10.

⁷⁶ *Id.* at 209 ("In *James v. New York Racing Ass'n*, 233 F.3d 149 (2d Cir. 2000), the Second Circuit considered whether the holding in *Reeves* was consistent with the holding in *Fisher*, in which the circuit court rejected the proposition previously outlined in *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995)—"that evidence satisfying *McDonnell Douglas*'s minimal requirements of a *prima facie* case plus evidence from which a factfinder could find that the employer's explanation was false necessarily requires submission to the jury." *James*, 233 F.3d at 156-57. The Second Circuit reasoned that application of the *Binder* rule "would illogically permit a plaintiff to prevail notwithstanding the absence of evidence capable of supporting a finding of discrimination." *Id.* at 154. This is because the *prima facie* requirements of *McDonnell Douglas* "are so minimal that they do not necessarily support any inference of discrimination; and there are so many reasons why employers give false reasons for an adverse employment action that evidence contradicting the employer's given reason—without more—does not necessarily give logical support to an inference of discrimination." *Id.* The circuit court further recognized that in some circumstances, a *prima facie* showing plus proof of falsity might provide "powerful evidence of discrimination ... but in others, the two together might fall far short of providing evidence from which a reasonable inference of discrimination could be drawn." *Id.* "The essential point ... [is] that

discriminatory intent, which was ‘frontloaded’ into the plaintiff’s *prima facie* case, was of *de minimus* value. There is no Supreme Court support for such a proposition.⁷⁷

The court simultaneously granted the defendant an implicit presumption of the veracity and probative value of its LNDR. In other words, rather than accepting the *prima facie* evidence as sufficient for an inference of discrimination, even with the articulation of the LNDR, the court instead presumed that the *prima facie* evidence was *insufficient*. The court also, and erroneously, presumed that any evidence that supported the *prima facie* case was implicitly incapable of being used to challenge the LNDR. The court consequently, and erroneously, also presumed that additional evidence was therefore needed.

So, rather than accepting that a *prima facie* case and a LNDR create a question of fact that allows a jury to decide between the two, the court erroneously determined that the *prima facie* case was intrinsically worthless and the alleged LNDR was presumptively valid. The court, therefore, concluded that a jury could only believe the defendant.

No Supreme Court case law supports this analysis. But, unfortunately, the Second Circuit cases *Fisher* and *James* and their derivatives demand it. They are wrong, and they directly contribute to unlawful summary judgments against discrimination plaintiffs in direct defiance of the Supreme Court.

Nor was this case an isolated incident. *Fisher* and *James* and their derivatives have been cited thousands of times, primarily in support of summary judgment against discrimination plaintiffs.

employers should not be held liable for discrimination in the absence of evidence supporting a reasonable finding of discrimination.”). *Id.* at 154-55; *Abdallah*, 909 F. Supp. 2d at 209.

⁷⁷ “The Supreme Court has never called a Title VII *prima facie* case “*de minimis*.” *Burdine* called it “not onerous,” 450 U.S. at 253, and *Hicks* called the requirements “minimal,” 509 U.S. at 506, which may simply mean at the low end of a traditional range.” *Vassar Coll.*, 114 F.3d at 1367 (Newman, J., dissenting) (abrogated by *Reeves*, 530 U.S. 120).

II. THE REDEFINING OF THE ELEMENTS OF THE PRIMA FACIE CASE

As described above, the basic *prima facie* case under *McDonnell Douglas* requires 1) the identification of a protected class, 2) the identification adverse action, and 3) the disposal of the most common reasons for the adverse action. However, in the proceeding case study, the District Court used a different articulation of the *prima facie* case.

Under this framework, the plaintiff must first establish a *prima facie* case of discrimination by demonstrating that: (1) he was in a protected group; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination.⁷⁸

To be sure, the first and third elements in this articulation do conform to the *McDonnell Douglas* standard. The second element was one of two mechanics that was identified in *McDonnell Douglas* for the purpose of disposing of the most common reasons for the adverse action. It may or may not be applicable to all adverse actions. In Mr. Abdallah's case, it most closely resembles showing that he was performing duties satisfactorily. Thus, this articulation has begun its divergence from *McDonnell Douglas* standard, but is not yet fatally flawed.

The main problem is the fourth element. The fourth element of the articulation above is incredibly broad. On its face, it demands that all evidence that could support an inference of discrimination to be raised in the *prima facie* case. It led to Mr. Abdallah's 'front-loading' of all of his evidence into the *prima facie* case. Of course, the ultimate question is whether or not the plaintiff can prove discrimination. This articulation on its face seems in line with this ultimate burden. 'Frontloading' evidence, therefore, shouldn't be a problem since *all* of this evidence is properly used to both support a

⁷⁸ *Abdallah*, 909 F. Supp. 2d at 205.

finding of discrimination and to attack the defendant's proffered LNDR.

But, when the court adds in hidden presumptions in favor of the defendant this is a gigantic problem. Presuming the *prima facie* evidence is of *de minimis* value defeats the purpose of *McDonnell Douglas* burden shifting paradigm. Neither is there any support for this proposition in any Supreme Court law.⁷⁹ Yet, when employed, this false mechanic has the effect of raising the plaintiff's burden to a potentially insurmountable level.

If the plaintiff's *prima facie* case was supported only with evidence disposing of the most common reasons for the adverse action, this false *de minimis* mechanic might not be fatal. But, coupled with the misleading articulation quoted above, and the inevitable 'frontloading' this mis-articulation demands, it leads to an inescapable, however false, conclusion that the plaintiff's evidence is insufficient to support a verdict.

Thus, this articulation coupled with the false teachings of *Fisher* and *James*, is designed to render it effectively impossible for a plaintiff to prove discrimination with circumstantial evidence. In other words, these two components, wrought by the Second Circuit, work an insidious, *de facto*, abrogation of *McDonnell Douglas*.

This articulation of the fourth element has, unfortunately, become standard, at least within the Second Circuit.⁸⁰ This articulation of the fourth element also, coincidentally, facially disproves the majority's opinion in *Fisher*.⁸¹

⁷⁹ "The Supreme Court has never called a Title VII *prima facie* case "*de minimis*." *Burdine* called it "not onerous," 450 U.S. at 253, and *Hicks* called the requirements "minimal," 509 U.S. at 506, which may simply mean at the low end of a traditional range." *Vassar Coll.*, 114 F.3d at 1367 (Newman, J., dissenting) (abrogated by *Reeves*, 530 U.S. 120).

⁸⁰ "The Second Circuit requires a plaintiff to show that she or he (1) is a member of a protected class; (2) who is qualified for the position; (3) who suffered an adverse employment action; (4) under circumstances giving rise to an inference of discrimination." Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 663 (1998).

⁸¹ "Since those facts are sufficient to give rise to an inference of discrimination, they cannot cease to have such an effect simply because the employer has proffered

Judge Chin has argued that these changes in the *prima facie* articulation constitute an evolution of the law.⁸² But, the *prima facie* elements were defined by the Supreme Court. As a result only the Supreme Court may ‘evolve’ it.⁸³ But, the ‘new’ law Judge Chin refers to is a creation of district and circuit courts. It does not and cannot change the articulation in *McDonnell Douglas*. Yet, clearly at least one circuit judge thinks it does. Coupled the false teachings of *Fisher* and *James*, this ‘new’ law does not constitute an evolution. It is a rebellion.

Supreme Court has never held that any of its subsequent case law modifies the *prima facie* elements established in *McDonnell Douglas*. In fact the Court reiterated the *McDonnell Douglas prima facie* case while this article was in editing.⁸⁴ To be sure, the Supreme Court has acknowledged that “the *prima facie* case method established in *McDonnell Douglas* was ‘never intended to be rigid, mechanized, or ritualistic.’”⁸⁵ But this only means the *prima facie* case’s burden of “eliminate[ing] the most common nondiscriminatory reasons for the plaintiff’s [adverse action]”⁸⁶ may need to be pursued with different mechanics depending on the specific adverse action. The Supreme Court has never acknowledged that disproving the most common reasons for an adverse action no longer sufficient to support a *prima facie* case.

Lest some advocate of Judge Chin’s theory of evolution argue that *Hicks* or *Reeves* acknowledge exactly that, it is incumbent

an explanation . . . it does not deprive these facts of their capacity to support an inference of discrimination if the fact-finder finds these facts proven and then chooses to draw such an inference.” *Fisher*, 114 F.3d at 1363 (Newman, J., dissenting).

⁸² Chin & Golinsky, *supra* note 74, at 664.

⁸³ “We reaffirm that ‘[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’” *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

⁸⁴ *Young v. UPS*, 135 S.Ct. 1338 (2015).

⁸⁵ *Aikens*, 460 U.S. at 715.

⁸⁶ *Burdine*, 450 U.S. at 253-54.

to analyze what the Supreme Court actually said about the *prima facie* articulations in those cases.

In *Hicks*, the

Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a *prima facie* case (set out in *McDonnell Douglas*, *supra*, at 802, 93 S.Ct. at 1824-1825) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man. 756 F.Supp., at 1249-1250.⁸⁷

Likewise in *Reeves*,

It is undisputed that petitioner satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA (“individuals who are at least 40 years of age,” 29 U.S.C. § 631(a)), (ii) he was otherwise qualified for the position of Hinge Room supervisor, (iii) he was discharged by respondent, and (iv) respondent successively hired three persons in their thirties to fill petitioner's position. See 197 F.3d, at 691-692.⁸⁸

In *St. Mary's* and *Reeves*, the Supreme Court acknowledged that there was no dispute as to the sufficiency of the finding *prima facie* cases by the District Courts. Thus, the issue of the specific articulation was not before them. Having made that acknowledgment, the Supreme Court moved on to the actual issues that these opinions decided.

Because the Supreme Court has not addressed any sea change in the mechanics of articulation of the *prima facie* case, no lower court can presume that such a change has occurred. After all, “if a precedent of this Court has direct application in a case, yet

⁸⁷ *Hicks*, 509 U.S. at 506.

⁸⁸ *Reeves*, 530 US at 142.

appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”⁸⁹ And the Supreme Court has reiterated the exact *McDonnell Douglas* articulation as valid just this year.⁹⁰

The lower courts are not empowered to determine that any sort of ‘evolution’ has occurred regarding *prima facie* articulations without an explicit rule on that point by the Supreme Court. There has been no such ruling. Thus, there has been no ‘evolution.’ But, as *Fisher* and *James* show, there *has* been a rebellion.

III. THE *FISHER* AND *JAMES* FALLACY

A. *Fisher*—The Second Circuit’s Attempts to Rewrite the Law of *McDonnell Douglas*, *Burdine*, and *Hicks*

Fisher v. Vassar College was an *en banc* decision by the Second Circuit. It could be said to represent a coup d’état, overthrowing previous Second Circuit precedent that more closely conformed with the *McDonnell Douglas* paradigm outlined above.⁹¹ The panel decision below overturned the District Court’s bench trial’s finding of intentional discrimination. The *en banc* court sat to review the panel’s decision. Apparently, one of the judges died while the court was still deliberating. Whatever the effect of that unfor-

⁸⁹ *Felton*, 521 U.S. at 237.

⁹⁰ *Young v. UPS*, 135 S.Ct. 1338 (2015).

⁹¹ Such as *Binder* (“Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct. In so stating, we do not exclude the possibility that an employer may explain away the proffer of a pretextual reason for an unfavorable employment decision. See *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 n. 3 (1st Cir. 1994). Such an explanation might include, for example, protection of a business secret or even protection of the reputation of an employee who had engaged in undesirable conduct. No such explanation was offered in the instant matter.”). *Binder*, 57 F.3d at 200.

tunate circumstance, the actual outcome was a hotly contested battle about the meaning of the term *prima facie* case.⁹²

While the flawed reasoning of *Fisher* could be evaluated for pages and pages, and to a great extent was by the dissents, the fundamental flaw was the majority's ruling that *McDonnell Douglas* created a heretofore unknown third type of *prima facie* case that was applicable only for discrimination plaintiffs. The support for this ruling was anemic at best.

The majority states “the phrase ‘prima facie case’—as footnote 7 of *Burdine* says—is used in *McDonnell Douglas* not ‘to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue,’ but rather to ‘denote the establishment of a legally mandatory, rebuttable presumption.’”⁹³

To the contrary, the Supreme Court language the majority refers to specifically refute the majority's ruling.

“The phrase ‘prima facie case’ not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use “prima facie case” in the former sense.”⁹⁴

Disturbingly, the majority in *Fisher* actually cited the entirety of this language.⁹⁵ Unfortunately, no one in the majority appears to have bothered to actually read Wigmore.⁹⁶ While the dissents make

⁹² *Fisher*, 114 F.3d at 1369. (Judges Jacobs and Leval wrote the majority opinion, with a total of six judges concurring. Judge Jacobs also wrote a special, separate concurrence. There was another partially concurring opinion, as well as two scathing dissent's which were each joined by four judges).

⁹³ *Id.* at 1341.

⁹⁴ *Burdine*, 450 U.S. at 260.

⁹⁵ *Id.*

⁹⁶ Nor is there any indication that the dissents looked up Wigmore, given that the treatise is not cited anywhere else in any of the opinions.

strong arguments in favor of the position that there are, and always have been, only two types of *prima facie* case, the controlling fact is that the Supreme Court identified two types of *prima facie* case then cited to Wigmore to define them.

There are only two types of *prima facie* case identified by Wigmore. The Supreme Court specifically identified which of them applied to *McDonnell Douglas* discrimination cases. This bears repeating since the Second Circuit has evidently missed this point for nearly two decades.⁹⁷

To reiterate: “The phrase ‘prima facie case’ not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff’s burden of producing enough evidence to permit the trier of fact to infer the fact at issue.”⁹⁸ *McDonnell Douglas* should have made it apparent that in the Title VII context we use “*prima facie* case” in the former sense.⁹⁹

The Supreme Court identified two types of *prima facie* case and cited to Wigmore to define them. Nothing in the cited language, or anywhere else in Supreme Court jurisprudence, identifies a third type of *prima facie* case. Thus, the Second Circuit manifestly exceeded its authority in concluding that there was a third type of *prima facie* case, one that created a legally mandatory presumption but was otherwise not intrinsically sufficient to raise an inference of discrimination.¹⁰⁰

Even if the language the majority cites arguably supported a finding of a third type of *prima facie* case, the Second Circuit is not empowered to find that a third type exists without explicit language to that effect from the Supreme Court. “If a precedent of this Court

⁹⁷ *Fisher* was decided in 1997, and still in 2014 (or at least 2013) 17 (or 16) years later the Second Circuit still cites to *Fisher* and its third type of *prima facie* case.

⁹⁸ 9 J. Wigmore, *Evidence* § 2494 (3d ed. 1940).

⁹⁹ *Burdine*, 450 U.S. at 254.

¹⁰⁰ *Fisher*, 114 F.3d at 1340 abrogated by *Reeves*, 530 U.S. 133 (noting “Chief Judge Newman’s dissent is based largely on his surprising view, shared by Judge Winter, that the *prima facie* case of discrimination specified in *McDonnell Douglas* is as strong as any conventional *prima facie* case.”).

has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”¹⁰¹ The Second Circuit has attempted to usurp this prerogative.

Consequently, district courts are obligated to recognize this usurpation and “to recognize that the motion[s based upon it] ha[ve] to be denied unless and until this Court reinterpret[s] the binding precedent.”¹⁰²

B. The *James* Panel’s Faulty Resurrection of *Fisher*

Fisher appeared to have died the death it deserved when the Supreme Court addressed the so-called pretext-plus analysis in *Reeves*. This appeared to be a great victory for plaintiffs: yet, a three-judge panel of the Second Circuit, coincidentally comprised of the two main authors of the *Fisher* majority decision, snatched defeat from the jaws of victory when they held that “upon careful study of the *Reeves* opinion, we can find no indication in it that the Supreme Court has rejected what we said in *Fisher*.”¹⁰³

This is an astonishing holding given the actual language in *Reeves* and *Fisher*. The differences between *Reeves* and the majority opinion in *Fisher*, as well as the corresponding similarities between *Reeves* and the Newman dissent in *Fisher*, will be discussed below. As an initial matter, however, note must be taken of the evidently false statement of fact that the *James* panel propagated.

In *Fisher*, the majority stated that:

During consideration of the Petition for Rehearing in Banc, a question was raised whether our review for clear error violated a rule established in *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir.1995). A majority of

¹⁰¹ *Felton*, 521 U.S. at 237-38.

¹⁰² *Id.* at 238.

¹⁰³ *James*, 233 F.3d at 156.

the Court has decided to limit in banc review to resolution of the question whether a finding of liability under Title VII, supported by a prima facie case and a sustainable finding of pretext, is subject to review for clear error.¹⁰⁴

Thus, the court specifically declined to rule on the continued applicability of *Binder*. After all, *Fisher* was a ruling on a JNOV, whereas, *Binder* was a ruling on summary judgment i.e. the sufficiency to go to a fact finder in the first place. As such, *Binder* was actually a Second Circuit ruling in conformity with the *McDonnell Douglas* analysis outlined above.¹⁰⁵

After having declined to rule on the *Binder* precedent in *Fisher*, the *James* panel stated that *Fisher* had in fact overturned *Binder*.¹⁰⁶ In so doing, the panel propagated an overt falsehood about the prior holding in *Fisher*.

At the very least, an error of this magnitude about what the authors themselves said in a decision that they clearly considered vital calls into question their evaluation of the Supreme Court's meaning in *Reeves*. Yet the bulk of the *James* decision purports to do exactly that, saying that "the Supreme Court's reasoning in *Reeves* is wholly compatible and harmonious with our reasoning in *Fisher*."¹⁰⁷ But the *James* panel undercuts its own reasoning. It recognizes that *Reeves* appears to disagree with *Fisher*.¹⁰⁸ But the panel then states

¹⁰⁴ *Fisher*, 114 F.3d at 1333. Compare *Fisher*, with *James*, 233 F.3d at 153 (noting the Court "convened in banc in *Fisher* to reconsider our earlier precedent in *Binder*, 57 F.3d at 193.").

¹⁰⁵ "The Court held that while a trier of fact's rejection of the employer's asserted reasons does not compel a finding for the plaintiff, it permits the trier to infer discrimination. Put another way, 'rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination.' *Binder*, 57 F.3d at 199 (quoting *Hicks*, 509 U.S. at 511 n. 4 (emphasis in original))."

¹⁰⁶ *James*, 233 F.3d at 153 (noting "*Fisher* rejected the *Binder* standard, finding it both illogical and incompatible with the Supreme Court's guidance.").

¹⁰⁷ *James*, 233 F.3d at 155.

¹⁰⁸ "As the *Schnabel* opinion points out the Supreme Court in *Reeves* introduced some confusion as to the meaning of the *Fisher* opinion. The [*Reeves*] Court stated that it was granting certiorari to resolve the conflict among circuits as to whether a prima facie case plus evidence of the falsity of the employer's proffered justifica-

that “[w]ith all respect the Court was mistaken.”¹⁰⁹ Ultimately concluding that “[t]here is no inconsistency between the two rulings.”¹¹⁰

But as other commentators have said, this conclusion is not a reasonable one. “Both the First and Second Circuits... have unconvin­cingly denied the existence of any conflict between the Reeves opinion in their own pre-*Reeves* jurisprudence, even though both cir­cuits were clearly among those that endorsed the discredited ‘pretext-plus’ approach.”¹¹¹ Although *Reeves* in its broadest and most general statements might facially appear to be in agreement with *Fisher’s* broadest and most general statements,¹¹² review of the more detailed statements of *Reeves* show that the Supreme Court’s reasoning follows almost exactly with Judge Newman’s dissent in *Fisher* rather than the majority’s opinion. In short, the *James* panels’ evaluation of *Fisher* “was so ridden with error that [the panel] could not honestly have relied upon it.”¹¹³

Compare the following examples from the *Reeves* decision as against the majority and the dissent from *Fisher*.

The *Fisher* majority believes that the *McDonnell Douglas prima facie* case, unlike all other *prima facie* cases, is not sufficient in and of itself to raise an inference of discrimination.

tion is adequate to sustain a finding of liability. In a parenthetical clause following its citation to *Fisher*, the Court described *Fisher* as requiring that plaintiffs ‘introduce sufficient evidence for jury to find both that employer’s reason was false and that real reason was discrimination.’” See *James*, 233 F.3d at 157 n.3 (internal citations omitted) (quoting *Reeves*, 530 U.S. at 140).

¹⁰⁹ *James*, 233 F.3d at 157 n. 3.

¹¹⁰ *Id.* at 155

¹¹¹ JANICE GOODMAN, EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE, Ch. 2, Title VII, § 2.05(2)(v)(vi) n. 100 (Christopher Bello ed., 2013) (Lexis Advance).

¹¹² *Reeves* even cites *Fisher* positively, stating “[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent.” *Reeves*, 530 U.S. at 148 (quoting *Fisher*, 114 F.3d, at 1338).

¹¹³ *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980).

Reeves: “Again, the court disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner's prima facie case.”¹¹⁴

Fisher (Majority): “Such a limited prima facie case does not necessarily have much force in showing discrimination.”¹¹⁵

Fisher (Dissent): “They are the Supreme Court's own example of facts sufficient, in the Supreme Court's words, to ‘give rise to an inference of unlawful discrimination.’”¹¹⁶

The *Fisher* majority's belief in “such a limited prima facie case,” aside from having been disproved above, does not mesh the Supreme Court analysis of “critical evidence favorable to petitioner—namely, the evidence supporting petitioner's prima facie case.” If the *prima facie* case actually had such a limited probative value as the *Fisher* majority believes, the *Reeves* court would not consider it critical evidence. The dissent's analysis makes far more sense in conjunction *Reeves* than the majority's.

Likewise, the *Fisher* majority's belief that a showing of pretext must *point* to discrimination is entirely at odds the decision in *Reeves*.

Reeves: “it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.”¹¹⁷

Fisher (Majority): “When the presumption drops away, plaintiff's burden is enlarged to include every element of the claim . . . plaintiff must then (unlike the prima facie stage) point to sufficient evidence to reasonably support a finding that he was harmed by the employer's illegal discrimination.”¹¹⁸

¹¹⁴ *Reeves*, 530 U.S. at 152.

¹¹⁵ *Fisher*, 114 F.3d at 1336, abrogated by *Reeves*, 530 U.S. 133.

¹¹⁶ *Id.* at 1363; *Burdine*, 450 U.S. at 253 (emphasis added).

¹¹⁷ *Reeves*, 530 U.S. at 147.

¹¹⁸ *Fisher*, 114 F.3d at 1337.

Fisher (Dissent): “When the Supreme Court says in *St. Mary's*, as all other courts have also said, that a fact-finder may infer discrimination from a finding of pretext, it is obviously in no doubt as to the direction in which a pretext finding points. Moreover, the Supreme Court's assertion that an inference of discrimination may be drawn from a finding of pretext, without any additional evidence required from the plaintiff, necessarily means that the pretext finding generally points toward discrimination with considerable force, enough force to enable the plaintiff to win”¹¹⁹

Consider the same principle as to the probative value of a showing of pretext in his comparative examples.

Reeves: “Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.”¹²⁰

Fisher (Majority): “We have seen that, while a prima facie case and a finding of pretext may in some cases powerfully show discrimination, neither one necessarily gives plaintiff much support in discharging his obligation to prove that he was the victim of discrimination.”¹²¹

Fisher (Dissent): “Thus, the panel opinion is quite wrong to assert that the pretext finding made by the District Court in this case “points nowhere.” On the contrary, it starts out pointing in the same direction that all pretext findings point toward the finding of discrimination that is inferable from the facts constituting the plaintiff's prima facie case.”¹²²

Again on the same point

¹¹⁹ *Id.* at 1372-73.

¹²⁰ *See id.* at 517 (“[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination”); *Reeves*, 530 U.S. at 147.

¹²¹ *Fisher*, 114 F.3d at 1338.

¹²² *Id.* at 1372.

Reeves: “the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as “affirmative evidence of guilt.”¹²³

Fisher (Majority): “a Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext *for discrimination*, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction-or both.”¹²⁴

Fisher (Dissent): “The reason for permitting an inference of discrimination from a finding of pretext is evident. In the context of Title VII lawsuits, the likely motivation for a defendant, called upon in court to proffer an explanation for its adverse employment action, to proffer a *pretextual* explanation is to hide the true explanation of discrimination.”¹²⁵

And again on the same point

Reeves: “Once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.”¹²⁶

Fisher (Majority): “What the panel opinion meant by “points nowhere” was that the inaccuracies in Vassar's statements are explicable by so many equally possible motiva-

¹²³ *Reeves*, 530 U.S. at 147; *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); *see also* *Wilson v. United States*, 162 U.S. 613, 620-21, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); 2 J. Wigmore, *Evidence* § 278(2), p. 133 (J. Chadbourn rev. 1979).

¹²⁴ *Fisher*, 114 F.3d at 1339.

¹²⁵ *Id.* at 1372.

¹²⁶ *Reeves*, 530 U.S. at 147.

tions that none emerged with any persuasive force; more particularly, the panel concluded that under the circumstances Vassar's inaccuracies gave little if any support to the inference that Vassar had engaged in discrimination."¹²⁷

Fisher (Dissent): "But once it proffers its reason in court, it subjects that reason to the assessment of the fact-finder, and if the fact-finder concludes, with support in the record, that the proffered reason is a pretext, the defendant is usually at risk of having the fact-finder draw the permissible inference that the pretextual reason was proffered to hide the true reason-discrimination."¹²⁸

Perhaps the most telling failure of reasoning by the *James* panel was in regard to the *possibility* that a *prima facie* case in showing pretext might not sustain a jury verdict. On its face, in the broadest possible terms, this proposition is stated by both *Reeves* and *Fisher*. But the *James* panel evidently ignored the examples which the Supreme Court used to illustrate their meaning on the point, a meaning which is wholly different from that espoused by the *Fisher* majority.

Reeves: "This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue

¹²⁷ *Fisher*, 114 F.3d 1332, 1345 (2d Cir. 1997) *abrogated by Reeves*, 530 U.S. 133 (2000).

¹²⁸ *Id.*

and there was abundant and uncontroverted independent evidence that no discrimination had occurred.”¹²⁹

Fisher (Majority): “But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility . . . In short, the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff.”¹³⁰

Fisher (Dissent): “The majority relies on the large number of reasons why a pretext explanation could be proffered as a circumstance for diminishing the force of the pretext finding that was made by the District Court. . . . In every case where a person is seen running from the scene of a crime, the jury is instructed that they may, but need not, draw an inference that such flight is probative of consciousness of guilt, and that state of mind, in turn, is probative of ultimate guilt (though not alone sufficient to convict). Of course, the strength of the inference from flight will depend on all of the evidence in the case. If there is some slight evidence of an innocent explanation for the flight, the inference of consciousness of guilt might be lessened. If the evidence of an innocent explanation is strong, the inference of consciousness of guilt will be weak. And cases might arise where the evidence of an innocent explanation is so strong that no reasonable fact-finder could draw the inference of consciousness of guilt, in which event a finding based on the inference would be clearly erroneous.”¹³¹

¹²⁹ *Reeves*, 530 U.S. 133, 148 (2000).

¹³⁰ *Fisher*, 114 F.3d 1332, 1345 (2d Cir. 1997), abrogated by *Reeves*, 530 U.S. 133 (2000).

¹³¹ *Id.*

While the Supreme Court acknowledged that there might be circumstances where a *prima facie* case coupled with a showing of pretext might not ultimately be sufficient to prove intentional discrimination, they would be presumptively rare. Such as when evidence “conclusively revealed some other, nondiscriminatory reason for the employer’s decision” or “there was abundant and uncontroverted independent evidence that no discrimination had occurred.”

These are circumstances where powerful evidence in the record at trial *conclusively* identifies some other reason for the pretext. Not, as the *Fisher* majority would have it, whenever speculation on the part of the hostile court can articulate some other conceivable reason even though unsupported by any evidence. This is exactly where Judge Newman was headed with the argument that “*numbers* of possibilities have little to do with probative force.” Again, the *Reeves* decision cleaves far more closely to the *Fisher* dissent than it does to the *Fisher* majority.

If the *James* panel’s assertion that “[t]here is no inconsistency between the two rulings”¹³² were subjected to the same summary judgment standard that discrimination plaintiffs are held to, ‘no reasonable jurist could conclude that the assertion in *James* is supported by sufficient evidence.’

IV. *FISHER* AND *JAMES* HAVE HAD FAR-REACHING DELETERIOUS CONSEQUENCES FOR DISCRIMINATION PLAINTIFFS

The *Abdallah* case critiqued above was not just a flash in the pan. Rather, it was just another in a long line of perfectly valid discrimination cases that is been destroyed by *Fisher* and *James* and their derivatives. A quick the referral to the Westlaw database shows that each of these cases has been cited nearly a thousand times. That is a broad reach for such erroneously decided cases of the course of a

¹³² *James*, 233 F.3d 149, 155 (2d Cir. 2000).

decade and a half. Nor is *James* the only circuit decision that has defied the command of *Reeves*.¹³³

In further illustration of the destructive reach, consider the following pair of cases. A recent decision by The Western District of New York disposed of a plaintiff's case on summary judgment because "[a] jury cannot infer discrimination from thin air."¹³⁴ The judge was quoting the Second Circuit's decision in *Norton*.¹³⁵ The *Norton* panel held that

[A] jury cannot infer discrimination from thin air. And thin air is all the plaintiff has produced in the case before us. Norton proved (1) that he was over forty years old when he was fired; (2) that the person who fired him was under forty years of age; and (3) that one other person who was fired around the same time as Norton was also over forty. Norton further suggested that the principal reason offered by Sam's Club for his dismissal (his having taken one long lunch) was preposterous. Norton established, at best, an *extremely* weak prima facie case.¹³⁶

The panel was evidently offended by what it perceived to be the extreme weakness of the *prima facie* case.¹³⁷

¹³³ "The practice in the first and second circuits of more or less ignoring Reeves commands has also been reflected in *Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000); *Schnabel*, 232 F.3d 83; *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87 (2d Cir. 2001); *Weinstock v. Columbia Univ.*, 224 F.3d 33 (2d Cir. 2000); and *Budde v. H and K S Distrib. Co.*, 2000 U.S. App. LEXIS 15811 (2d Cir. 2000) (unpubl)." Goodman, *Employee Rights Litigation: Pleading and Practice* 2-175 [2009]

¹³⁴ *Grant v. Rochester City Sch. Dist.*, 10-CV-6384, 2013 WL 3105536 (W.D.N.Y. June 18, 2013).

¹³⁵ *Norton v. Sam's Club*, 145 F.3d 114, 119 (2d Cir 1998).

¹³⁶ *Id.*

¹³⁷ "*Norton* established, at best, an *extremely* weak prima facie case. It is not infrequent that people who are dismissed are fired by managers who differ from them in some respect—managers who are younger or older, or of a different race or gender. If that fact, without more, could suffice to support the finding of discrimi-

The panel cited to *Fisher* to hold that “even if the jury could find that the explanation offered by Sam's Club for why it fired Norton was absurd, it is hard to see how this would add much of significance to Norton's case.”¹³⁸ This is, again, directly refuted by the Supreme Court's holding that “the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as “affirmative evidence of guilt.”¹³⁹ Whether the *prima facie* case was weak or not, a showing of falsity, or in this case ‘absurdity,’ permits the ultimate finding of discrimination.

As it happens, the *Norton* case was presided over at the district court level by the same judge as in *Grant*.¹⁴⁰ In *Norton*, the case went to trial and the plaintiff won a verdict and damages. But again, relying on *Fisher*, the Second Circuit snatched defeat from the jaws of victory, hijacking the plaintiff's jury verdict and casting it away in favor of the flawed reasoning of *Fisher*. When fifteen years later in *Grant*, the district court disposed of that case through summary judgment rather than letting it go to trial as he did in *Norton*, it may be said that the judge learned the lesson that the Second Circuit sought to teach him. A lesson that relied on the false teachings of *Fisher*.

V. CONCLUSION

The Second Circuit, through *Fisher* and *James*, has led a rebellion against the well-settled Supreme Court case law of *McDonnell Douglas* and its progeny. In doing so, the Second Circuit has either ignored or abandoned the basic principles underlying *McDonnell Douglas*: the important national policy that Title VII is designed to effectuate and the rarity of overt evidence of discrimi-

nation in the instant case, it would be hard to imagine a termination that could not be attributed to discrimination.” *Id.*

¹³⁸ *Id.*

¹³⁹ *Reeves*, 530 U.S. 133, 147 (2000).

¹⁴⁰ *Norton*, 145 F.3d at 119.

natory intent because discriminating employers go out of their way to hide such evidence. This has led to an unlawful increase in the evidentiary standard that plaintiffs must meet either to overcome summary judgment or even to sustain a verdict after trial. This unlawfully heightened standard works an insidious effect against plaintiff's, essentially demanding that the District Court's grant summary judgment in the vast majority of cases.

Through the false reasoning of *Fisher* and *James* the Second Circuit has evidently abandoned its duty to root out "subtle" discrimination.¹⁴¹ Given the profound rarity of overt evidence of discrimination, "subtle" cases make up the vast majority of discrimination cases. Thus, *Fisher* and *James* close the courthouse doors upon the vast majority of discrimination plaintiffs in direct contravention of Title VII's mandate.

Clearly, within this circuit, corrective action must be taken. Given the Second Circuit's evident refusal to adhere to *Reeves*, it would appear that the Second Circuit needs to police itself abrogating *Fisher* and *James*. But, even at the district level, courts are obligated to recognize this usurpation and "to recognize that the motion[s based upon it] ha[ve] to be denied unless and until [The Supreme] Court reinterpret[s] the binding precedent."¹⁴²

¹⁴¹ "[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Corp.*, 411 U.S. 792, 801 (1973).

¹⁴² *Felton*, 521 U.S. 203, 237-38 (1997).