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Employment Law Survey

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EMPLOYMENT LAW SURVEY

INTRODUCTION

Many of the Tenth Circuit's employment decisions in the survey year[1] specifically addressed the method by which a plaintiff may prove discrimination with indirect evidence under Title VII of the Civil Rights Act of 1964[2] or the Age Discrimination in Employment Act.[3] Initially, this Survey outlines the allocation and burden of proof in an indirect evidence intentional discrimination case. An analysis of the Tenth Circuit's decisions demonstrates that although the court continued to lighten the plaintiff's burden in making out a prima facie case,[4] the court departed from precedent and significantly increased the plaintiff's burden at the pretext stage.[5]

In interpreting the prima facie requirement, the Tenth Circuit adhered to the Supreme Court's warning that the prima facie case was "never intended to be rigid, mechanized, or ritualistic."[6] Accordingly, the court continued to treat the plaintiff's burden as flexible and minimally demanding. Most importantly, in *Hooks v. Diamond Crystal Specialty Foods, Inc.*,[7] the court concluded that a plaintiff need not prove equal or better qualifications than the person selected to satisfy the prima facie case.[8] Additionally, in *Whalen v. Unit Rig, Inc.*,[9] the court decided that the plaintiff's failure to apply formally for the position at issue did not defeat the prima facie case.[10] After *Whalen*, a showing that the employer had notice of the plaintiff's status as one who might reasonably be interested in the job, or of the fact that the plaintiff sought employment, will serve to satisfy the prima facie case.[11]

These court decisions addressing the requirements of the prima facie case must be contrasted with the court's decisions that imposed a more stringent pretext burden on the plaintiff. The court confronted the pre-

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1. The survey year covers decisions handed down between September 1, 1992 and December 31, 1993.

2. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

3. 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992). The methodologies for proving intentional discrimination discussed in this survey are also used in proving intentional discrimination under 42 U.S.C. § 1981 (1988) and 42 U.S.C. § 1983 (1988). *See* Drake v. City of Fort Collins, 927 F.2d 1156, 1163 (10th Cir. 1991).

4. *See infra* parts I.A., II.A.

5. *See infra* parts I., II.B. Once the employer has rebutted plaintiff's prima facie case, a finding of intentional discrimination depends on plaintiff's success in showing pretext. A finding of pretext indicates that the reasons offered by the employer were not the real reasons for the employment decision, but an attempt to mask the consideration of impermissible factors.

6. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

7. 997 F.2d 793 (10th Cir. 1993).

8. *Id.* at 797.

9. 974 F.2d 1248 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1417 (1993).

10. *Id.* at 1251.

11. *See id.*

text issue in an indirect intentional discrimination case in *EEOC v. Flasher Co.*,[12] and held that a mere finding of disparate treatment,[13] without a showing that it was the result of intentional discrimination based on protected class characteristics, does not prove a violation of Title VII.[14] The Tenth Circuit's ruling in *Sanchez v. Philip Morris Inc.*,[15] reinforced the heavy pretext burden articulated in *Flasher* and detailed the nature of the more stringent "pretext-plus" requirement for plaintiffs.[16]

By tracing the evolution and clarification of the *McDonnell Douglas* framework,[17] this Survey criticizes both the court's inconsistent interpretation of the framework and the court's movement towards increased burdens on plaintiffs at the pretext stage. The Tenth Circuit's pretext decisions will be discussed in light of the Supreme Court's recent clarification of the indirect evidence framework in *St. Mary's Honor Center v. Hicks*.[18] The Survey concludes that the heightened burdens imposed by the Tenth Circuit render the *McDonnell Douglas* framework useless, since indirect evidence alone, without the anticipation and defeat of all other possible reasons for the employer's decision, will not support an inference of intentional discrimination.

I. THE INDIRECT EVIDENCE INTENTIONAL DISCRIMINATION CASE: BACKGROUND

The purpose of Title VII of the Civil Rights Act of 1964[19] is "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."[20] Although Title VII does not guarantee a job to each person, it requires "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."[21] Congress emphasized that other civil rights guaranteed in the Act mean little without the right "to gain the economic wherewithal to enjoy or properly utilize them."[22] Specifically, Title VII

12. 986 F.2d 1312 (10th Cir. 1992).

13. *See infra* note 24.

14. *Flasher*, 986 F.2d at 1314.

15. 992 F.2d 244 (10th Cir. 1993).

16. *See infra* note 44.

17. The Supreme Court established the indirect evidence framework for Title VII claims in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

18. 113 S. Ct. 2742 (1993).

19. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

20. *McDonnell Douglas*, 411 U.S. at 800.

21. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

22. H.R. REP. No. 914, 88th Cong., 2d Sess., pt. 2, 29 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2516. The House Report went on to state that "[a]side from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable." *Id.* at 30.

prohibits discrimination on the basis of an individual's race, color, religion, sex, or national origin.[23]

To prove intentional discrimination under Title VII, the plaintiff must show disparate treatment.[24] A plaintiff may prove disparate treatment by offering express,[25] direct,[26] or indirect[27] evidence of intentional discrimination.

A. *The* McDonnell Douglas *Framework*

In *McDonnell Douglas Corp. v. Green*,[28] the Court, in an effort to clarify the appropriate inquiry in an indirect evidence intentional employment discrimination case, allocated the burden of production and established an order for the presentation of proof. Under the *McDonnell Douglas* framework, the plaintiff in a Title VII case carries the initial burden of establishing a prima facie case of discrimination.[29] To establish a prima facie case, the plaintiff must show that: (1) she is a member of a racial minority, (2) she was qualified and applied for an available position, (3)

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23. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1988).

Congress delegated the primary responsibility of preventing and eliminating unlawful employment practices to the Equal Employment Opportunity Commission ("EEOC"). *Id.* §§ 2000e-4(a), 5(a).

24. Disparate treatment is one of two methods recognized by the Supreme Court for proving individual discrimination under Title VII. Disparate treatment exists where the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "[D]isparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.*

The other method of proof, disparate impact, "involve[s] employment practices that are facially neutral in their treatment of different groups but . . . fall more harshly on one group than another and cannot be justified by business necessity." *Id.*

25. Express evidence of employment discrimination would be an explicit statement by an employer indicating discriminatory intent (i.e. "I will not hire you *because* you are a woman"). *See* Roberto L. Corrada, St. Mary's Honor Center v. Hicks: *Much Ado About Nothing?* 1 (1993) (unpublished manuscript, on file with the *University of Denver Law Review*).

26. Consistent statements made by an employer to his employees that he dislikes African Americans, coupled with the fact that an African American has never received a promotion in the respective workplace, is an example of direct evidence of discrimination. The phrase "smoking gun" is also used to characterize direct evidence. *See* Gilbert M. Roman, *Proving Intentional Discrimination in Employment Cases Through Indirect Evidence: The Supreme Court Clarifies the Rules*, 42 TRIAL TALK 6 (1993).

The mixed-motive case, in which a plaintiff shows that an employer considered both an impermissible factor and a legitimate factor in making the employment decision, is a direct evidence case properly analyzed under the framework established in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

27. Indirect evidence is best understood as circumstantial evidence. *See* 2 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 50.19, at 10-6 (1993).

28. 411 U.S. 792 (1973). "[T]he Court deliberately used this case as the occasion and the vehicle for the promulgation of a general rule designed to bring order out of a chaotic situation that had developed within the lower courts." LARSON & LARSON, *supra* note 27, § 50.10, at 10-4.

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

she was rejected for the position, and (4) the position remained open.[30] If the plaintiff succeeds in proving the prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[31]

If the employer carries its burden, the plaintiff then has an opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by the employer were only a pretext for discrimination.[32] Relevant to showing pretext is evidence regarding the employer's treatment of the individual employee during the term of employment, the employer's reaction to lawful civil rights activities, the employer's general policy regarding minority employment, and a statistical showing of a pattern of discrimination by the employer.[33]

B. *Refining the Framework*

In *Texas Department of Community Affairs v. Burdine*,[34] the Court clarified the *McDonnell Douglas* framework by detailing the relevant burdens.[35] In confronting the plaintiff's initial burden, the Court stressed the importance of a prima facie showing, which creates an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[36] The prima facie case establishes a mandatory, rebuttable presumption[37] that shifts the burden of production, not persuasion, to the defendant.[38] The nature of the defendant's burden must be "understood

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30. *Id.* Although the Court stated the requirements for a prima facie case in a refusal to hire context, the Court explicitly stated that "[t]he facts necessarily will vary in Title VII . . . and the specification above . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

Accordingly, the federal courts have since adapted the prima facie case to accommodate a number of employment contexts. *See, e.g.*, Purrington v. University of Utah, 996 F.2d 1025 (10th Cir. 1993) (retaliation); Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988) (discharge and age discrimination claim); McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988) (discharge); Foster v. MCI Telecommunications Corp., 773 F.2d 1116, (10th Cir. 1985) (layoff); Mohammed v. Callaway, 698 F.2d 395 (10th Cir. 1983) (failure to promote); Worthy v. United States Steel Corp., 616 F.2d 698 (3d Cir. 1980) (discipline); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974) (denial of training); Lanegan-Grimm v. Library Ass'n, 560 F. Supp. 486 (D. Or. 1983) (compensation); Chapman v. Pacific Tel. & Tel. Co., 456 F. Supp. 65 (N.D. Cal. 1978) (transfer).

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

32. *Id.* at 804.

33. *Id.* at 804-05.

34. 450 U.S. 248 (1981).

35. For a more detailed discussion of the individual burdens in a disparate treatment case, see Mack A. Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984).

36. *Burdine*, 450 U.S. at 254 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). The prima facie case also serves to eliminate the two most common nondiscriminatory reasons for the plaintiff's rejection: (1) no available positions, and (2) plaintiff is unqualified for an available position. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

37. *Burdine*, 450 U.S. at 254 n.7.

38. *Id.* at 254-55. Prior to *Burdine*, the nature of the defendant's burden remained undefined by the Court. LARSON & LARSON, *supra* note 27, § 50.32(a), at 10-38 to 10-44.

in light of the plaintiff's ultimate and intermediate burdens."[39] To rebut the prima facie case, the defendant need not persuade the court of its nondiscriminatory reasons, but must produce enough evidence to raise a genuine issue of fact as to the plaintiff's claim of discrimination.[40] If the defendant remains silent in the face of the presumption, however, the court must enter judgment for the plaintiff.[41]

In discussing the burden shift back to the plaintiff, the Court noted that if the defendant meets the burden of production, "the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity."[42] To meet the final burden of persuasion, the plaintiff must prove that the proffered reason was not the true reason for the defendant's action. The plaintiff may succeed in proving intentional discrimination "either directly by persuading the court that a discriminatory reason more than likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[43] The proposition that a plaintiff may prove pretext solely by discrediting the defendant's proffered reasons proved to be the most controversial aspect of the *Burdine* decision.[44]

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39. *Burdine*, 450 U.S. at 253. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

40. *Id.* at 254-55. The purpose of the defendant's burden of production is both to present a "legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56.

41. *Id.* at 254. It is particularly important that the Court addressed the weight of articulations not admitted into evidence and concluded that such an articulation will *not* meet the defendant's burden. *Id.* at 255 n.9.

42. *Id.* at 255.

43. *Id.* at 256. Although *Burdine*'s two-prong test uses the terms "indirectly" or "directly," the plaintiff still uses indirect, circumstantial evidence to prove intentional discrimination. When employing the "more likely motivated" prong, the plaintiff directly (affirmatively) proves discrimination through the use of circumstantial evidence. When employing the "unworthy of credence" prong, the plaintiff proves discrimination without an affirmative showing that the defendant more likely was motivated by impermissible factors. Marina C. Szteinbok, Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 COLUM. L. REV. 1114, 1118 n.34 (1988).

44. Following *Burdine*, the circuit courts adopted one of two interpretations: (1) the "pretext only" rule which embraced the "unworthy of credence" prong, and (2) the "pretext-plus" rule which prohibited a plaintiff from establishing pretext with a mere showing that the employer is lying. The "pretext-plus" courts require a showing of pretext, plus proof that no other legitimate factor was responsible for the employment decision. For a detailed discussion of the differences between the two approaches, see Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

Although several circuit courts were slow in interpreting *Burdine*'s "unworthy of credence" prong, the "pretext only" rule eventually emerged in eight different circuits. *See* Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988); MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988); Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1549 (10th Cir. 1987); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); Tye v. Board of Educ., 811 F.2d 315, 319-20 (6th Cir.), *cert. denied*, 484 U.S. 924 (1987); Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986); Lowe v. City of Monrovia, 775 F.2d 998, 1005 (9th Cir. 1985), *modified*, 784 F.2d 1407 (9th Cir. 1986); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985).

The "pretext-plus" rule was articulated by four circuit courts. *See* Spencer v. General Elec. Co., 894 F.2d 651, 659 (4th Cir. 1990); Benzies v. Illinois Dep't of Mental Health &

C. St. Mary's Honor Center v. Hicks: *Clarifying* Burdine

In light of the controversy in the circuit courts regarding the "unworthy of credence" prong of *Burdine*, the Supreme Court granted certiorari to hear *St. Mary's Honor Center v. Hicks*.[45] Justice Scalia, writing for the majority, held that the trier of fact's rejection of the defendant's proffered reasons does not compel a judgment for the plaintiff as a matter of law.[46] Reversing the Eighth Circuit's decision,[47] the majority noted that while discrediting the employer's proffered reasons may prove pretext, it does not, by itself, prove that the employer's actions were a "pretext *for discrimination*."[48] Justice Scalia admitted that the decision directly contradicted the "unworthy of credence" language in *Burdine*, but concluded that the *Burdine* Court's suggestion that a mere showing of unworthiness could suffice to prove pretext was an "inadvertence" on the part of the Court.[49]

The Court's rejection of *Burdine*'s "unworthy of credence" prong indicates that plaintiffs must not only prove their own case, but must also convince the trier of fact that no other possible reasons for the employment action exist.[50] In his dissent, Justice Souter warned that the imposition of such a severe burden would cause a "scouring the record" problem as the trier of fact may look beyond the presented evidence in search of unarticulated, although completely legitimate, nondiscriminatory reasons for the employment action.[51]

Arguably, *St. Mary's* essentially gutted both the rationale and the effect of *Burdine*.[52] By eliminating *Burdine*'s "unworthy of credence" prong, the *McDonnell Douglas* framework no longer "permits the plaintiff meriting

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Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987); White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983).

Although the Sixth Circuit originally adhered to the "pretext only" rule, the court recently shifted to a "pretext-plus" notion. *See* Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 283 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992).

45. 113 S. Ct. 954 (1993).

46. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993).

47. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993). The Eighth Circuit had concluded that once the plaintiff discredited each of the employer's proffered reasons, a judgment for the plaintiff was compelled as a matter of law. *Id.* at 492.

48. *St. Mary's*, 113 S. Ct. at 2752. The Court stressed that while discrediting the employer's reasons does not compel a finding of discrimination, such a showing, accompanied by a strong prima facie case, may allow an inference of intentional discrimination. *Id.* at 2749.

49. *Id.* at 2752-53.

50. The Court stated that Title VII only awards damages against those employers who are proven to have taken the adverse action based on impermissible factors. *Id.* at 2756. Furthermore, "[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." *Id.*

51. *Id.* at 2761-63 (Souter, J., dissenting). Although the majority downplayed this possibility by noting the *Burdine* requirement that the defendant's articulation must be admitted into evidence, the Court failed to address adequately the issue of the unarticulated reason. *Id.* at 2755.

52. *See supra* notes 34-44 and accompanying text.

relief to demonstrate intentional discrimination" through indirect evidence.[53]

II. TENTH CIRCUIT CASE LAW

A. *The Prima Facie Case*

Following the *McDonnell Douglas* decision, the Tenth Circuit consistently has adhered to the notion that the plaintiff's "burden of establishing a prima facie case of disparate treatment is not onerous."[54] As articulated in *McDonnell Douglas*, to establish a prima facie case the plaintiff must show that: (1) she is a member of a protected class, (2) she applied and was qualified for an available position, (3) she was rejected, and (4) the position remained open following her rejection.[55] During the survey year, the court confronted the most challenging aspect of the prima facie case, the application/qualification requirement,[56] and continued to lighten the burden on plaintiffs at that stage.[57]

1. *Hooks v. Diamond Crystal Specialty Foods, Inc.*[58]

In *Hooks*, the plaintiff, an African American, brought suit against his employer alleging discriminatory failure to promote.[59] In accordance with a company-wide reduction in force, Diamond eliminated the converting coordinator position, a position occupied by the plaintiff.[60] Hooks expressed interest in the position of production supervisor, but was reassigned to assistant production supervisor. The production supervisor position went to a white male, and several months later Hooks' position was eliminated.[61] The district court, relying on *Allen v. Denver Public School Board*,[62] concluded that Hooks failed to prove a prima facie case of discrimination and granted summary judgment for the defendant.[63] Concluding that the trial court applied the wrong standard for a prima facie case, the Tenth Circuit stated that "the best approach is to remain consistent with the prima facie elements laid out in *McDonnell Douglas* and *Bur-*

53. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

54. *Id.* at 253.

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

56. "The question whether a particular plaintiff . . . fulfills the qualification requirement or not is often the central issue in cases involving the *McDonnell Douglas* prima facie formula." LARSON & LARSON, *supra* note 27, § 50.31(c), at 10-25 to 10-26.

57. While the cases offered expected clarification of the prima facie case, the court's treatment of the prima facie case offers an interesting comparison with the court's treatment of the plaintiff's burden at the pretext stage. *See infra* part II.B.

58. 997 F.2d 793 (10th Cir. 1993).

59. Although not relevant to this discussion, the plaintiff also alleged constructive discharge and failure to contract on a nondiscriminatory basis in violation of 42 U.S.C. § 1981 (1988). *Hooks*, 997 F.2d at 796. The court also briefly addressed the plaintiff's claim of discriminatory demotion. *Id.* at 799-800.

60. *Id.* at 795.

61. *Id.* Hooks subsequently accepted Diamond's offer of early retirement. *Id.* at 795-96.

62. 928 F.2d 978 (10th Cir. 1991).

63. *Hooks*, 997 F.2d at 796-97.

dine."[64] Thus, in establishing a prima facie case, the plaintiff "need not show that he or she is equally or better qualified than the person selected for the position."[65] On the contrary, in order to shift the burden of production to the defendant, the plaintiff need only show that he or she is qualified for the position.[66]

The court, in addressing the importance of the plaintiff's qualifications, stressed that the investigation properly occurs at the pretext stage, where the relative qualifications of the applicants serve to illuminate the employer's reasons for the decision.[67] Since the trial court inappropriately considered Hooks' relative qualifications at the prima facie stage, the court reversed the trial court's conclusion that Hooks failed to make out a prima facie case.[68] Because Hooks failed to prove pretext,[69] however, the court affirmed the trial court's grant of summary judgment.[70]

2. *Whalen v. Unit Rig, Inc.*

In *Whalen v. Unit Rig, Inc.*,[71] the court confirmed that the prima facie application requirement merely requires a constructive showing of application. In that case, the plaintiff, a sixty-three year old man, brought suit alleging age discrimination.[72] Following a restructuring of the defendant corporation, John Whalen, an employee of eleven years, was fired. Subsequently, the corporation hired a twenty-nine year old man to replace Whalen. On the basis of indirect evidence,[73] the jury found for the plaintiff.

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64. *Id.* at 797. In *Allen*, the court held that a plaintiff must show that she was "equally or better qualified than those employees actually promoted" to establish a prima facie case. *Allen*, 928 F.2d at 984 (quoting Clark v. Atchison, Topeka & Santa Fe Ry., 731 F.2d 698 (10th Cir. 1984)). Although not explicitly overturning *Allen*, the court cautioned that the case must "not be read to increase the prima facie burden established in *McDonnell Douglas*." *Hooks*, 997 F.2d at 797.

65. *Hooks*, 997 F.2d at 797.

66. *Id.* If the plaintiff, however, shows that the person actually hired was significantly less qualified, this will be of great assistance both in showing that the plaintiff's own qualifications met the minimum requirements for the job and in offering evidence of pretext. LARSON & LARSON, *supra* note 27, § 50.31(c), at 10-28.

67. *See Hooks*, 997 F.2d at 797. The term "qualification" consists of two distinct notions: (1) absolute qualification suggests that the plaintiff possesses the minimum requirements for the job and is facially qualified; and (2) relative qualification refers to the individual's qualifications compared with those of the other applicants for the position. *See generally* Alisa D. Shudofsky, Note, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553 (1982).

68. *See Hooks*, 997 F.2d at 797.

69. *Id.* at 798. The record failed to indicate that Hooks was the better candidate for the position. The promoted individual possessed a similar amount of supervisory experience. *Id.*

70. *Id.* at 799-800.

71. 974 F.2d 1248 (10th Cir. 1992).

72. Age discrimination claims are brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992). Although not a Title VII claim, the *McDonnell Douglas* framework has been adapted to this context. *See* EEOC v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988).

73. *See Whalen*, 974 F.2d at 1250. Evidence produced at trial indicated that, prior to the acquisition, a list of employees was generated in declining order of age and delivered to the vice president of the company. One witness testified that the president had expressed his intent to hire a young controller. *Id.*

Affirming the trial court's denial of the defendant's motion for summary judgment and judgment notwithstanding the verdict, the court found the jury's conclusion that Whalen established a prima facie case to be plausible.[74] "Employment discrimination law does not require that a plaintiff formally apply for the job in question."[75] Instead, the plaintiff can meet that requirement one of two ways: if formal hiring procedures are used, the plaintiff must show that the employer received specific notice that the plaintiff was seeking employment; or if informal hiring procedures are used, the plaintiff need only show that he or she was in the group of people who might be reasonably interested in the position at issue.[76]

3. Prima Facie Analysis

The *Hooks* decision suggests that while the relative qualifications[77] of the plaintiff are important in a Title VII case, they are best addressed at the pretext stage. Accordingly, the plaintiff's absolute qualifications[78] are the *only* factors at issue in the qualification prong of a prima facie case of intentional discrimination.[79]

The *Whalen* court's "constructive notice" articulation of the application requirement offers plaintiffs two new methods of meeting that prong of the prima facie case. The effect of such a broad standard may be to encourage individuals who otherwise would not meet the application requirement to pursue employment discrimination claims. Specifically, the *Whalen* "constructive notice" standard addresses instances in which an applicant expresses an interest in the position, is met by an unfavorable employer reaction, and as a result, ultimately does not submit a formal application. Application of the *Whalen* reasoning in such circumstances will prevent employers from engaging in the subtle discouragement and suppression of interested potential applicants.[80]

The Tenth Circuit's commitment to offering plaintiffs a fair opportunity to prove a prima facie case is strong, although not particularly surpris-

74. *Id.* at 1252.
75. *Id.* at 1251.
76. *Id.*
77. *See supra* note 67.
78. *See supra* note 67.
79. The court's decision in Kenworthy v. Conoco, Inc., 979 F.2d 1462 (10th Cir. 1992), supports the above analysis. In *Kenworthy*, the court ruled that a plaintiff, in making out a prima facie case, could show that she was qualified even when the employer disputed such qualifications. *Id.* at 1470. The court properly noted that the employer's reasons for the employment decision cannot be used to defeat the plaintiff's prima facie case. *Id.* (citing MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F.2d 1115, 1120 (10th Cir. 1991)).
80. Such a case would arise in the following hypothetical situation. An Asian American woman seeks employment in a traditionally white male workplace. Before formally applying for a position, she travels to the workplace to get a general sense of the environment. Upon arrival, she is ignored, perhaps ridiculed, and discovers a noticeable absence of women employees. She speaks with the employer, expresses an interest in the available position, but is told that she probably would not enjoy working for this company because of the stress and time commitment involved.

Provided she was qualified for the position, the constructive notice standard approach arguably would allow her to make out a prima facie case of sex and/or race discrimination.

ing. The prima facie case still serves its function of screening out unsupported claims while providing easy access into the heart of the intentional discrimination claim.

B. *Proving Pretext*

The court's initial response to *Burdine*'s "unworthy of credence" prong is best characterized as one of indifference. With one notable exception,[81] the court did not employ the "unworthy of credence" prong until 1987, in *Furr v. AT & T Technologies, Inc.*[82] Between 1987 and 1992, the court consistently followed *Furr* and ruled that the plaintiff could prove pretext merely by discrediting the employer's proffered reasons.[83] The court's decision in *EEOC v. Flasher Co.*[84] marked a clear departure from *Furr* and parallels the Court's abandonment of *Burdine* in *St. Mary's.*

1. *EEOC v. Flasher Co.*

In *Flasher,* Edward Perez, a Hispanic male, was fired by the defendant after an altercation with another employee. The EEOC brought suit on behalf of Perez, alleging that Perez was fired in violation of Title VII because he was Hispanic.[85] The employer rebutted the plaintiff's prima facie case[86] by claiming that Perez was fired for violating company rules. Although Perez demonstrated significant disparities in the company's disciplinary treatment of Perez and non-minorities,[87] the trial court concluded that the plaintiff had not sustained his burden in showing pretext.

In a somewhat tortured approach, the Tenth Circuit affirmed the trial court.[88] Perhaps the most startling aspects of the case come from the internal inconsistencies in Judge Ebel's reasoning. Initially, Judge Ebel

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81. *See* Beck v. Quiktrip Corp., 708 F.2d 532 (10th Cir. 1983). After citing the "unworthy of credence" language of *Burdine,* the court concluded that the duty of the trial court is to "decide which party's explanation of the employer's motivation it believes." *Id.* at 535 (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

82. 824 F.2d 1537 (10th Cir. 1987). The court narrowed the pretext inquiry by stating that "[t]he critical question for the jury is whether it believes the defendant's proffered reasons for the employment decision, rather than the plaintiff's assertion of impermissible discrimination." *Id.* at 1549.

83. *See* Bell v. AT & T, 946 F.2d 1507, 1512 (10th Cir. 1991) (suggesting that the plaintiff *must* focus on the defendant's proffered reasons when proving pretext); Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1421-22 (10th Cir. 1991) (stating that one of the ways a plaintiff may prove intentional age discrimination is by discrediting the employer's reason for the employment decision); Krause v. Dresser Indus., 910 F.2d 674, 677 (10th Cir. 1990) (concluding that the plaintiff need only show that the employer's reason is unworthy of credence to prove pretext).

84. 986 F.2d 1312 (10th Cir. 1992).

85. *Id.* at 1315.

86. The appropriate prima facie showing in a claim relating to termination for violation of a work rule is established if the plaintiff shows that: (1) the plaintiff is a member of a protected class, (2) he was terminated for violation of a company rule, and (3) non-minority employees who are similarly situated were treated differently. *Id.* at 1316 (citing McAlester v. United Air Lines, 851 F.2d 1249, 1260 (10th Cir. 1988)).

87. *See id.* at 1316. Perez presented five separate instances where non-minorities received only verbal reprimands, suspensions, or demotions following company rule violations. *Id.* at 1315.

88. *See id.* at 1316.

seemed to follow Tenth Circuit precedent when he stated that the defendant's burden of production

> defines the parameters of the trial, as the plaintiff then knows the precise reason that he or she may try to show is only a pretext for an illegal discriminatory motive. By articulating the reasons for the plaintiff's termination, the defendant eliminates a myriad of possible reasons that would otherwise have to be addressed.[89]

Indeed, this language reinforces the notion that the defendant must articulate the reasons for the decision and that the plaintiff *must* respond to those reasons in order to prove pretext.[90]

An important distinction for Judge Ebel was the difference between the reason for the decision and the reason for the disparity in treatment.[91] This distinction allowed Judge Ebel to conclude that the employer need not explain the differential treatment of minorities and non-minorities in terms of rational business policies. Even irrational or accidental differences of treatment may *not* compel a finding of intentional discrimination.[92] Such a rationale accounted for the holding of the case: "a mere finding of disparate treatment, without a finding that the disparate treatment was the result of intentional discrimination based upon protected class characteristics, does not prove a claim under Title VII."[93]

Judge Ebel's unprecedented dissection and reformation of the disparate treatment claim was enhanced by his dilution of the "unworthy of credence" prong. After failing to cite *any* of the Tenth Circuit precedent that followed *Burdine* literally,[94] the court concluded that a finding that the defendant's reasons are pretextual does not compel a finding of discrimination unless shown to be a "pretext for discrimination against a protected class."[95] To support such a conclusion, the court relied on the rationale that "[p]roffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to liability under Title VII."[96] In light of the above, the Tenth Circuit concluded that the trial

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89. *Id.* at 1318. Judge Ebel stressed that "there is no limit to the potential number of reasons that could be raised at trial." *Id.* The defendant is required to enunciate the reasons for the employment decision to prevent "needlessly confused and delayed" litigation of discrimination claims. *Id.*

90. *See* Bell v. AT & T, 946 F.2d 1507 (10th Cir. 1991). It is interesting to note that Judge Ebel served on the panel that decided *Bell.*

91. Judge Ebel clarified that the defendant must only address the reason for the decision against the plaintiff in step two of the *McDonnell Douglas* framework, while the reason for the disparity between the plaintiff's treatment and that of other employees is appropriately addressed by the plaintiff in stage three. *See Flasher*, 986 F.2d at 1319 & n.7.

92. *Id.* at 1320.

93. *Id.* at 1314.

94. *See supra* notes 81-83 and accompanying text. Instead of relying on Tenth Circuit precedent, Judge Ebel cited cases from the "pretext-plus" courts of the Fourth, Sixth, and Seventh Circuits. *Flasher*, 986 F.2d at 1321.

95. *Flasher*, 986 F.2d at 1321. This is essentially the same holding reached by the Supreme Court in *St. Mary's. See supra* part I.C.

96. *Flasher*, 986 F.2d at 1321. To justify such a conclusion, Judge Ebel initially commented on the inherent complexities of human relationships. *See id.* at 1319. He noted the error in assuming "that differential treatment between a minority and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy *must* be based on illegal discrimination" in violation of Title VII. *Id.* at 1319-20. On

court was not compelled to enter judgment for the plaintiff upon a showing of unexplained differential treatment.[97]

The opinion suggests that the trier of fact may need to scour the record to locate some of these acceptable reasons in case the employer fails to articulate the "real" reason for the decision due to the sensitivity of the issue.[98] Such sensitive non-articulations may include personal animus, favoritism, grudges, random conduct, or procedural errors.[99]

a. *Comparison:* Flasher *and* St. Mary's

As the decision in *Flasher* preceded the Supreme Court's decision in *St. Mary's*, Judge Ebel's opinion may have influenced Justice Scalia's opinion. Judge Ebel struggled with the "pretext" verses "pretext for discrimination" distinction made in *Burdine* and concluded that the latter constituted the proper showing.[100] Justice Scalia reached the same result after an extended discussion of what the Court really "intended" to convey in *Burdine*.[101] The scouring the record problem clearly presented itself in *Flasher*[102] and was a key issue in Justice Souter's dissenting opinion in *St. Mary's*.[103] Judge Ebel's articulation of improper verses proper motives,[104]

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the contrary, apparently irrational differential treatment that cannot be explained on the basis of clearly articulated company policies may be explained by a number of factors: (1) the discipline was administered by different supervisors; (2) the events occurred at different times when the company's attitudes were different; (3) the individualized circumstances offered mitigation for the infractions less severely punished; (4) the less severely sanctioned employee was more valuable to the company for legitimate, nondiscriminatory reasons; or (5) "the inevitability that human relationships cannot be structured with mathematical precision." *Id.* at 1320.

97. *See id.* at 1322.

98. *See id.* at 1321 (citing Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987)).

This conclusion must be compared to contrary statements in Bell v. AT & T, 946 F.2d 1507, 1514 (10th Cir. 1991). In reversing the trial court, the *Bell* court faulted the lower court's reliance on an unarticulated reason to support a finding for the defendant. "[W]hen the trial court relies on what it considers to be a legitimate reason not articulated by the employer to rebut the plaintiff's prima facie case . . . a plaintiff does not have a full and fair opportunity to demonstrate pretext . . . ." *Id.* The *Bell* court's conclusion clearly forbids the fact finder from straying out of the *McDonnell Douglas/Burdine* framework. By relying on unarticulated reasons, the trial court in *Bell* effectively denied the plaintiff the right to mount a formidable challenge at the pretext stage. *See supra* note 41 for similar reasoning by the *Burdine* Court.

99. *See Flasher*, 986 F.2d at 1321 (citing *Benzies*, 810 F.2d at 148).

100. *See id.*

101. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993). Justice Scalia concluded that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* In light of that two-part necessity, Justice Scalia noted that where the *Burdine* Court merely stated the word "pretext," one must reasonably understand such language to refer to "pretext for discrimination." *See id.*

102. *See supra* notes 95-99 and accompanying text.

103. *See St. Mary's*, 113 S. Ct. at 2762 (Souter, J., dissenting). Justice Souter stated that:

> under the majority's scheme, a victim of discrimination . . . will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record.

Id.

104. *See supra* note 96 and accompanying text.

although not confronted by Justice Scalia in detail, was also reflected in the *St. Mary's* decision.[105]

That is not to suggest that the two opinions do not differ in important aspects. Judge Ebel failed to acknowledge that his opinion disturbed prior Tenth Circuit acceptance of *Burdine*'s "unworthy of credence" prong. The first half of Judge Ebel's opinion seemed to suggest a continued acceptance of *Burdine*.[106] His ultimate betrayal of the "unworthy of credence" prong seemed misplaced, as he directly contradicted earlier statements. Indeed, one wonders if Judge Ebel even realized the true importance of the opinion or understood the inherent contradictions in his rationale.

Justice Scalia, on the other hand, realized the need to confront *Burdine* head on and devoted much of his opinion to showing that the "unworthy of credence" prong was merely inadvertence on the part of the *Burdine* Court.[107] Yet, instead of overturning *Burdine*, the *St. Mary's* Court merely discredited the opinion. Such a backhanded approach may lead to an abandonment of *Burdine*'s overwhelming acceptance in the circuit courts.[108]

2. *Sanchez v. Philip Morris Inc.*

Although in retrospect, the language in *Flasher* proved to be a significant blow to the ability of claimants to prove pretext, the effect of the opinion was accentuated by the court's ruling in *Sanchez v. Philip Morris, Inc.*[109] In *Sanchez*, the court reversed the district court's finding of reverse and national origin discrimination. The plaintiff, a Hispanic male, brought suit under Title VII after he was refused employment in the defendant's company on three different occasions.[110] After noting that Raul Sanchez made out a prima facie case,[111] and that the defendant successfully rebutted the presumption,[112] the court concluded that the district court erred in finding that the plaintiff proved pretext.[113]

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105. *See St. Mary's*, 113 S. Ct. at 2751 n.5. The Court stated that it would be "a mockery of justice to say that if the jury believes the reason [the employer] set forth is probably not the 'true' one, all the other utterly compelling evidence that discrimination was *not* the reason will then be excluded from the jury's consideration." *Id.*

For a critical analysis of Justice Scalia's reasoning, see Corrada, *supra* note 25.

106. *See supra* note 89 and accompanying text.

107. *See St. Mary's*, 113 S. Ct. at 2751-55.

108. *See* Corrada, *supra* note 25, at 18-19 (criticizing Justice Scalia's treatment of *Burdine* and predicting future credibility problems for the Court's decisions).

109. 992 F.2d 244 (10th Cir. 1993).

110. Sanchez applied for an entry level sales position three times with Philip Morris. It was undisputed that he met the minimum requirements for the position—that the applicant be twenty-one years old and possess a valid driver's license. *Id.* at 245. In each of the three instances, Caucasians were hired for the positions. *Id.*

111. Sanchez established a prima facie case in the failure to hire context by showing that he was a member of a protected class, was qualified for an available position, and was rejected for a position that was ultimately filled. *Id.*

112. The employer merely articulated that Sanchez was not the "best qualified for any of the three positions." *Id.* at 246.

113. The trial court erroneously concluded that the individual hired for the third position was less qualified than Sanchez. The circuit court criticized that conclusion because the difference in the two applicants' qualifications was due to different individual work experiences. *See id.* at 247.

The court initially emphasized that "the plaintiff in a Title VII case must prove that intent to discriminate based upon plaintiff's protected class characteristics was the *determining* factor for the allegedly illegal employment decision."[114] The court then concluded that after a plaintiff successfully proves that the defendant's reasons are unworthy of belief, "the plaintiff must still prove that the true motive for the employment decision violates Title VII."[115] After finding that the plaintiff failed to prove that the employer's decision was not motivated merely by a mistake, favoritism, or any other possible reason, the court reversed the district court's imposition of liability.[116]

3. Pretext Analysis

As both *Flasher* and *Sanchez* demonstrate, the Tenth Circuit has elevated the burden on the plaintiff during the pretext stage from a "pretext only" burden to a "pretext-plus" burden.[117] It is no longer enough to disprove and/or discredit the defendant's articulated reasons for the employment decision. Instead, the plaintiff must prove that perhaps the only, and certainly the determining, factor leading to the decision was the employer's reliance on an impermissible discriminatory reason. Such a standard exceeds even Justice Scalia's articulation in *St. Mary's*,[118] and in fact, encourages factfinders to search the record to make sure no other reasons exist that would justify the defendant's decision. Essentially, such a standard eliminates the need for the defendant to meet the burden of production in good faith.[119] Arguably, it makes no difference what sort of

114. *Id.* at 246-47 (emphasis added) (citing EEOC v. Flasher Co., 986 F.2d 1312 (10th Cir. 1992)).

115. *Id.* at 247. "Because the prima facie case only creates an inference of unlawful discrimination, some evidence that the articulated legitimate business reason for the decision was pretextual does not compel the conclusion that the employer intentionally discriminated." *Id.* (citing *Flasher*, 986 F.2d at 1321).

The Tenth Circuit reached the same conclusion in Kendall v. Watkins, 998 F.2d 848 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1075 (1994). In *Kendall*, the court affirmed the district court's entry of summary judgment against the plaintiff's Title VII claim. *Id.* at 849. The court used the pretext requirement articulated in *Sanchez* to conclude that the plaintiff failed to show that sex discrimination was the true motive for the defendant's employment decision. *See id.*

116. *Sanchez*, 992 F.2d at 248. The court rested its conclusion on the basis of the trial court's failure to equate the differences in qualifications with discrimination. Instead, the trial court considered the differences in qualifications, standing alone, to be sufficient to support a judgment for the plaintiff. *See id.* at 247-48.

117. *See supra* note 44.

118. As *St. Mary's* offers a less harsh pretext standard than *Flasher*, plaintiffs' attorneys will attempt to use the limited holding of *St. Mary's* to argue that an "unworthy of credence" demonstration still allows an inference of intentional discrimination. Such an approach, although reasonable, may be met with mixed success in the Tenth Circuit. Most likely, the Court will remain extremely hesitant to infer, or uphold an inference of, discrimination based only on the establishment of the prima facie case and disproof of the employer's articulated reasons.

119. Justice Souter, in his *St. Mary's* dissent, addressed the new incentive employers would have to lie in meeting the burden of production. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2764 (1993) (Souter, J., dissenting). If a defendant remains silent at the production stage, judgment for the plaintiff is compelled as a matter of law. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Thus, employers who fail to articulate a nondiscriminatory reason for the employment decision "not only will benefit from lying, but

evidence the defendant offers if the factfinder[120] is allowed, even instructed, to scan the record.

C. *Assessment of Plaintiff's Overall Burden*

The Tenth Circuit's conclusion that the plaintiff's initial burden is minimal seems somewhat obvious and expected. The court's stringent pretext requirement, however, serves to minimize any advantage gained by the plaintiff at the prima facie stage. Initially, by recognizing the factfinder's prerogative to search for any nondiscriminatory reason for the employment decision, whether articulated by the defendant or not, the court has effectively erased the defendant's burden. The burden of production fails to define the scope of the inquiry, and arguably, no longer serves a useful purpose. Moreover, the plaintiff must now anticipate all reasons that *may be* articulated by the employer and the unarticulated reasons that the factfinder *may* rely upon after scouring the record.

The elimination of *Burdine*'s "unworthy of credence" prong compounds the severe burden. Proof that the employer lied in its justifications for the employment action fails to establish that those reasons were merely a pretext for discrimination. Instead, the plaintiff must prove that the employer's consideration of an impermissible factor was the only reason for the decision. Such a severe standard of proof will discourage future employment discrimination claims for a number of reasons. The need to disprove both the employer's articulated and unarticulated defenses will result in a significant increase in discovery expense. Additionally, plaintiffs will not succeed unless exceptionally strong circumstantial evidence substantiates their claims. As a result, attorneys may hesitate in representing the plaintiff with a legitimate complaint but only minimal proof.

Arguably, this "pretext-plus" burden shatters the *McDonnell Douglas* framework and seems to beg the indirect evidence question. Plaintiffs, after progressing through the *McDonnell Douglas* framework designed to help them prove intentional discrimination indirectly, must still essentially prove direct intentional discrimination. Indeed, for practical purposes, the *McDonnell Douglas* framework as clarified by *Burdine* has lost all meaning in the Tenth Circuit.

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must lie to defend successfully against a disparate treatment action." *St. Mary's*, 113 S. Ct. at 2764 (Souter, J., dissenting). By offering false evidence, the employer meets the prima facie case and can hope that the factfinder will search the record for an unarticulated reason that may offer a nondiscriminatory explanation for the decision. *Id.*

120. In future cases, the "factfinder" will likely be a jury. The Civil Rights Act of 1991 allows either party in an intentional discrimination case under Title VII to demand a jury trial. *See* Civil Rights Act of 1991, § 102(c)(1), 42 U.S.C. § 1981A(c)(1) (Supp. III 1991). The Supreme Court recently concluded, however, that the Act does not apply retroactively. Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1513 (1994).

CONCLUSION

The Tenth Circuit has witnessed dramatic changes in the application of the *McDonnell Douglas* framework since the *Burdine* clarification. Although the plaintiff's prima facie burden continued to lighten during the survey year, the court developed a more stringent pretext standard in *Flasher*. The court also embraced that standard in *Sanchez*, thus ensuring the Tenth Circuit's commitment to the *Flasher* rationale. Plaintiffs in the Tenth Circuit now face one of the harshest pretext burdens in the nation. Subsequent Tenth Circuit opinions are unlikely to deviate from *Flasher*, particularly since the Supreme Court decided *St. Mary's* soon thereafter. As a result, in order to support an inference of intentional discrimination, attorneys must maneuver through the "new improved" *McDonnell Douglas* framework to prove, *directly*, through the use of indirect evidence, that impermissible factors motivated the employer's decision.

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