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Civil Rights - Employment Discrimination: The Standard of Review in State-Based Employment Discrimination Claims: The North Dakota Supreme Court Redefines the Standard of Review in Employment Discrimination Claims

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CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION: THE STANDARD OF REVIEW IN STATE-BASED EMPLOYMENT DISCRIMINATION CLAIMS: THE NORTH DAKOTA SUPREME COURT REDEFINES THE STANDARD OF REVIEW IN EMPLOYMENT DISCRIMINATION CLAIMS

Schuhmacher v. North Dakota Hospital Association, 528 N.W.2d 374 (N.D. 1995)

I. FACTS

The North Dakota Hospital Association[1] [hereinafter NDHA] hired Alan J. Schuhmacher in 1974 and Dale Wavra in 1981.[2] After fifteen years and eight years of employment respectively, NDHA terminated Schuhmacher and Wavra due to an alleged financial crisis.[3]

Believing that NDHA had discriminated against Schuhmacher and Wavra based on their ages, the two former employees sued NDHA under the North Dakota Human Rights Act,[4] claiming age discrimination.[5] At trial, the jury found for Schuhmacher and Wavra and awarded them a total of $730,000 in damages.[6] In addition, the district court awarded

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1. NDHA is a nonprofit association consisting of independent hospitals and clinics. Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374, 376 (N.D. 1995). NDHA is funded mostly through annual dues from its member hospitals and clinics. *Id.* NDHA's primary function is to facilitate the purchasing of supplies and the collection of outstanding debts for its member institutions. *Id.* NDHA has two profit-making subsidiaries: Advantage, NDHA's purchasing agent; and Hospital Services Incorporated, NDHA's collection agency. Brief for Appellant at 2, Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374 (N.D. 1995) (No. 940155).

2. *Schuhmacher*, 528 N.W.2d at 376.

3. *Id.* at 377. When NDHA discharged Schuhmacher, NDHA redistributed Schuhmacher's duties among existing sales staff at Advantage. *Id.* In October of 1989, NDHA gave one of its staff members at Advantage, Wade Johnson, who was 39 years of age, the title of Vice President, Chief Operating Officer of Advantage, which is the position that Schuhmacher formerly held. *Id.* After NDHA terminated Wavra, Hospital Services Incorporated moved from Grand Forks to Bismarck where NDHA named Kim Rau "head collector" whose duties included overseeing the opening of the Bismarck operation. *Id.* In January of 1991, NDHA promoted Rau, at the age of 32, to the position of Vice President, which is the position that Wavra formerly held. *Id.*

4. N.D. CENT. CODE §§ 14-02.4-01 to -21 (1991 & Supp. 1995).

5. *Schuhmacher*, 528 N.W.2d at 377. At the time of their terminations, Schuhmacher was 54 years of age and Wavra was 58 years of age. *Id.* at 376. The Human Rights Act of North Dakota is codified in chapter 14-02.4 of the North Dakota Century Code. N.D. CENT. CODE §§ 14-02.4-01 to -21 (1991 & Supp. 1995); *see also* Human Rights Act, ch. 173, 1983 N.D. Laws 466; STATE BAR ASSOCIATION OF NORTH DAKOTA, THE NORTH DAKOTA HUMAN RIGHTS ACT AND YOU 1 (1985) (referring to chapter 14-02.4 as the Human Rights Act of North Dakota). The Act provides:

> It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer . . . .

N.D. CENT. CODE § 14-02.4-01 (Supp. 1995).

6. *Schuhmacher*, 528 N.W.2d at 377.

$308,000 in costs and attorneys' fees, bringing the total judgment against NDHA to over one million dollars.[7]

NDHA appealed both the jury's verdict and the district court's award of costs and attorney's fees.[8] NDHA challenged the sufficiency of the evidence and the district court's jury instructions, evidentiary rulings, and award of attorneys' fees.[9] Specifically, NDHA argued four major points.[10] First, NDHA again argued that Schuhmacher and Wavra's terminations were based on legitimate business reasons.[11] Second, NDHA asserted that Schuhmacher and Wavra did not satisfy all elements required to prove age discrimination as they were not required to demonstrate that they were replaced after their terminations.[12] Third, NDHA argued that regardless of whether Schuhmacher and Wavra could prove that they were replaced, Schuhmacher and Wavra failed to prove that age was a "determining factor" in the terminations.[13] Finally, NDHA argued that the district court improperly instructed the jury that the replacement element[14] of a prima facie case could be satisfied by showing that the plaintiffs' duties were either distributed among younger existing employees or assumed by newly hired younger employees.[15]

The North Dakota Supreme Court reversed and remanded the trial court's decision.[16] In doing so, the supreme court *held* that the district court's instructions did not adequately inform the jury of the applicable law.[17] In addition, the supreme court ruled that the district court erroneously excluded relevant evidence necessary to the defense.[18]

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7. Brief for Appellant at 36, Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374 (N.D. 1995) (No. 940155).

8. *Schuhmacher*, 528 N.W.2d at 377.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id. See infra* note 67 and accompanying text (discussing the replacement element of a prima facie case).

13. *Schuhmacher*, 528 N.W.2d at 378. NDHA cited to authority which stated that a plaintiff, in a business reorganization or reduction in force case, must not only prove that he or she was replaced, but the plaintiff must also come forward with additional evidence that age was a "determining factor" in the termination. *Id. See* Ridenour v. Lawson Co., 791 F.2d 52, 57 (6th Cir. 1986) (stating that a plaintiff must come forward with additional direct, circumstantial, or statistical evidence that age was a determining factor in the termination). NDHA also argued that the trial court improperly equated salary-status decision making with age-based decision making. *Schuhmacher*, 528 N.W.2d at 377. *See* Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706-07 (1993) (finding it improper to consider a decision based on the employee's years of service to be "age-based").

14. *See infra* note 151 and accompanying text (discussing the jury instruction concerning the replacement element of a prima facie case).

15. *Schuhmacher*, 528 N.W.2d at 379.

16. *Id.* at 376.

17. *Id.*

18. *Id.*

II. LEGAL BACKGROUND

A. FEDERAL LAW IN EMPLOYMENT DISCRIMINATION

1. Title VII Of The Civil Rights Act Of 1964 and The Age Discrimination in Employment Act

In the 1964 Civil Rights Act, Congress passed Title VII, a federal statutory law prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin.[19] During the floor debate over Title VII, both Senators and Representatives offered amendments to include age as one of Title VII's protected classes.[20] However, opponents of the amendments argued that there was not enough information on the nature of age discrimination.[21] This strong opposition to the inclusion of age under Title VII ultimately resulted in the amendment's defeat.[22]

Although Congress did not include age as a protected class in Title VII, Congress did provide a provision[23] which directed the Secretary of Labor to study the problem of age discrimination in employment and to recommend remedial legislation to Congress.[24]

Pursuant to this Congressional mandate, the Secretary of Labor submitted his report, *The Older American Workers—Age Discrimination*

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19. 42 U.S.C. § 2000e-2 (1988). *See* EEOC v. Wyoming, 460 U.S. 226, 229-33 (1983) (discussing Title VII and the legislative history leading up to the passage of the Age Discrimination in Employment Act). Title VII regulates the relationship between employers and their employees and applicants, between unions and their members and potential members, and between employment agencies and their clients. 42 U.S.C. § 2000e-2(a) to (c) (1988). However, Title VII does not prohibit all arbitrary employment practices. 42 U.S.C. §§ 2000e-2 to -3 (1988). Rather, Title VII only prohibits employers from discriminating on the basis of race, color, national origin, sex, or religion. *Id.*

20. *EEOC v. Wyoming*, 460 U.S. at 229 (discussing the Congressional debates leading up to the passage of the Age Discrimination in Employment Act). *See* Act of July 2, 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N. (78 Stat.) 2355, 2401 (codified at 42 U.S.C. § 2000e) (citing to the legislative history of Title VII).

21. EEOC v. Wyoming, 460 U.S. 226 (1983) (discussing that part of the argument against inclusion of age discrimination in employment was the lack of information upon which to determine whether there was a widespread problem).

22. *Id.* at 229-39. *See* 110 CONG. REC. 2596-2599, 9911-9913, 13490-13492 (1964) (discussing congressional hearings to the suggested amendments and the arguments against enactment).

23. 42 U.S.C. § 715, 78 Stat. 265 (1964); *see also EEOC v. Wyoming*, 460 U.S. at 230 (noting that 42 U.S.C. § 715 has been superseded by § 10 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111).

24. *EEOC v. Wyoming*, 460 U.S. at 230. One reason for the omission of age from Title VII is that the legislation was already having difficulty passing Congress and the addition of another protected category, age, would have created more opposition to the act. ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION LAW § 98.32, at 21-11, 21-12 (1992). Another reason for the separate treatment of "age" is that many members of Congress believed that the EEOC would already be overtaxed with race and sex cases, and that the Wage and Hour Division of the Department of Labor could handle age complaints more expediently. *Id.*

in Employment (1965),[25] to Congress which revealed evidence of widespread age discrimination in employment in the United States.[26] In response to the Secretary of Labor's findings, Congress passed the Age Discrimination in Employment Act (ADEA) of 1967.[27]

Congress' purpose in enacting the ADEA was to prohibit arbitrary age discrimination in the workplace and to help reconcile problems that arise from the impact of age on employment.[28] In order to provide the same employment protection to older Americans that Title VII provided to its protected classes, Congress wrote the ADEA with similar substantive provisions.[29] However unlike Title VII,[30] which is enforced by the Equal Employment Opportunity Commission (EEOC), Congress chose to use the enforcement procedures of the Department of Labor, as defined in the Fair Labor Standards Act (FLSA) of 1938.[31]

2. *Types of Claims Under the ADEA*

Generally, in employment discrimination law, there are two primary types of theories under which a claim may be brought: disparate treatment and disparate impact.[32]

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25. *EEOC v. Wyoming*, 460 U.S. at 230 (citing REPORTS OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT (June 1965)).

26. *Id.*; *see also* 113 CONG. REC. 1377 (1967) (discussing the findings in the Secretary of Labor's support for the Age Discrimination in Employment Act of 1967).

27. *EEOC v. Wyoming*, 460 U.S. at 230-31 (1983); 29 U.S.C. § 621(b) (1982). *See* Act of December 15, 1967, Pub. L. No. 90-202, 1967 U.S.C.C.A.N. (81 Stat.) 2213 (codified at 29 U.S.C. § 621) (citing to legislative history of the Age Discrimination in Employment Act).

28. 29 U.S.C. § 621(b) (1982).

29. *See* 113 CONG. REC. 31,254 (1967) (comparing Title VII's protection of women, minority, racial, ethnic, and religious groups to the similar protection that the ADEA provides older workers).

30. Lorillard v. Pons, 434 U.S. 575, 584 (1978). The most noticeable similarity between Title VII and ADEA is the statutory language. *Compare* 42 U.S.C. § 2000e-2(a) (1989) (citing to the statutory language of Title VII) *with* 29 U.S.C. § 623(a) (1988) (referring to the similar statutory language). The statutory language in Title VII and the ADEA is identical except that "age" represents the stated "protected class" in the ADEA as opposed to Title VII's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1988); 29 U.S.C. § 623(a) (1988).

31. *Lorillard*, 434 U.S. at 584. One of the reasons Congress originally applied the procedural provisions of the FLSA to ADEA claims was because of its expediency concerns that the Equal Employment Opportunity Commission was already overloaded with race and sex cases. Kimberlye K. Fayssoux, Note, *The Age Discrimination In Employment Act of 1967 and Trial By Jury: Proposals For Change*, 73 VA. L. REV. 601, 606 (1987) (discussing why Congress chose to use the procedural standard of the FLSA in the ADEA). However, in July of 1979, the Presidential Reorganization Plan No. 1, transferred the enforcement of the ADEA to the EEOC. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 509 (1988). Therefore, the EEOC now enforces both the ADEA and Title VII. *Id.*

32. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1705 (1993).

a. Disparate Treatment

The most common and easily understood type of ADEA claim is the disparate treatment claim.[33] Disparate treatment cases involve an employee's claim that the employer has intentionally treated an employee less favorably because of the employee's age, race, color, religion, sex, or national origin.[34] Thus, in employment discrimination cases where the claim is disparate treatment, the plaintiff must prove the employer's discriminatory intent.[35]

(1) Types of Cases Under The Disparate Treatment Theory

(a) Pretext Cases

Pretext cases arise when an employer asserts a nondiscriminatory reason for its employment decision which the plaintiff seeks to discredit.[36] To facilitate the plaintiff's burden in pretext cases, the United States Supreme Court established a three-step analysis known as the *McDonnell Douglas* standard,[37] which allows a plaintiff to use circumstantial evidence to prove that the employer was motivated by discriminatory intent.[38] This standard allocates the burden of proof each party bears.[39] The three stages of the *McDonnell Douglas* standard dictate the following:

Stage I: The plaintiff has the burden of proving by a preponderance of evidence a prima facie case of intentional discrimination.

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33. *Id.*

34. Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1013-14 (2d Cir. 1980) (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)).

35. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1249 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

36. Kirschner v. Office of the Comptroller of New York, 973 F.2d 88, 92 (2d Cir. 1992). The courts have identified three ways to prove pretext: (1) the plaintiff may show that the employer's reasons had no basis in fact; (2) the plaintiff may show that the reasons were not the real factors motivating the discharge; or (3) the plaintiff may show that even if the reasons were factual, they were jointly insufficient to motivate the discharge. Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216, 1221 (7th Cir. 1991) (finding that the plaintiff needs to do more than establish a prima facie case to prove basic age discrimination).

37. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing a standard in which the plaintiff may use circumstantial evidence to show that the employer's employment decision was intentional discrimination).

38. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).

39. *McDonnell Douglas*, 411 U.S. at 801-803.

> Stage II: The employer has the burden of production to rebut the presumption of discrimination by proffering a non-discriminatory reason for the employment decision.
>
> Stage III: The plaintiff has the burden of persuasion to show that the reasons offered by the employer were merely pretext for intentional discrimination and persuade the trier of fact that discrimination was the real reason for the employment practice.[40]

In the first stage, the plaintiff has the initial burden of persuading the fact finder that he or she has met the elements of the prima facie case.[41] Generally, a prima facie case is made up of four elements: (1) the plaintiff is a member of the protected group; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) the plaintiff was rejected; and (4) after the plaintiff was rejected, the position remained open and the employer continued to seek applicants from persons with the complainant's qualifications.[42]

If the plaintiff establishes a prima facie case, the burden of production shifts to the employer to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its employment decision.[43] Here, the employer's legitimate, nondiscriminatory reason must be specific enough to raise a genuine issue of fact as to whether it discriminated against the plaintiff.[44]

In the third and final stage, if the employer carries its burden of production, the burden shifts back to the plaintiff to show that the reason given by the employer was a pretext for intentional discrimination.[45] The plaintiff may show pretext by persuading the court that a discriminatory reason more likely motivated the employer or by showing that the employer's proffered explanation is false.[46]

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40. *See Burdine*, 450 U.S. at 252-56 (discussing the *McDonnell Douglas* standard for allocating the burdens of each party and the order of presentation of proof in a case alleging discriminatory treatment).

41. *McDonnell Douglas*, 411 U.S. at 802. The elements necessary to establish a prima facie case vary depending on the circumstances of the alleged discrimination, such as showing that a plaintiff belongs to a racial minority where the plaintiff alleges race discrimination. Favors v. Fisher, 13 F.3d 1235, 1237 (8th Cir. 1994) (citing Jones v. Frank, 973 F.2d 673, 676 (8th Cir. 1992)). In fact, the Supreme Court has noted that the prima facie case under *McDonnell Douglas* is not necessarily applicable in every respect to differing factual situations. *McDonnell Douglas*, 411 U.S. at 802 n.13.

42. *McDonnell Douglas*, 411 U.S. at 802.

43. *Burdine*, 450 U.S. at 254. At this stage, the employer does not need to litigate the merits of its reasoning for its decision, nor does the employer need to persuade the fact finder that it was actually motivated by its proffered reasoning. *Id.*

44. *Id.* at 254-55.

45. *Id.* at 255.

46. *Id.* at 256 (noting that the plaintiff always retains the burden of persuasion that he or she was the victim of intentional discrimination). *See McDonnell Douglas*, 411 U.S. at 804-805 (discussing the

Until recently, the federal courts were divided over whether a plaintiff was entitled to a judgment, as a matter of law, when the employer's proffered reasons for its employment practices were rejected by the trier of fact.[47] This controversy, however, was settled by the Supreme Court in *St. Mary's Honor Center v. Hicks*.[48] In *Hicks*, the Court held that a plaintiff is not entitled to judgment as a matter of law even if he or she proves the employer's asserted reasons were false or if the trier of fact rejects the employer's stated reasons.[49] The Court, restating its reasoning in *Burdine*,[50] concluded that the ultimate burden of persuading the trier of fact remains, at all times, with the plaintiff.[51] Thus, the Court determined that simply disbelieving the employer's stated reasons is not enough for a plaintiff to prevail.[52] Rather, the Court opined that the fact finder must also believe the plaintiff's explanation for the intentional discrimination.[53] Accordingly, for a plaintiff to prevail, the plaintiff must persuade the trier of fact that the employer's proffered reasons are false and that discrimination was the true reason for the employment decision.[54]

(b) Mixed-Motives Cases

Mixed-motives cases arise when an employer proffers both a legitimate and a discriminatory reason for its employment decision.[55] In the landmark mixed-motives case, *Price Waterhouse v. Hopkins*,[56] a female partnership candidate was refused admission as partner in her accounting firm.[57] She sued under Title VII alleging that her firm had discriminated against her on the basis of sex in its partnership decisions.[58] In its defense, the firm stated that although some partners felt that Ms. Hopkins was not feminine enough, its ultimate reason for refusing to admit Ms. Hopkins as a partner was because she lacked sufficient interpersonal skills.[59]

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methods in which the petitioner may show a pretext for discrimination). *See supra* note 36 (discussing the different methods that courts have identified in finding pretext).

47. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2750 (1993).

48. 113 S. Ct. 2742 (1993).

49. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2754-55 (1993).

50. 450 U.S. 248 (1981).

51. *Hicks*, 113 S. Ct. at 2747 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

52. *Id.* at 2754.

53. *Id.*

54. *Id.* at 2752.

55. Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448 (8th Cir. 1993) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989)).

56. 490 U.S. 228 (1989).

57. Price Waterhouse v. Hopkins, 490 U.S. 228, 231-32 (1989).

58. *Id.* at 232.

59. *Id.* at 234-37.

Facing a mixed-motive discrimination case for the first time, the United States Supreme Court determined that in order to prevail, a plaintiff must show that it is more likely than not that the discriminatory factor played a motivating part in the employment decision.[60] Accordingly, the case was remanded with the instructions that if the plaintiff successfully proves that the discriminatory reason was a motivating factor in the employment decision, the burden shifts to the employer to prove, by a preponderance of evidence, that it would have made the same decision even if it had not taken the unlawful factor into account.[61]

(c) Reduction-in-Force Cases

Under the ADEA, an employer may make employment decisions based on reasonable factors other than age or for good cause.[62] Specifically, an employer may justify the termination of an employee by claiming that a reduction-in-force [hereinafter RIF] is dictated by an economic necessity.[63] As a result, when a company undergoes a RIF due to economic necessity, terminated employees face a more difficult burden in proving age discrimination.[64] Normally, in non-reduction-in-force cases, the fourth element of a prima facie case requires the plaintiff to merely show that, after the discharge, the position remained open and the employer sought applicants with similar qualifications to fill the position.[65] However, RIF situations complicate matters because the plaintiff's position is either eliminated or combined with another posi-

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60. *Id.* at 243-47.

61. *See* Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)). Trial courts determine whether a given disparate treatment case should be analyzed as a pretext or a mixed motive case after all the evidence has been presented. *Id.* If there is no direct evidence of discrimination, the court considers the claim a pretext case and applies the *McDonnell Douglas* standard. *Id.* On the other hand, if the plaintiff has produced direct evidence that the employer's decision was motivated by a discriminatory factor, the court considers the claim a mixed motive case and applies the *Price Waterhouse* analysis. *Id.*

In 1991, Congress amended the Civil Rights Act by adding a new subsection which states that an unlawful employment practice is automatically established whenever a complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice. 42 U.S.C. § 2000e-2(m) (Supp. IV 1992). By adding this subsection to the Act, a defendant is now liable for any impermissible employment practice even though other factors may have also motivated the employer's decision. *Id.* Nevertheless, the amendment still allows an employer, in a mixed motive claim, to escape compensatory and punitive damages, but may require reinstatement, hiring, promotion, or back pay, by showing that the same decision would have been made even without considering the discriminatory factor. 42 U.S.C. § 2000e-5(g) (Supp. IV 1992). In addition, the employer may be liable for declaratory and injunctive relief, and attorney's fees and costs. *Id.*

62. 29 U.S.C. § 623(f) (1993).

63. Holley v. Sanyo Mfg., 771 F.2d 1161, 1168 (8th Cir. 1985). *See also* 29 U.S.C. § 623(f) (1988) (referring to business necessity as an employer's defense to liability under the ADEA because a business necessity is considered a good cause for termination).

64. *Holley*, 771 F.2d at 1165-66.

65. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

tion and it does not remain open.[66] Therefore, in RIF cases, many courts require a plaintiff to present additional evidence to prove that age was a factor in the termination in order to establish the prima facie case.[67]

b. Disparate Impact

Another type of claim that may be recognized under the ADEA is disparate impact. Disparate impact cases involve employment practices that are facially neutral[68] in their treatment of different groups but have a significant adverse effect on a protected group compared to nonprotected groups.[69] Therefore, in a disparate impact claim, the issue is whether the actual consequences of the employment practices are discriminatory, regardless of the employer's motivation.[70]

In *Griggs v. Dukes Power Co.*,[71] the United States Supreme Court established a separate and distinct test for claims involving disparate impact.[72] First, the plaintiff must establish a prima facie case by demonstrating that a facially neutral employment practice has a significant discriminatory impact.[73] Next, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to show that there is a business

66. *Id. See generally Holley*, 771 F.2d 1161.

67. *Holley*, 771 F.2d at 1166 (quoting LaGrant v. Gulf & Western Mfg., 748 F.2d 1087, 1090-91 (6th Cir. 1984)). While the plaintiff need not show replacement by a younger worker to make out a prima facie case, the plaintiff must provide either direct, circumstantial, or statistical evidence tending to indicate that the employer discharged the plaintiff for unlawful reasons. Barnes v. Gencorp, Inc., 896 F.2d 1457, 1464-65 (6th Cir. 1990). *See also* Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 800 (8th Cir. 1994) (finding that in a reduction-in-force termination the plaintiff is required to make an additional showing that age was a factor in his termination); Leichiman v. Pickwick Int'l, 814 F.2d 1263, 1268 (8th Cir. 1987), *cert. denied*, 484 U.S. 885 (1987) (stating that age must be a "determining factor" in termination); EEOC v. Western Elec. Co., 713 F.2d 1011, 1014 (4th Cir. 1983) (finding reversible error in failing to require that the prima facie case include a showing of age as a factor in the reduction in force demotion). *But see* Wallis v. J. R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994) (finding that a plaintiff can establish a prima facie case by showing that his job duties were assumed by a retained younger employee); Herold v. Hajoca Corp., 864 F.2d 317, 320 (4th Cir. 1988) (finding that a plaintiff may satisfy the requirement element of a prima facie case by showing that persons outside protected group were retained in the same position).

68. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-36 (1971) (finding that the hiring requirements and testing practices of Duke Power Company, although neutral in terms of intent, operated to freeze the status quo of prior discriminatory employment practices).

69. Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1013-14 (2d Cir. 1980) (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)).

70. *Griggs*, 401 U.S. at 432.

71. 401 U.S. 424 (1971).

72. Griggs v. Duke Power Co., 401 U.S. 424, 428-36 (1971).

73. *See* Connecticut v. Teal, 457 U.S. 440, 446-47 (1982) (discussing the *Griggs* three-part analysis for disparate impact claims). The standard of proof by which a plaintiff must show the prima facie case is by a preponderance of the evidence. EEOC v. High Top Coal Co., 677 F.2d 1136, 1137 (6th Cir. 1982) (discussing how a plaintiff can establish a claim under the disparate impact theory). Further, the plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact, except when the plaintiff is able to show that the elements of the employer's decision making process are not capable of separation for analysis. 42 U.S.C. §2000e-2(k)(1)(B)(i) (Supp. V 1993).

necessity for the challenged practice.[74] At this point, the employer's burden is more onerous than the employer's burden in a disparate treatment claim.[75] An employer cannot demonstrate that an employment practice is a business necessity by simply showing that the practice serves legitimate management functions.[76] Rather, the employer must show that the practice has great importance to the job.[77] Furthermore, the employer must also show a "manifest relationship" between the job requirement in question and the employment.[78]

Finally, if the employer proves job relatedness or business necessity for the employment practice in question, the plaintiff is then given an opportunity to show there are alternatives to the employer's employment practices that would have a less discriminatory effect but would still serve the employer's business interests.[79] If the plaintiff demonstrates a less discriminatory or nondiscriminatory alternative, the plaintiff successfully establishes disparate impact under the *Griggs* test.[80]

Although the United States Supreme Court has recognized disparate impact claims under Title VII, the Court has not yet established whether a disparate impact theory of liability is available under the ADEA.[81] In a recent ADEA decision, *Hazen Paper Co. v. Biggins*,[82] Justice Kennedy wrote a concurring opinion specifically noting that nothing in the Court's opinion should be read as incorporating the disparate impact theory into the ADEA.[83] However, lower federal courts have recognized ADEA disparate impact claims in both pre-*Biggins* and post-*Biggins* decisions.[84]

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74. *See Griggs*, 401 U.S. at 431-32 (discussing the employer's burden in the second stage of the disparate impact analysis). In *Griggs*, while referring to the employer's burden, the Court used the terms "business necessity" and "related to job performance" interchangeably. *Id.* at 431.

75. *See* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2d Cir. 1980) (stating that in stage two of a disparate treatment claim, an employer must only articulate a legitimate nondiscriminatory reason).

76. *See* Williams v. Colorado Springs Sch. Dist., 641 F.2d 835, 840-41 (10th Cir. 1981) (discussing how an employer meets his or her burden by showing that the employment practice serves a legitimate business necessity).

77. *Id.*

78. *Griggs*, 401 U.S. at 432. A manifest relationship means that there is a demonstrable relationship to capable performance of the jobs for which the practice is used. *Id.*

79. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (discussing the plaintiff's burden when demonstrating alternatives to the employer's employment practices).

80. *Id.*

81. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1993).

82. 113 S. Ct. 1701 (1993).

83. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1710 (1993).

84. *See* Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) (employing statistical evidence to establish disparate impact in an age discrimination case brought under the ADEA); Howell v. Levi Strauss & Co., 840 F. Supp. 132, 136 (M.D. Ga. 1994) (discussing the disparate impact theory under Title VII or the ADEA); Caron v. Scott Paper Co., 834 F. Supp. 33, 35-36 (D. Me. 1993) (holding that disparate impact claims are cognizable under the ADEA); Leidig v. Honeywell, 850 F. Supp. 796, 801-02 (D. Minn. 1994) (assuming that a disparate impact claim is

In *Schuhmacher v. North Dakota Hospital Association*,[85] the plaintiffs alleged only disparate treatment, claiming they were intentionally discriminated against based on their age.[86] The plaintiffs in *Schuhmacher* relied exclusively on circumstantial evidence for their discrimination claim.[87] Furthermore, NDHA claimed that it terminated both plaintiffs due to a reduction-in-force.[88] This comment will therefore focus solely on disparate treatment in a reduction-in-force situation with respect to the North Dakota Supreme Court's modified version of the *McDonnell Douglas*[89] standard as established in *Schweigert v. Provident Life Insurance Co.*[90]

B. THE NORTH DAKOTA SUPREME COURT'S ADOPTION OF FEDERAL LAW TO REVIEW STATE-BASED DISCRIMINATION CLAIMS

1. The North Dakota Human Rights Act

In 1983, the North Dakota Legislature enacted the Human Rights Act,[91] prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, and other discriminatory factors.[92] The Act is intended to prevent and eliminate discrimination in employment relations, public accommodations, public services, and credit transactions.[93] The Act also functions to deter those who aid, abet, induce discrimination, or coerce others to discriminate.[94] In enacting the Human Rights

cognizable under the ADEA for the purposes of a motion for summary judgment). *But see* EEOC v. Sears, Roebuck & Co., 883 F. Supp. 211, 214-15 (N.D. Ill. 1995) (holding that a claim for disparate impact does not exist under the ADEA).

85. 528 N.W.2d 374 (N.D. 1995).

86. Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374, 377 (N.D. 1995).

87. *Id.*

88. *Id.*

89. *See supra* notes 40-46 and accompanying text (discussing the framework of the *McDonnell Douglas* standard).

90. 503 N.W.2d 225 (N.D. 1993). For further information about Schweigert v. Provident Life Ins. Co, see Nicholas W. Chase, Comment, *Civil Rights—Employment Discrimination: Modifying Federal Standards To Reflect Principles Of State Law: The North Dakota Supreme Court's Examination Of The Hicks Rationale Prompts The Court To Customize Its Own Standard To Review State-Based Employment Discrimination Claims*, 70 N.D. L. REV. 207 (1994).

91. N.D. CENT. CODE §§ 14-02.4-01 to -21 (1991 & Supp. 1995). Prior to the 1983 Legislative Session, the North Dakota Legislature had considered two bills relating to human rights. REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL, 46TH LEGISLATIVE ASSEMBLY 163-65 (1979). During the 1977 Legislative Session, two human rights bills were introduced, but both failed to pass. *Id.* One of the bills was entitled the North Dakota Human Rights Act of 1977. *Id.* This bill prohibited discrimination because of race; color; creed; religion; sex; ancestry; national origin; age; marital status; the presence of any sensory, mental, or physical disability; or status with regard to public assistance. *Id.* The other bill relating to human rights was entitled the North Dakota Equal Employment Opportunity Act. *Id.* This bill prohibited employers, employment agencies, labor organizations, or licensing agencies from discriminating in employment practices. *Id.*

92. Moses v. Burleigh County, 438 N.W.2d 186, 188 (N.D. 1989) (quoting N.D. CENT. CODE § 14-02.4-01).

93. N.D. CENT. CODE § 14-02.4-01.

94. *Id.*

Act, the North Dakota Legislature sought to afford North Dakotans the right to advance discrimination cases in the state courts rather than federal courts.[95]

2. *The North Dakota Supreme Court's Interpretation of the North Dakota Human Rights Act and Federal Law*

The North Dakota Supreme Court first reviewed an employment discrimination claim under the North Dakota Human Rights Act in *Moses v. Burleigh County*,[96] in which the plaintiff claimed race and sex discrimination.[97] On appeal from the trial court's dismissal of Moses' claim, the supreme court reversed and remanded the case, recommending that the trial court perform analysis similar to the *McDonnell Douglas* standard.[98] The supreme court ordered the trial court to allow the defendants to give a legitimate, nondiscriminatory reason for the employment decision, and then to allow Moses an opportunity to prove that the employment decision was pretextual.[99]

However, the North Dakota Supreme Court's apparent adoption of the *McDonnell Douglas* federal standard to analyze claims brought under the North Dakota Human Rights Act was clearly a matter of controversy among the court.[100] Justice Levine, in her concurring and dissenting opinion, argued in favor of the majority's use of federal law to analyze state law.[101] Justice Levine stated that "[f]ederal law is a rich resource which we would be foolish to ignore . . . where federal law has ironed out some wrinkles, we should take advantage of that experience."[102] Conversely, Justice Vande Walle, concurring in part and

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95. STATE BAR ASS'N OF N. D., THE NORTH DAKOTA HUMAN RIGHTS ACT AND YOU 1 (1985). In the case of age discrimination, the Act covers persons at least forty years of age. N.D. CENT. CODE § 14-02.4-02. However, the Act does not prohibit compulsory retirement of an employee who reaches the age of sixty-five. N.D. CENT. CODE § 14-02.4-03.

96. 438 N.W.2d 186 (N.D. 1989). The supreme court had reviewed other employment discrimination cases prior to *Moses*, but had dismissed them for lack of evidence showing discrimination. *See* Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 796 (N.D. 1987) (holding that "the mere assertion that one is overweight or obese is not alone adequate to make a claimant one of the class of persons afforded relief for discrimination," thus, requiring something more be shown); Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 215 (N.D. 1987) (finding that the plaintiff had "failed to offer any evidentiary showing [to] support a jury finding of age discrimination").

97. Moses v. Burleigh County, 438 N.W.2d 186, 187 (N.D. 1989). In *Moses*, Leora Moses, an African-American woman, sued the Sheriff and Burleigh County claiming she was discriminated against in her employment because of her race and sex. *Id.*

98. *Id.* at 189 n.3.

99. *Id.* at 191-92.

100. *Id.* at 194-97 (VandeWalle, J., concurring in part and dissenting in part) (Levine, J., concurring and dissenting).

101. *Id.* at 197 (Levine, J., concurring and dissenting).

102. *Moses*, 438 N.W.2d at 197 (Levine, J., concurring and dissenting).

dissenting in part, criticized the majority's use of federal law, arguing that:

> It is apparent there are substantial similarities, but if we are to be an echo of the Federal Act there would appear to be little need for our own statutes on the matter. . . .
>
> . . . .
>
> . . . Where the reason for the Federal rationale does not exist in North Dakota there is no reason we should adopt it indiscriminately.[103]

In 1993, the North Dakota Supreme Court revisited the *McDonnell Douglas* standard.[104] In *Schweigert v. Provident Life Ins. Co.*,[105] the trial court applied the *McDonnell Douglas* standard to a sex discrimination in employment claim finding in favor of the defendant, Provident Life, since it found Provident Life was not motivated by discriminatory reasons.[106]

On appeal, however, the supreme court rejected the trial court's complete adoption of the *McDonnell Douglas* standard.[107] Of significance was the court's finding that the *McDonnell Douglas* standard was somewhat contradictory to the North Dakota Rules of Evidence.[108] The supreme court noted that under the *McDonnell Douglas* standard, after a plaintiff has established a prima facie case, the presumption of discrimination shifts only the burden of production to the defendant.[109] However, the supreme court pointed out that Rule 301 of the North Dakota Rules of Evidence requires that a defendant has the burden of proving that the presumed fact does not exist.[110] Therefore, to resolve the

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103. *Id.* at 195-96 (Vande Walle, J., concurring in part and dissenting in part).

104. *See supra* notes 40-46 and accompanying text (referring to the *McDonnell Douglas* standard and the burdens allocated to each party).

105. 503 N.W.2d 225 (N.D. 1993).

106. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 229 (N.D. 1993). In *Schweigert*, the plaintiff, Jocelyn Martin, filed suit against Provident Life when she was terminated as part of a business reorganization. *Id.* at 226. She claimed sex discrimination in violation of the North Dakota Human Rights Act. *Id.*

107. *Id.* at 229.

108. *Id.* at 228-29. *See also* N.D. R. EVID. 301; FED. R. EVID. 301.

109. *Schweigert*, 503 N.W.2d at 228. *See infra* note 110 and accompanying text (discussing N.D. R. EVID. 301). Rule 301 of the Federal Rules of Evidence provides:

> a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

110. *Schweigert*, 503 N.W.2d at 228-29. Rule 301 of the North Dakota Rules of Evidence provides:

> If facts giving rise to a presumption are established by credible evidence, the

discrepancy, the North Dakota Supreme Court parted from federal law, providing a new standard which reconciles North Dakota Rule 301 with the *McDonnell Douglas* standard.[111]

Unlike the three-step federal standard, the *Schweigert* court's standard only had two steps.[112] The *Schweigert* court's standard is as follows:

> Stage I: The plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination.
>
> Stage II: If the plaintiff meets his or her burden of persuasion, the defendant then has the burden of persuasion to rebut the presumption of discrimination by proving by a preponderance of the evidence that his or her employment decision was based on a legitimate, nondiscriminatory reason. If the employer fails to meet this burden, the plaintiff prevails; if the employer meets his or her burden, the employer prevails.[113]

The *Schweigert* standard differs from the *McDonnell Douglas* standard in that, in the second stage, the employer has the burden of *persuasion*, which is required by the North Dakota Rules of Evidence, rather than the burden of *production*, as the *McDonnell Douglas* standard requires.[114] Thus, in the second stage, the employer must not simply articulate a legitimate, nondiscriminatory reason for the employment decision, but the employer must prove that the legitimate, nondiscriminatory reason existed when making the employment decision.[115]

> presumption substitutes for evidence of the existence of the fact presumed until the trier of fact finds from credible evidence that the fact presumed does not exist, in which event the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

N.D. R. EVID. 301. Rule 301 of the North Dakota Rules of Evidence provides that a presumption imposes upon the party against whom it is directed the burden of proving its nonexistence. N.D.R.EVID. 301 (explanatory note). Thus, the North Dakota rule gives presumptions a stronger effect than they are given under Rule 301 of the Federal Rules of Evidence, which imposes only a burden of producing evidence to rebut a presumption. *Id.*

Accompanying Rule 301 of the North Dakota Rules of Evidence, the two competing theories concerning the function of presumptions are discussed in the explanatory note. *Id.* Under the first theory, a presumption is stated in terms of its effect on the burden of proof. *Id.* Thus a presumption operates to "shift" the original burden of proof to the opponent of the presumption. *Id.* Under what is known as the "bursting bubble" theory, "a presumption imposes upon its opponent a burden of going forward with evidence to rebut the presumption; once this is done, the presumption disappears." *Id.*

111. *Schweigert*, 503 N.W.2d at 229.

112. *Id.*

113. *Id.*

114. *Id.* at 228-29.

115. *Id.* Because the burden of proof is higher than the burden of production, Stage III under federal law is not necessary under the North Dakota standard. *See supra* notes 40-46 and accompanying text (citing to the *McDonnell Douglas* standard).

III. LEGAL ANALYSIS

In *Schuhmacher v. North Dakota Hospital Ass'n*,[116] the North Dakota Supreme Court reversed and remanded the judgment on two grounds.[117] First, the court found that the district court's jury instructions did not inform the jury of the applicable law.[118] Second, the court found that evidence relevant to the defense was erroneously excluded.[119] Most significantly, however, was the *Schuhmacher* court's review and criticism of the *Schweigert* standard to review employment discrimination claims under the North Dakota Human Rights Act.[120]

A. THE SUPREME COURT'S REVIEW OF THE *SCHWEIGERT* STANDARD

Although the North Dakota Supreme Court in *Schweigert*[121] only recently established a new standard of review for state-based discrimination claims, the *Schuhmacher* majority seemed to criticize its earlier ruling in *Schweigert*.[122] Under *Schweigert*, the plaintiff's only burden was to establish a prima facie case, and after doing so, the burden of persuasion shifted to the defendant to prove that the alleged discriminatory practice did not play a part in the employment decision.[123] However, in *Schuhmacher*, the court questioned this standard.[124] According to the *Schweigert* decision, a plaintiff may prevail merely by satisfying the prima facie case if the defendant cannot prove a legitimate nondiscriminatory reason.[125] Thus, a plaintiff, without actually providing any evidence that the decision was "because of" discrimination, may prevail simply because the jury disbelieves the defendant's proffered reason.[126] The court reasoned that although the *Schweigert* standard is consistent with Rule 301 of the North Dakota Rules of Evidence, the standard incorrectly eliminated the North Dakota Human Rights Act's[127] statutory element of proof that the employment decision was "because of"

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116. 528 N.W.2d 374 (N.D. 1995).
117. Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374, 376 (N.D. 1995).
118. *Id.*
119. *Id.*
120. *Id.* at 378.
121. 503 N.W.2d 225 (N.D. 1993).
122. Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374, 378 (N.D. 1995).
123. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225 (N.D. 1993). *See supra* notes 116-18 and accompanying text (referring to the *Schweigert* standard).
124. *Schuhmacher*, 528 N.W.2d at 379.
125. *Id.* at 384 (Neumann, J., concurring). Consequently, the *Schuhmacher* court ruled that "a properly-instructed jury which finds by a preponderance of the evidence a prima facie case of age discrimination while disbelieving the defendant's alternative explanations . . . could viably conclude that the defendant illegally discriminated on the basis of age." *Id.* at 379.
126. *Id.* at 383 (Meschke, J., concurring).
127. N.D. CENT. CODE § 14-02.4-03 (1991 & Supp. 1995).

discrimination.[128] The court in *Schuhmacher* stated that the ultimate burden of proof should be on the plaintiff, as it is in federal law.[129]

The majority's apparent condemnation of the *Schweigert* decision fueled the long-standing controversy over the adoption of federal standards to analyze state law, thus prompting separate opinions from Justices Meschke and Neumann.[130] In his concurring opinion, Justice Meschke objected to the majority's ruling on the grounds that it employed the federal framework rather than the *Schweigert* framework.[131] Justice Meschke stated that the *Schweigert* court modified the federal standard in order to reflect the evidentiary principles of North Dakota law.[132] Justice Meschke reasoned that these principles state that a jury *must* conclude that the employer unlawfully discriminated if they find that the plaintiff has established a prima facie case and they disbelieve the employer's proffered reasons.[133] Thus, Justice Meschke concluded that the majority undermined what it had sought to accomplish in *Schweigert*—a framework which was consistent with North Dakota law.[134]

Justice Neumann concurred with the majority, but also criticized the majority for not providing trial courts with a definite direction to follow when faced with employment discrimination cases under the North Dakota Human Rights Act.[135] Challenging the majority's opinion, Justice Neumann questioned whether an employee could lose a lawsuit even though the employee successfully proved a prima facie case and the employer failed to rebut it.[136] If the majority did not intend for a complainant to win under these circumstances, Justice Neumann posed another possibility of the effect of the court's ruling on the employee's case.[137] Justice Neumann reasoned that it may be possible that when an employer fails to meet his or her burden of proof, that failure could constitute the missing evidence of intentional discrimination and thus

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128. *Schuhmacher*, 528 N.W.2d at 379.

129. *Id.*

130. *Id.* at 383-85 (Meschke, J., concurring; and Neumann, J., concurring). *See supra* notes 115-18 and accompanying text (referring to the North Dakota Supreme Court's reconciliation of N.D. R. EVID. 301 and FED. R. EVID. 301).

131. *Schuhmacher*, 528 N.W.2d at 383-84 (Meschke, J., concurring).

132. *Id.* *See* Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 228-29 (1993) (discussing the contradiction between North Dakota and federal evidentiary principles).

133. *Schuhmacher*, 528 N.W.2d at 383-84 (Meschke, J., concurring).

134. *Id.* Additionally, Justice Meschke criticized the majority's implementation of federal law because the North Dakota Human Rights Act covers all types of employment discrimination, while the federal counterparts are "fragmented, separate, and often differently construed for different kinds of discrimination." *Id.* Therefore, Justice Meschke asserted that using federal law to interpret North Dakota's Human Rights Act was of little value to the court. *Id.* at 384.

135. *Id.* at 384-85 (Neumann, J., concurring).

136. *Id.* at 384.

137. *Id.*

allow the plaintiff to prevail without having to directly prove intentional discrimination.[138] Regardless of which possibility the supreme court intended in its ruling, Justice Neumann concluded that the court's ruling illustrates federal evidentiary principles rather than the state principles enunciated in *Schweigert*.[139]

B. INSTRUCTING THE JURY IN EMPLOYMENT DISCRIMINATION CASES BROUGHT UNDER THE NORTH DAKOTA HUMAN RIGHTS ACT

1. The Replacement Element

In *Schuhmacher*,[140] the supreme court also overturned the district court's jury instruction that the replacement element of a prima facie case could be demonstrated by showing that "the plaintiff's duties were either distributed among younger employees or assumed by newly-hired younger employees."[141] The supreme court rejected this instruction, reasoning that in RIF cases it is inappropriate to focus on whether a plaintiff was replaced since a plaintiff's position is usually eliminated.[142] Although the *Schuhmacher* court did not specify what is required to satisfy the replacement element in a RIF case, the court firmly stated that a plaintiff must come forward with further evidence that he or she was unlawfully discharged.[143]

The court opined that if a plaintiff merely has to show that his or her duties were distributed among younger retained employees, the employer would be subjected to an age discrimination case any time an employer laid off an older employee.[144] Furthermore, the court pointed out that firing an employee who is over forty is not prohibited by the North Dakota Human Rights Act.[145] Rather, the North Dakota Human

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138. *Schuhmacher*, 528 N.W.2d at 384 (Neumann, J., concurring).

139. *Id.*

140. 528 N.W.2d 374 (N.D. 1995).

141. Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374, 379 (N.D. 1995).

142. *Id.* at 378-80. The supreme court found that the plaintiffs must have assumed that the *Schweigert* majority believed that the replacement element could be demonstrated "by a showing that a plaintiff's job duties were distributed among younger, retained employees." *Id.* at 380. Schuhmacher and Wavra's argument was that the *Schweigert* majority must have found a prima facie case by holding that the defendant's proffered explanations were not pretext for discrimination. *Id.* However, the *Schuhmacher* court opined that the *Schweigert* majority did not delineate the elements of a prima facie case because the defendant never challenged that issue. *Id.* The *Schweigert* court did, however, note that the elements are generally that: (1) the plaintiff was a member of a protected class; (2) the plaintiff was satisfactorily performing the job duties; (3) the plaintiff was discharged; and (4) others in the protected class were treated more favorably. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 227 n.2 (N.D. 1993).

143. *Schuhmacher*, 528 N.W.2d at 378-80.

144. *Id.* at 380-81.

145. *Id.* at 381.

Rights Act only prohibits firing an employee *because* he or she is over forty.[146]

2. *Age Versus Years of Service*

Also on review, the supreme court admonished the district court for its instruction regarding the relative costs associated with older workers.[147] At trial, the district court instructed the jury to find for the plaintiffs if it found that a motivating factor in the termination was that the plaintiffs were paid more than their younger replacements.[148] The district court further instructed the jury that it did not have to find that age was the sole or main reason for the termination.[149] In admonishing the district court, the North Dakota Supreme Court relied on the United States Supreme Court's holding in *Hazen Paper Co. v. Biggins*,[150] in stating "that '[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based'.'"[151] Accordingly, the supreme court ruled that it is impermissible to take into account any factors other than the factor or factors being alleged in the discrimination claim.[152]

3. *The "At-Will" Employment Doctrine*

Although the supreme court found that the district court made several errors when instructing the jury, the supreme court concluded that the erroneous instructions would not have been as prejudicial if the district court would have instructed the jury on the "at-will" employment doctrine.[153] Under North Dakota law, employment that has no definite term is presumed to be "at-will."[154] Thus, an employer has the right to terminate the employee with or without cause.[155] The supreme court found that the district court should have instructed the jury on the "at-will" employment doctrine for two reasons.[156] First, the supreme

146. *Id.* *See also* N.D. CENT. CODE §§ 14-02.4-02 to 03 (1991 & Supp. 1995) (referring to the plain language of the statute that it is unlawful to fire an employee because of the employee's age).

147. *Schuhmacher*, 528 N.W.2d at 381.

148. *Id.*

149. *Id.*

150. 113 S. Ct. 1701 (1993).

151. *Schuhmacher*, 528 N.W.2d at 382.

152. *Id.* at 381-82.

153. *Id.* at 382.

154. Bykonen v. United Hosp., 479 N.W.2d 140-49 (N.D. 1992) (stating the general rule for at-will employment in North Dakota). The "at-will" doctrine provides that "[a]n employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title." N.D. CENT. CODE § 34-03-01 (1987).

155. N.D. CENT. CODE § 34-03-01 (1987).

156. Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374, 382 (N.D. 1995).

court viewed Schuhmacher and Wavra as "at-will" employees and therefore the doctrine was applicable.[157] And secondly, because much of the plaintiffs' case was made by questioning the credibility of the defendant's actions, the court reasoned that the jury could have erroneously based a finding of discrimination on its own perception of the defendant's sound business judgment, unless it was cautioned that it may not base a decision on such considerations.[158]

In his concurring opinion, Justice Meschke criticized the majority's mandate of instructing on the "at-will" doctrine, because under the North Dakota Human Rights Act,[159] an employer must justify its employment decision with a legitimate, nondiscriminatory reason.[160] Therefore, an employer faced with an employment discrimination claim under the North Dakota Human Rights Act cannot fire an employee for any reason, or no reason at all.[161]

IV. IMPACT

In future discrimination cases under the North Dakota Human Rights Act, district courts will have to reconcile the supreme court's two seemingly contradictory opinions.[162] Under *Schweigert*, the plaintiff's only burden was to establish a prima facie case of intentional discrimination.[163] And, as the United States Supreme Court noted in *Burdine*,[164] the plaintiff's burden of establishing a prima facie case is not onerous.[165] However, under *Schuhmacher*, it appears as though the plaintiff must not only establish a prima facie case, but also come forward with additional information to prove that the employer's proffered reason or reasons were pretext for intentional discrimination.[166]

In *Schuhmacher*, the North Dakota Supreme Court's criticism of its previous ruling in *Schweigert* created many unanswered questions and undoubtedly leaves both attorneys and trial courts confused.[167] When future plaintiffs can prove a prima facie case, it is unclear what strength

157. *Id.*
158. *Id.*
159. N.D. CENT. CODE §§ 14-02.4-01 to -21 (1991 & Supp. 1995).
160. *Schuhmacher*, 528 N.W.2d at 384 (Meschke, J., concurring).
161. *Id.*
162. Schuhmacher v. North Dakota Hosp. Ass'n, 528 N.W.2d 374 (N.D. 1995); Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225 (N.D. 1993).
163. *Schweigert*, 503 N.W.2d at 229.
164. 450 U.S 248 (1981).
165. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
166. *Schuhmacher*, 528 N.W.2d at 379.
167. *See supra* notes 144-48 and accompanying text (referring to Justice Neumann's concurrence which poses many of the questions the supreme court leaves unanswered in its opinion).

that presumption of discrimination will carry. Under *Schweigert*, it was clear that after a plaintiff proved his or her prima facie case, the burden of *persuasion* would shift to the employer.[168] However, in light of the *Schuhmacher* court's criticism of the *Schweigert* decision, employers may only have to satisfy a burden of *production*.[169] Furthermore, it is uncertain whether a plaintiff must prove "pretext," following the employer's rebuttal of the presumption of discrimination. Therefore, attorneys will be forced to argue the supreme court's holdings in *Schuhmacher* and *Schweigert*.

In theory, the *Schweigert* standard is clearly more favorable to plaintiffs than *Schuhmacher*. However, in the final analysis, the distinction between the two cases may never amount to anything that would affect the outcome of a case. In a jury trial, if the court were to follow the *Schweigert* standard[170] and the employer successfully articulated a legitimate, nondiscriminatory reason, the plaintiff would obviously want to present rebuttal evidence to prove that the employer's reasons were false. The only noticeable difference between the two standards is that under *Schweigert*, the plaintiff does not necessarily have to present additional evidence after proving the prima facie case of discrimination.[171] According to *Schweigert*, the court is mandated to find for the plaintiff if the plaintiff establishes a prima facie case and the employer's proffered reasons are discredited.[172] In *Schuhmacher*, on the other hand, an employer could conceivably fail to articulate nondiscriminatory reasons and possibly still prevail.[173] Regardless, the difference in jury instructions may not play a significant role as it is questionable whether a jury would find for the employer if he or she was unable to explain his or her reason for the employment decision or if he or she offered an explanation which was proven to be blatantly false.[174]

The urgency of reconciling the ambiguity resulting from the *Schuhmacher* opinion is further dramatized when considering the fact

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168. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 229 (N.D. 1993) (applying the requirements of N.D. R. EVID. 301).

169. *Schuhmacher*, 528 N.W.2d at 379.

170. *Schweigert*, 503 N.W.2d at 229.

171. *Id.*

172. *Id.*

173. *Schuhmacher*, 528 N.W.2d at 379.

174. Although the supreme court admonished the trial court for not instructing the jury on the "at-will" employment doctrine, it is uncertain whether the supreme court intended for trial courts to routinely instruct juries on this doctrine in all employment discrimination cases. *Id.* at 382. In *Schuhmacher*, the court admonished the trial court on this issue only because it found other jury instructions erroneous. *Id.* Thus, the court reasoned that if the trial court would have instructed the jury on the "at-will" doctrine, the jury instructions, as a whole, would not have been as prejudicial. *Id.* Nevertheless, the court did not fully explain whether or not a trial court has to instruct juries on the "at-will" employment doctrine when the instructions are not otherwise erroneous. *Id.* at 382-83.

that a majority of North Dakota employees rely exclusively on state anti-discrimination protection. As of 1993, there were a total of 22,208 employers in North Dakota.[175] Of those employers, 19,731, or 88.8% had fewer than 20 employees.[176] This statistic is significant because it demonstrates the importance of the North Dakota Human Rights Act for the vast majority of employees in the State who would otherwise not be able to file claims under the applicable federal statutes on account of the employer not employing the sufficient number of persons required by those statutes.[177] Furthermore, one of the main purposes of the Act was to provide North Dakotans with the right to take their discrimination cases through the state courts rather than the federal courts. However, after *Schuhmacher*, those employees who have the ability to choose either state or federal court may just as well choose the federal court because the state court will not provide them with a more favorable forum.

Although the supreme court has purported that federal law is not binding on our state interpretation and enforcement of anti-discrimination laws,[178] it is apparent that federal precedents will have a great influence in the final outcome of discrimination cases. Recently, because of diversity of citizenship, an age discrimination case brought under the North Dakota Human Rights Act was litigated in the United States District Court for the District of North Dakota Northeastern Division.[179] In this case, the federal district court was forced to establish the standard of review in a state-based discrimination claim.[180] Ultimately, the federal district court's jury instructions reflected the framework established by the North Dakota Supreme Court in *Schuhmacher*.[181] In

175. Telephone Interview with Tom Pederson, Director of Research and Statistics, Job Service North Dakota (Nov. 7, 1995).

176. *Id.*

177. *See* 42 U.S.C. § 2000e(b) (1988) (referring to Title VII which applies to employers of fifteen or more employees); 29 U.S.C. § 630(b) (1988) (referring to the ADEA which applies to employers of twenty or more employees); 42 U.S.C. § 12111(5)(A) (Supp. III 1991) (referring to the ADA which applies to employers of fifteen or more employees).

178. Moses v. Burleigh County, 438 N.W.2d 186, 197 (N.D. 1989).

179. *See* Dahl v. Auto-Owners Ins. Co., No. 37 Civ. (D.N.D. filed Jan. 11, 1996) (No. A2-95-9).

180. *Id.*

181. *Id.* The United States District Court added a third *Schweigert* stage which instructed the jury as follows:

> If, on the other hand, defendant has produced evidence of a reason other than age for its actions, you may find for the defendant unless plaintiff has proven that the reason given by the defendant was not the true reason for the action, or that the plaintiff's age more likely than not was a determining factor in the adverse decision.

Id. (referring to jury instruction number 10 entitled "Essential Elements of Plaintiff's Claim—Indirect Evidence").

that case, the jury returned a verdict in favor of the defendant, but the significance of the jury instruction remains uncertain.[182]

When the supreme court formulated the *Schweigert* standard, it injected the principles of Rule 301 of the North Dakota Rules of Evidence into the existing federal standard because the federal standard would have otherwise contradicted North Dakota evidentiary principles.[183] Now, however, the supreme court has arguably undone that which it sought to accomplish in *Schweigert*—a standard that compliments North Dakota law.

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182. *Id.*
183. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 229 (N.D. 1993).