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

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I. INTRODUCTION

Plaintiffs in disparate treatment employment discrimination suits[1] are faced with a formidable task. In order to prevail they must prove that the defendant-employer was motivated by a discriminatory intent. Most plaintiffs are not so lucky as to have "smoking gun" evidence of the employer's discriminatory intent. In *McDonnell Douglas Corp. v. Green*,[2] the Supreme Court acknowledged this problem and established a three-step evidentiary framework which allows a plaintiff to prevail in Title VII suits without any direct evidence of intent. In the first step, the plaintiff must prove a prima facie case of discrimination by a preponderance of the evidence.[3] If the plaintiff is successful, the fact-finder must presume that the employer unlawfully discriminated against the employee unless the employer can introduce evidence of a nondiscriminatory reason for the employment

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1. This Note specifically addresses the implications of a Title VII disparate *treatment* case. The Supreme Court has consistently distinguished between disparate *treatment* claims and disparate *impact* claims. *See* Hugh Joseph Beard, Jr., *Title VII and Rule 301: An Analysis of the* Watson *and* Antonio *Decisions*, 23 AKRON L. REV. 105 (1990). Disparate *treatment* claims focus directly on the employer's intent, whereas disparate *impact* claims focus on the effects of an employment decision which, although facially neutral, has a different, and negative impact on a specific group. *Id. See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII liability incurred based solely on consequences of employment practice, regardless of whether intent was discriminatory). The Civil Rights Act of 1991 now provides for a separate presumption framework for disparate impact claims. 42 U.S.C. § 2000e-2(k) (Supp. 1992). Thus, this Note does not address disparate impact claims.

However, the analysis in this Note is relevant to other employment discrimination claims that have adopted the disparate treatment framework. The disparate treatment framework has been adapted to cases brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1988); Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140 (1988); and the Civil Rights Act of 1966, 42 U.S.C. § 1981 (1988). *See* Patterson v. Mclean Credit Union, 491 U.S. 164, 186-87 (1982) (42 U.S.C. § 1981); Dister v. Continental Group, 859 F.2d 1108, 1112 (2d Cir. 1988) (ERISA); Williams v. Edwards Apffells Coffee Co., 792 F.2d 1482, 1485 (9th Cir. 1986) (ADEA); *see also* Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985) (once the plaintiff established a prima facie case of violation of the Civil Rights Act (42 U.S.C. § 1982) and the Fair Housing Act (42 U.S.C. § 3604), the burden shifted to the defendant to rebut). Throughout this Note, where the term "employment discrimination" is used, the author is referring only to employment discrimination claims that utilize the disparate treatment framework from the Title VII context.

2. 411 U.S. 792 (1973).

3. *Id.* at 802. A prima facie case of race discrimination is established when a plaintiff proves by a preponderance of the evidence that (1) he was within the protected class; (2) he met applicable job qualifications; (3) despite these job qualifications, he suffered adverse employment action; and (4) after the adverse employment action the position remained open and the employer continued to seek applications from persons with similar qualifications. *Id.*

action taken against the plaintiff.[4] In the final step, the plaintiff has an opportunity to prove that the defendant-employer's reason for the employment action was not the true reason for its actions.[5]

While the Court adopted this presumption framework more than twenty years ago, until its recent decision in *St. Mary's Honor Center v. Hicks*[6] lower courts were divided over whether a plaintiff who had disproved the defendant's asserted reason for the employment action should automatically prevail on the issue of intentional discrimination.[7] In *St. Mary's*, a five-to-four majority held that a finding of pretext does not mandate a finding of discrimination.[8]

The *St. Mary's* Court provided little guidance to lower courts addressing summary judgment motions. Since the Court's opinion came down, lower courts have disagreed as to what evidence a plaintiff must have in order to survive a defendant's summary judgment motion.[9] This Note shows that the Court adopted a standard which allows disparate treatment plaintiffs to reach the jury whenever they have evidence that the defendant's reason is untrue, regardless of the absence of other specific evidence of discrimination. Indeed, *St. Mary's* may be read as holding that a Title VII plaintiff who has established a prima facie case of discrimination may be able to defeat a defendant's summary judgment motion based solely on his contention that he can discredit the defendant's explanation on cross-examination.

St. Mary's is also notable because of the Court's reliance on Federal Rule of Evidence 301 as an independent basis for its holding.[10] Rule 301 governs presumptions in civil actions. Basically, it states that presumptions may not have the effect of shifting the burden of proof.[11] Rule 301 certainly is applicable to the

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4. *Id.* The effect of the defendant's offer is commonly referred to as "rebutting the presumption." However, it is important to note that the presumption still retains probative value even after the defendant has met its burden of production. *See* FED. R. EVID. 301 advisory committee's note. Thus, the effect of the defendant's offer of a nondiscriminatory reason is that the presumption is no longer mandatory. If the defendant were to fail to produce any evidence at this point in the trial, the plaintiff would be entitled to judgment as a matter of law. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748 n.3 (1993).

5. *McDonnell Douglas*, 411 U.S. at 804.

6. 113 S. Ct. 2742 (1993).

7. *Compare* Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) (if the plaintiff convinces the fact-finder that the defendant did not act for its proferred reason, judgment for the plaintiff is permitted, but not compelled) *with* Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987) (evidence that merely disproves the defendant's proffered reason, without more, *compels* judgment for the defendant) *and* Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985) (if plaintiff convinces the trier of fact that the employer did not act for its proffered reason, then judgment is *compelled* for the plaintiff). *See also infra* notes 78-104 and accompanying text.

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

9. *See infra* notes 167-77 and accompanying text.

10. *St. Mary's*, 113 S. Ct. at 2747, 2749-51.

11. Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, 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. For a cogent description of the difference between the burden of production and the burden of proof, see *infra* note 189.

presumption used in employment discrimination cases. However, an analysis of the common law and legislative history of the Rule shows that it should not independently resolve the question presented in *St. Mary's*.

II. Facts and Procedural History of *St. Mary's Honor Center v. Hicks*

In 1978, Melvin Hicks, an African-American, was hired as a correctional officer at St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections and Human Resources [hereinafter MDCHR].[12] In 1980, he was promoted to Shift Commander. Over the next four years, his supervisors consistently rated his performance as competent.[13] In January of 1984, Steve Long became his new superintendent, and John Powell became Chief of Custody.[14] Prior to their arrival, Hicks was never written up, suspended, or disciplined in any way.[15]

Within seven months after the arrival of Long and Powell, Hicks was written up on three separate occasions for failing to adequately perform his duties.[16] At the request of Long and Powell, the Director of MDCHR suspended Hicks for five days in March of 1984 for rules violations committed by his supervisees while Hicks was the Shift Commander on duty.[17] No disciplinary action was taken against the other St. Mary's employees involved in this incident.[18] Later in March, Powell formally disciplined Hicks for failing to investigate a fight between two inmates.[19] In another incident, the St. Mary's Disciplinary Board recommended that Hicks be demoted for failing to enter the use of a St. Mary's vehicle into a log book.[20] Again, no disciplinary action was taken against the other St. Mary's employees involved.[21] Hicks was subsequently demoted from Shift Commander to Correction Officer I.[22]

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12. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1246 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

13. *St. Mary's*, 756 F. Supp at 1246.

14. *Id.*

15. *Id.*

16. *Id.* The standard procedure for disciplining rules violators at St. Mary's was for a disciplinary review board, which was composed of two whites, one of whom was John Powell, and two blacks, to make a recommendation to the superintendent, Steve Long. *Id.* at 1246-47 n.6. Long then made recommendations to the Director of MDCHR, who made the final decision. *Id.*

17. *Id.* at 1246-47. These violations included his supervisees being away from their posts, the absence of an officer who was supposed to be at the front door, and the first floor lights being off. *Id.* at 1246.

18. *Id.* At trial, John Powell, Chief of Custody at St. Mary's, testified that it is his policy to discipline only the Shift Commander for violations which occur during his shift. *Id.* at 1247.

19. *Id.* The district judge found that Hicks had initially been lied to about the fight, and when Hicks did find out about it, he ordered a correction officer to submit a report. *Id.*

20. *Id.* Hicks allowed a St. Mary's employee to use an institutional vehicle to pick up another St. Mary's employee for work. *Id.* While the use of the vehicle was not a violation of St. Mary's rules, Hicks was disciplined for failing to register the use of the vehicle in the proper log book. *Id.*

21. *Id.*

22. *Id.* "John Powell, a member of the disciplinary board, voted to terminate [Hicks] for the infraction." *Id.* at 1247 n.7. Hicks was not informed of this decision until April 19. *Id.*

John Powell informed Hicks of his demotion on April 19.[23] Hicks was visibly shaken and requested the rest of the day off.[24] On his way out, however, Powell followed him, and a heated discussion ensued in which Hicks informed Powell that he was willing to "step outside."[25] Hicks left minutes later without further incident.[26] Powell instituted disciplinary action against Hicks for the threats made during this confrontation.[27] The Disciplinary Board, of which Powell was a member, recommended that Hicks be suspended for three days.[28] Superintendent Long, however, recommended termination.[29] On June 7 the Director of MDCHR fired Hicks.[30]

Hicks filed a three-count complaint against Steve Long and St. Mary's Honor Center, alleging violations of Title VII of the Civil Rights Act of 1964,[31] 42 U.S.C. § 1981, and 42 U.S.C. § 1983, for demoting and terminating him because of his race.[32] At trial the district court judge applied the three-step analysis established in *McDonnell Douglas Corp. v. Green* for Title VII cases.[33] The judge found

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23. *Id.* at 1247.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1248.

30. *Id.*

31. *Id.* at 1245. Hicks' claim was specifically based on § 703(a)(1) of the Civil Rights Act of 1964. Section 703(a) reads:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or,
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1988).

32. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1245 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993). The defendant's motion for summary judgment on the § 1981 claim was granted prior to trial. *St. Mary's*, 756 F. Supp at 1245. Hicks did not include this judgment in his appeal to the Eighth Circuit. *St. Mary's*, 970 F.2d at 488.

33. *St. Mary's*, 756 F. Supp. at 1249. In *McDonnell Douglas*, the Court

> set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (citations and footnotes omitted).

that Hicks had successfully established a prima facie case of race discrimination.[34] Consistent with *McDonnell Douglas*, the judge then stated that the effect of establishing this prima facie case was that it shifted to the defendants the burden of asserting "a legitimate, non-discriminatory reason for the adverse employment actions."[35] The judge then found that the defendants fulfilled this obligation with their assertion that the employment actions were taken due to "the severity and accumulation of violations committed by [the] plaintiff."[36]

Hicks introduced evidence on which the judge found that the reasons offered by the defendants were pretextual.[37] The judge stated, however, that the plaintiff had not "proven by direct evidence or inference that his unfair treatment was motivated by his race."[38] Thus, the court held that both defendants were entitled to judgment in their favor, even though the court disbelieved their stated reasons for demoting and firing Hicks.[39]

On appeal Hicks argued that "the district court erred in holding that plaintiff failed to meet his burden of proving racial discrimination even though he had . . . proven by a preponderance of the evidence that defendants' proffered non-discriminatory reasons for demoting and terminating him were pretextual."[40] The Eighth Circuit Court of Appeals agreed with Hicks and reversed the district court's judgment as to the Title VII and § 1983 claims.[41] The court held that once

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34. *St. Mary's*, 756 F. Supp. at 1249-50. The judge found that Hicks had successfully established a prima facie case of race discrimination by establishing that (1) as an African American, he was a member of a protected class; (2) he met the applicable job qualifications of a Shift Commander; (3) he suffered adverse employment action; and (4) after his demotion, the position "was presently filled by a white male." *Id.* at 1250. Actually, the fact that the person chosen to fill plaintiff's position was a white male may not be relevant. *St. Mary's*, 113 S. Ct. at 2758 n.1 (Souter, J., dissenting). The Supreme Court "has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today." *Id.* (citing Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 154-55 (1st Cir. 1990) (identity of replacement is not relevant)).

35. *St. Mary's*, 756 F. Supp. at 1250.

36. *Id.*

37. *Id.* From January 1984 to June 1984, Hicks brought no fewer than seven violations of institutional rules by his co-workers to the attention of his superiors. *Id.* at 1248. In all but one of these incidents, no disciplinary action was taken whatsoever. *Id.* In all but one of these incidents, the persons committing the violations were white. *Id.* In one of the incidents, Hicks recommended that one of his white subordinates be disciplined for cursing Hicks "with highly profane language." *Id.* John Powell, the supervisor who would later seek disciplinary action against Hicks for alleged threats on the day Hicks was demoted, "concluded that [the subordinate] was merely venting justifiable frustration, and did not discipline [him] for the incident." *Id.*

38. *Id.* at 1252.

39. *Id.* at 1251. The district court judge never made a finding as to why Hicks was fired, but did imply that it could have been for purely personal reasons. *Id.* at 1252. Judge Limbaugh stated: "It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of . . . Steve Long in this endeavor. The question remains, however, whether plaintiff's race played a role in their campaign." *Id.* at 1251. The district court also pointed to evidence tending to show that St. Mary's was not discriminating on the basis of race. *Id.* For example, "[i]n January, 1984 there were thirty blacks employed at St. Mary's. In December, 1984 there were twenty nine blacks employed at St. Mary's." *Id.* at 1252. The judge initially applied his findings to the Title VII claim against St. Mary's. After finding that it was entitled to judgment in its favor, he stated that Long was also entitled to a judgment on Hicks' § 1983 claim because "[w]hen § 1983 is used as a parallel remedy with Title VII in a racial discrimination suit, the elements of the cause of action are the same under both statutes." *Id.* at 1253 (citing Irby v. Sullivan, 737 F.2d 1418, 1431 (5th Cir. 1984)).

40. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 488 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

41. *St. Mary's*, 970 F.2d at 492-93. Hicks did not appeal the district court's decision as to his § 1981 claim. *Id.* at 488.

the district court judge found that Hicks had succeeded in showing that the reasons offered by the defendants were pretextual, the judge was bound to enter judgment in Hicks' favor.[42] Accordingly, the judgment of the district court was reversed, and the case remanded for further findings on the remaining issues, including damages.[43]

The Supreme Court granted certiorari[44] and reversed the Eighth Circuit.[45] Justice Scalia, writing for the Court, reviewed the relevant trilogy of *McDonnell Douglas Corp. v. Green*,[46] *Texas Department of Community Affairs v. Burdine*,[47] and *United States Postal Service Board of Governors v. Aikens*,[48] and held that those cases do not require a verdict for the plaintiff where the finder of fact simply finds that the defendant's proferred reason for the employment action is false.[49] Rather, the fact-finder must be independently convinced that race was the motivating factor.[50]

III. History of Title VII Disparate Treatment Law

A. The McDonnell Douglas *Framework for Title VII Disparate Treatment Cases*

In *McDonnell Douglas Corp. v. Green*,[51] the Court set out the framework within which Title VII cases should be decided.[52] Justice Powell, writing for a unanimous Court, set out a four-part test to establish a prima facie case of racial discrimination. A claimant may do so by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[53]

The Court went on to explain that a plaintiff who shows a prima facie case establishes a rebuttable presumption that the defendant discriminated against the plaintiff.[54] The burden then shifts to the defendant to "articulate some legitimate,

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42. *Id.* at 492-93.
43. *Id.* at 493.
44. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).
45. *Id.*
46. 411 U.S. 792 (1973).
47. 450 U.S. 248 (1981).
48. 460 U.S. 711 (1983).
49. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993).
50. *Id.* at 2756.
51. 411 U.S. 792 (1973). In *McDonnell Douglas* the Court held that the Equal Employment Opportunity Commission's failure to determine that a reasonable cause existed to substantiate a Title VII claim did not bar a later suit in federal court. *Id.* at 797. The Court also addressed "[t]he critical issue . . . [of the] order and allocation of proof in a private . . . action challeging employment discrimination." *Id.* at 800.
52. *Id.* at 798-807.
53. *Id.* at 802. The Court noted that "[t]he facts necessarily will vary in Title VII cases, and . . . the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.
54. *Id.* at 802.

nondiscriminatory reason for the employee's rejection."[55] By offering its reason for the employment action, stated Justice Powell, the defendant rebuts the plaintiff's presumption of discrimination created by the prima facie case.[56] The burden is then on the plaintiff to prove discriminatory intent.[57]

Unfortunately, the *McDonnell Douglas* opinion was ambiguous as to how a plaintiff could prove discriminatory intent.[58] First, the Court stated that judgment for the plaintiff was required when the plaintiff had shown that "the [defendant's] stated reasons for [the plaintiff's] rejection [were] in fact pretext."[59] This statement implied that a Title VII plaintiff was entitled to judgment in his favor as soon as he disproved the defendant's reason for the employment decision, regardless of whether the fact-finder was convinced that the employer did in fact discriminate against him. However, only a paragraph later the Court implied that the plaintiff was not entitled to judgment simply by disproving the defendant's proffered reason for the adverse employment action. The Court stated: "In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the [defendant's proffered] reasons for his rejection were in fact *a cover up for a racially discriminatory decision*."[60]

The Court returned to the Title VII framework in *Texas Department of Community Affairs v. Burdine*.[61] In *Burdine*, the Court held that while the defendant does have the burden of producing a nondiscriminatory reason for firing the plaintiff, the defendant does not have to persuade the finder of fact that the proffered reason was the true reason for her termination.[62] The Court stated that the burden on the defendant was only one of production.[63] Thus, the defendant need only "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."[64] The Court explained that after the defendant offered evidence of a nondiscriminatory reason, the presumption created by the prima facie case should "drop[ ] from the case."[65]

The Court went on to describe the plaintiff's burden of proof after the presumption was rebutted.[66] However, the opinion failed to resolve the ambiguity created in *McDonnell Douglas* over whether a plaintiff had to prove that the defendant's reason was simply pretextual, or whether the plaintiff had to prove that the defendant's reason was specifically a pretext for discrimination. The opinion stated both (1) that a plaintiff need only prove that the defendant's explanation was

55. *Id.*
56. *Id.* at 803.
57. *Id.*
58. *Id.*
59. *Id.* at 804.
60. *Id.* at 805 (emphasis added).
61. 450 U.S. 248 (1981).
62. *Id.* at 253.
63. *Id.* at 255 n.8.
64. *Id.* at 255.
65. *Id.* at 255 n.10.
66. *Id.* at 256.

"pretextual;"[67] and (2) that the plaintiff must prove that the defendant's proffered explanation was a "pretext for discrimination."[68]

Thus, after *Burdine*, the question left open in *McDonnell Douglas*—whether the plaintiff automatically prevailed by showing pretext only or whether he must prove that the defendant's proffered reason was a pretext for discrimination—remained unanswered. The Court's opinion in *United States Postal Service Board of Governors v. Aikens*[69] showed that the Court was struggling with the question and hinted at the direction the Court would eventually go.

In *Aikens*, the Court held that a plaintiff does not have to offer direct proof of discrimination in order to prevail in a Title VII suit.[70] Justice Rehnquist, writing for the majority, pointed out that "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence."[71] Thus, the district court "should not have required Aikens to submit direct evidence of discriminatory intent."[72] Justice Rehnquist went on to state that when a defendant has produced evidence of a non-discriminatory reason for the employment action, the presumption "drops from the case."[73] Of course, Justice Rehnquist noted, the plaintiff should have an opportunity to show that the proffered reason was not the true reason but rather was pretextual.[74] Justice Rehnquist then quoted *Burdine*, but added this caveat:

> "The plaintiff retains the burden of persuasion . . . [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *In short, the district court must decide which party's explanation it believes.*[75]

The last sentence of this quote conflicted with the language from *Burdine* which immediately preceded it. The *Burdine* quote stated that the plaintiff could prove intentional discrimination simply by disproving the defendant's proffered reason. The sentence with which Justice Rehnquist followed this quote implied that the fact-finder must not only disbelieve the defendant's reason, but also must be independently convinced of the truth of the plaintiff's "story" of purposeful discrimination. Undoubtedly aware of this inconsistency, Justice Blackmun wrote a concurring opinion which Justice White joined.[76] The concurrence tried to establish that the former statement from *Burdine* was controlling:

> While the Court is correct that the ultimate determination . . . in discrimination cases should be no different from that in other types of civil suits, the *McDonnell*

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67. *Id.*
68. *Id.* at 253 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).
69. 460 U.S. 711 (1983).
70. *Id.* at 713-14.
71. *Id.* at 714 n.3.
72. *Id.*
73. *Id.* at 714-15 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S 248, 255 n.10 (1981)).
74. *Id.* at 716 n.5 (quoting *Burdine*, 450 U.S. at 256).
75. *Id.* at 716 (emphasis added) (citation omitted).
76. *Id.* at 717 (Blackmun, J., concurring).

Douglas framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.[77]

B. Lower Court Confusion: Whether a Finding of Pretext Mandates a Finding of Discrimination

After *Aikens*, the lower courts split over whether a plaintiff who had already established a prima facie case could prevail simply by proving that the defendant's proffered reasons were untrue.[78] Lower courts applied three different approaches.[79] Some courts held that once a plaintiff had proven that the defendant's proffered reasons were untrue, then judgment was compelled for the plaintiff.[80] Other courts held that where a plaintiff could only prove the untruth of the defendant's explanation, without offering additional and more specific evidence of

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77. *Id.* at 718 (citations omitted).

78. *Compare* Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) (if the plaintiff convinces the fact-finder that the defendant did not act for its proferred reason, judgment for the plaintiff is permitted, but not compelled) *with* Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987) (evidence that merely disproves the defendant's proffered reason, without more, *compels* judgment for the defendant) *and* Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985) (if plaintiff convinces the trier of fact that the employer did not act for its proffered reason, then judgment is *compelled* for the plaintiff). *See generally* 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. 59 (1991).

79. Some commentators have grouped the approaches into only two categories. *See* William L. Kandel, *Age Discrimination: Recent Decisions by Appellate Courts Under the Age Discrimination in Employment Act Through Mid-1993* (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5163, 1993) (available on Westlaw); Lanctot, *supra* note 78, at 71-100. Professor Lanctot described the division between the courts prior to *St. Mary's* as being between "pretext-only" courts and "pretext-plus" courts. "Pretext-only" courts were those that held that a plaintiff need only prove pretext in order to prevail in a Title VII disparate impact claim. Lanctot, *supra* note 78, at 71. "Pretext-plus" courts were those that held not only that a plaintiff had to prove pretext, but also that the plaintiff had to separately prove discriminatory motive as well. Lanctot, *supra* note 78, at 86-88. Similarly, Kandel also divided pre-*St. Mary's* courts into two groups, referring to "one step" courts (based on the fact that these courts allowed plaintiffs to prove pretext and discriminatory motive in a single step) and "two step" courts (based on their holding that a plaintiff had to prove pretext, and then further convince the fact-finder that the employer was motivated by unlawful discriminatory considerations).

The result in *St. Mary's* is easier to understand, however, by creating a third category of cases—those cases which held that a plaintiff *could* prevail based on a finding that the defendant's reason was untrue, but that judgment was *not compelled* by a finding of pretext. *See, e.g.*, *Shager*, 913 F.2d at 401. Professor Lanctot characterizes these cases as "pretext-only" because the plaintiff can prevail by showing pretext. These cases would be characterized by Kandel as "two step" cases because the plaintiff does not necessarily prove intentional discrimination by proving pretext. The reasoning of cases such as *Shager* was ultimately adopted by the Court in *St. Mary's*. *See infra* text accompanying notes 162-66. Therefore, it is important to note that the reasoning of cases such as *Shager* is analytically distinct from other "pretext-only" and "two step" cases.

80. *See, e.g.*, Sparks v. Pilot Freight Carrier's, 830 F.2d 1554, 1564 (11th Cir. 1987) (" '[T]he *McDonnell Douglas/Burdine* framework requires that the plaintiff prevail if the plaintiff demonstrates that the legitimate, nondiscriminatory reason proffered by the employer is not the true reason for the employment decision.' " (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (Blackmun, J., concurring))); Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986) (finding that defendant's reason is untrue negates the rebuttal effect of the defendant's proffered reason and leaves the plaintiff's prima facie case intact and unrebutted); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985) (if plaintiff convinces the trier of fact that the employer did not act for its proffered reason, then judgment is *compelled* for the plaintiff); Harris v. Marsh, 679 F. Supp 1204, 1285 (E.D.N.C. 1987) (plaintiff's presumption stands unrefuted where the defendant's reason is found to be arbitrary), *aff'd in part and rev'd in part*, Blue v. United States Dep't of Army, 914 F.2d 525 (4th Cir. 1990), *cert. denied sub nom.* Chambers v. United States Dep't of Army, 499 U.S. 959 (1991).

discrimination, then judgment was compelled for the defendant.[81] Still others adopted a third approach according to which a plaintiff who had shown the defendant's proffered reason to be untrue created a question of fact, thus precluding summary judgment for either side.[82]

1. Finding That Defendant's Reason Is Pretextual Mandates a Finding for the Plaintiff

In *Thornbrough v. Columbus & Greenville Railroad*,[83] the Fifth Circuit held that once the plaintiff had proven that the defendant's proffered reason was pretextual, judgment for the plaintiff was mandatory.[84] In so doing the court stated that by disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff effectively resurrected the presumption.[85]

In support of this resurrection theory, the court relied on *Burdine* for the proposition that " 'when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not [that] the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.' "[86] So, the *Thornbrough* Court added, "unlike Humpty Dumpty, the employee's prima facie case can be put back together again, through proof that the employer's proffered reasons are pretextual."[87]

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81. *See, e.g.*, Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) (plaintiff's evidence that the employer's proffered reason is untrue is not enough to create a jury issue); Freeman v. Package Mach. Co., 865 F.2d 1331, 1341-42 (1st Cir. 1988) (plaintiff cannot create a jury question merely by offering evidence disputing the defendant's proffered reason); Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987) (evidence that merely disproves the defendant's proffered reason, without more, compels judgment for the defendant); Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986) ("[E]vidence contesting the factual underpinnings of the reasons proffered by [the defendant] . . . without more [is] insufficient . . . to present a jury question."); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980) (per curiam) (evidence contesting the defendant's asserted reason for discharge does not create a question of material fact), *cert. denied*, 450 U.S. 959 (1981).

82. *See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 401-02 (7th Cir. 1990) (once the defendant's reason is shown to be untrue, judgment for the plaintiff is permitted, but not compelled); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (plaintiff *may*, but does not automatically prevail where he has proven that the defendant's proffered reasons are pretextual); *see also* Visser v. Packer Eng'g Assocs., 924 F.2d 655, 657 (7th Cir. 1991) (en banc) (falsity of defendant's reason permits, but does not compel finding for the plaintiff) (dictum).

83. 760 F.2d 633 (5th Cir. 1985).

84. *Id.* at 640. Although *Thornbrough* was an ADEA case, it nevertheless applied the *McDonnell Douglas* presumption framework. *Id.* at 638-39 n.4. At the time *Thornbrough* was decided, most circuits were applying the *McDonnell Douglas* framework in ADEA cases. *Id. See* Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3rd Cir. 1984), *cert denied*, 469 U.S. 1087 (1985); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); Loeb v. Textron, 600 F.2d 1003, 1004, 1014-16 (1st Cir. 1979); Schwager v. Sun Oil Co., 591 F.2d 58, 60-61 (10th Cir. 1979). *But see* Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (refusing to apply *McDonnell Douglas* framework to ADEA claim).

85. *Thornbrough*, 760 F.2d at 640.

86. *Id.* (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

87. *Id.*

2. Finding of Pretext Alone Insufficient to Allow a Finding for the Plaintiff

In *Dea v. Look*,[88] the First Circuit held that a finding of pretext alone was insufficient to permit a finding of discrimination.[89] In *Dea*, the plaintiff had successfully established a prima facie case of discrimination.[90] The defendant then "articulated a plausible, nondiscriminatory reason" for the employment action and filed a motion for summary judgment.[91] The plaintiff pointed to evidence which could show that the defendant's reason was pretextual. However, because the plaintiff had no other specific evidence of discrimination, the district court granted the defendant's summary judgment motion.[92] The First Circuit Court of Appeals affirmed the district judge's decision.[93] The court stated that "evidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question."[94] The court reasoned that allowing the plaintiff to create a genuine issue of material fact simply by discrediting the defendant's proffered reason would "impose on the defendant an almost impossible burden of proving [the] 'absence of discriminatory motive.' "[95]

3. Finding of Pretext May Allow, But Does Not Require, a Finding for the Plaintiff

In *Shager v. Upjohn Co.*,[96] the Seventh Circuit held that a finding that the defendant's reason was pretextual created a question of fact which could either be resolved for or against the plaintiff.[97] The district court in *Shager* granted the defendant's summary judgment motion based on the plaintiff's failure to offer evidence of discrimination beyond that which would show that the defendant's reason was pretextual at trial.[98] The Seventh Circuit reversed.[99] The court acknowledged that a finding of pretext did not automatically entitle the plaintiff to judgment.[100] However, the court stated that as long as a rational fact-finder could infer that the employer's reason was untrue, summary judgment was inappropriate, and the plaintiff was entitled to proceed to trial.[101] The court reasoned that the fact-finder could still infer, based on the plaintiff's prima facie case, as well as evidence

88. 810 F.2d 12 (1st Cir. 1987).
89. *Id.* at 16.
90. *Id.* at 14.
91. *Id.*
92. *Id.* at 14-16.
93. *Id.* at 16.
94. *Id.* at 15.
95. *Id.* (quoting White v. Vathally, 732 F.2d 1037, 1042 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984)).
96. 913 F.2d 398 (7th Cir. 1990).
97. *Id.* at 401-02.
98. *Id.* at 401.
99. *Id.* at 401-02.
100. *Id.* at 401.
101. *Id.*

showing that the employer's asserted reason was pretextual, that the employer did in fact possess a discriminatory intent.[102]

Thus, under the rule adopted in *Shager*, a finding that the defendant's proffered reason was pretextual would not mandate a finding for the plaintiff.[103] However, such a finding would create a genuine issue of a material fact, thus precluding summary judgment.[104]

4. Differences Between the Three Approaches: Prelude to *St. Mary's*

These three approaches to summary judgment under the *McDonnell Douglas* framework produce very different results when applied to identical facts. For example, recall the facts of *St. Mary's*.[105] The plaintiff, Hicks, established a prima facie case of employment discrimination based on his race. The defendant rebutted the presumption by offering a nondiscriminatory reason for firing the plaintiff—that the plaintiff was actually fired because of numerous violations of work-place rules. The plaintiff then introduced evidence that proved that the defendant's proffered reason was pretextual, but did not offer additional evidence that showed that it was specifically a pretext for discrimination. In courts applying the rule applied in *Thornbrough*, the plaintiff would prevail on a summary judgment motion. In courts applying the rule applied in *Dea*, the defendant would prevail on a summary judgment motion. In courts applying the *Shager* rule, a question of fact would exist which could not be resolved on a summary judgment motion.

In order to resolve the divergent views among the lower courts, the Supreme Court granted certiorari in *St. Mary's Honor Center v. Hicks* "to determine whether, in a suit alleging . . . intentional racial discrimination . . . the trier of fact's rejection of the employer's asserted reasons . . . mandates a finding for the plaintiff."[106]

IV. *St. Mary's Honor Center v. Hicks*

The Court, in a five-to-four opinion, held that a finding that the employer's asserted reason for the employment action is untrue does not require a judgment for the plaintiff.[107] Justice Scalia, writing for the majority, stated that once the defendant introduced evidence of its reasons for the employment action, the presumption was effectively rebutted and dropped from the case.[108] The Court explained that the burden on a defendant is only one of production, not of proof.[109] Thus, it held that the defendant must only introduce evidence which, if taken as true, would

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102. *Id.*

103. *Id.* at 401-02.

104. *Id.*

105. *See supra* notes 12-39 and accompanying text.

106. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 (1993).

107. *Id.* at 2749. The Court remanded the case for a determination of whether the findings of the district judge were "clearly erroneous" when considered in light of the *St. Mary's* opinion. *Id.* at 2756.

108. *Id.* at 2749 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).

109. *Id.* at 2748-49.

permit the conclusion that there was a nondiscriminatory reason for the adverse action.[110] Even if this reason later turns out to be "obviously contrived,"[111] the presumption of discrimination is still rebutted, and the defendant would have still met its burden.[112]

The Court went on to acknowledge that the fact-finder's disbelief of the reason put forward by the defendant may, along with the evidence establishing the prima facie case, "*permit* the trier of fact to infer the ultimate fact of intentional discrimination."[113] Thus, the Eighth Circuit Court of Appeals was correct in holding that "no additional proof of discrimination is *required*" in order for the fact-finder to make a finding of discrimination.[114] The Eighth Circuit, the Court stated, went too far by holding that rejection of the defendant's proffered reason *compels* judgment for the plaintiff.[115] The Court reasoned that compelling the fact-finder to find for the plaintiff based solely on disbelief of the defendant's proffered reasons effectively shifted the burden of persuasion onto the defendant.[116] This was improper, the Court stated, because it disregarded both "the fundamental principle of Rule 301 that a presumption does not shift the burden" of persuasion, and the repeated admonition of Title VII precedent that the plaintiff at all times bears the burden of persuasion.[117]

Justice Souter, joined by Justices White, Blackmun, and Stevens, issued a sharp dissent.[118] The dissent accused the majority of abandoning "two decades of stable law" by ignoring language in both *Burdine* and *McDonnell Douglas* that required a judgment for the plaintiff when the defendant's proffered reasons were shown to be pretextual.[119] The dissent relied heavily on the statement from *Burdine* that once the defendant has rebutted the presumption of discrimination, "the plaintiff can meet his burden of persuasion in either of two ways: 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is

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110. *Id.* at 2748. Of course, if the defendant fails to meet this burden of production, and no reasonable minds could differ as to the existence of the facts constituting a prima facie case, then the plaintiff is entitled to judgment as a matter of law. *Id.* at 2748 n.3.

111. *Id.* at 2756.

112. *Id.*

113. *Id.* at 2749.

114. *Id.* (citing *St. Mary's*, 970 F.2d at 493).

115. *Id.*

116. *Id.*

117. *Id.* (citations omitted).

118. *Id.* at 2756 (Souter, J., dissenting).

119. *Id.* at 2757.

unworthy of credence.' "[120] To the dissent, this statement clearly meant that a Title VII plaintiff should prevail when he has proven that the defendant's proffered reasons are pretextual.[121]

The dissent argued that the Court's holding was unfair to Title VII plaintiffs who were not so lucky as to have direct evidence of discriminatory intent and was contrary to the reasons which originally compelled the Court to adopt the *McDonnell Douglas* framework.[122] By proving a prima facie case, the dissent explained, a Title VII plaintiff has eliminated the most common reasons for demotion and firing, "that he was unqualified for the position or that the position was no longer available."[123] Discrimination is therefore presumed, "because we presume [the employer's] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[124] Requiring the defendant to come forward with nondiscriminatory reasons for its actions gives it the opportunity to set the scope of the factual issues to be decided by the fact-finder.[125] When the defendant meets this burden of production, the trial should be narrowed to a "new level of specificity"—narrowed to the question of pretext.[126]

The majority's holding was incorrect, argued the dissent, because it did not narrow the issues to be resolved at all.[127] Rather, it leaves employment discrimination plaintiffs with the unfair burden of either having to produce direct evidence of discrimination or "eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."[128]

Turning to the majority's assertion that limiting the scope of inquiry to whether the defendant's proffered reasons were pretextual would place the burden of proof

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120. *Id.* at 2760 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)). The dissent accused the majority's treatment of this passage from *Burdine* as amounting to a "rewriting" of it. *Id.* at 2760 n.7. The dissent stated that the majority discarded or ignored this as well as other language in Title VII precedent because it was in dicta. *Id.* at 2765. Justice Souter stated that the type of evidentiary framework established in *McDonnell Douglas*, and refined in *Burdine*, should not be casually abandoned merely because it is stated in dicta, as lower courts and litigants rely on these statements in ordering their trials. *Id.* The dissent also attacked the majority's reliance on *Aikens*. *Id. Aikens* repeated the language of *Burdine* that a plaintiff can prevail by proving that the defendant has lied. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). The *Aikens* Court then immediately stated that the district court must "decide *which party's* explanation of the employer's motivation it believes." *Id.* (emphasis added). The dissent argued that this language barred the majority's conclusion that the fact-finder may disbelieve the defendant and still not find for the plaintiff. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2765 (1993) (Souter, J., dissenting).

121. *St. Mary's*, 113 S. Ct. at 2757 (Souter, J., dissenting).

122. *Id.*

123. *Id.* at 2758.

124. *Id.* (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

125. *Id.* at 2759.

126. *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)). The dissent stated:

> *McDonnell Douglas* makes it clear that if the plaintiff fails to show "pretext," the challenged employment action "must stand." If, on the other hand, the plaintiff carries his burden of showing "pretext," the court "must order a prompt and appropriate remedy" . . . . *Burdine* drives home the point that the case has proceeded to "a new level of specificity" by explaining that the plaintiff can meet his burden of persuasion by . . . "showing that the employer's proffered explanation is unworthy of credence." *Id.* at 2759-60 (citations and footnotes omitted).

127. *Id.* at 2759-61.

128. *Id.* at 2758.

on the defendant, the dissent explained that the plaintiff would still have to prove by a preponderance of the evidence that the defendant's proffered reasons were untrue.[129] Thus, to the dissenters, once Hicks proved that St. Mary's reasons were pretextual, *Burdine* required a judgment in favor of Hicks.[130]

The majority opinion responded to the dissent in detail, addressing the dissent's accusation that the Court's opinion sets aside "settled precedent" and "decades of stable law."[131] Justice Scalia argued that the dissent's interpretation of precedent was "utter[ly] implausib[le]," and "doesn't even pretend" to rely on the Court's "prior *holdings*."[132]

The Court's opinion then addressed what it described as the "dicta" upon which the dissent relied. The majority sidestepped the most troublesome language from *Burdine*, that a Title VII plaintiff could prevail indirectly by persuading the court that the defendant's proffered reasons were untrue.[133] Justice Scalia acknowledged that the dissent's interpretation of this language was correct, stating that "[t]he words bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff."[134] However, Justice Scalia continued, that passage must have been a mere inadvertence because: (1) the precedent from *McDonnell Douglas* that Justice Powell used to support the *Burdine* passage did not support the proposition made in *Burdine*, but actually said just the opposite;[135] (2) this passage contradicted other statements made in *Burdine* itself;[136] and (3) giving this passage precedential effect would amount to shifting the burden of proof onto the defendant – something Federal Evidence Rule 301 and the "classic law of presumptions" expressly forbids.[137]

Justice Scalia then turned to post-*Burdine* case law to lay the "problematic passage" from *Burdine* to rest.[138] Justice Scalia pointed out that *Aikens* quoted the

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129. *Id.* at 2759-60.

130. *Id.* at 2761. The dissent rejected the view that it is mandatory because the presumption was resurrected. *Id.* at 2759 n.2. Justice Souter stated: "The question presented . . . is not whether the mandatory presumption is resurrected (everyone agrees that it is not), but whether the factual enquiry is narrowed by the *McDonnell Douglas* framework to the question of pretext." *Id.*

131. *Id.* at 2750 (Scalia, J.).

132. *Id.* at 2750-51. Justice Scalia stated that the dissenters were left with a position which "has no support in the statute, no support in the reason of the matter, [and] no support in any holding of this Court." *Id.* at 2751.

133. *Id.* at 2752.

134. *Id.*

135. *Id.* at 2753. Justice Scalia quoted the passage from *McDonnell Douglas* which stated that the respondent "must be given a full and fair opportunity to demonstrate . . . *that whatever the stated reasons for his rejection, the decision was in reality racially premised.*" *Id.* (alteration in original) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n.18 (1973)).

136. *Id.* For example, at times the Court in *Burdine* stated that a plaintiff may prevail by showing that the defendant's proffered reasons were pretextual, and at others the *Burdine* opinion stated that the plaintiff must prove that the proffered reasons were a "pretext for discrimination" as opposed to being merely pretextual. *Id.* (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981)). *See supra* notes 61-68 and accompanying text.

137. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2753 (1993) (citing *Burdine*, 450 U.S. at 248 n.8 (citing FED. R. EVID. 301; F. JAMES & G. HAZARD, JR., CIVIL PROCEDURE § 7.9, at 255 (2d ed. 1977) (presumptions allocate burden of production only); 9 WIGMORE'S EVIDENCE § 2491 (3d ed. 1990))).

138. *Id.* at 2754.

Burdine passage upon which the dissent relied, but then added: "In short, the district court must decide which party's explanation . . . it believes."[139] Justice Scalia interpreted *Aikens* to mean that in order for the plaintiff to prevail, the fact-finder must actually believe the plaintiff's story, not simply disbelieve the defendant's.[140]

Finally, the majority rejected the dissent's argument that the majority opinion is inconsistent with *McDonnell Douglas'* requirement that the defendant's offer should move the inquiry to "a new level of specificity."[141] The Court explained that this "new level of specificity" only describes the change in the nature of the evidence before the fact-finder.[142] By introducing evidence of a nondiscriminatory purpose in making the employment decision, the Court explained, the defendant moves the inquiry "from the few generalized factors that established a prima facie case to the specific proofs and rebuttals . . . the parties have introduced [for the employment action]."[143]

V. EFFECT OF *St. Mary's* ON EMPLOYMENT DISCRIMINATION CASES

A. Scope of Fact-Finder's Inquiry After the Presumption Has Been Rebutted

The *McDonnell Douglas* framework allows the defendant to rebut the plaintiff's presumption by offering a nondiscriminatory reason for the employment action taken.[144] At the close of all evidence, the fact-finder often faces at least two competing explanations as to why the employment action was taken.[145] However, after *St. Mary's* it is clear that the fact-finder is not required to choose from either of these two explanations in deciding whether to find for the plaintiff. In *St. Mary's*, the Court stated that once the defendant successfully met its production burden of articulating a nondiscriminatory reason for the employment action, the "*McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."[146] This holding is consistent with the Court's admonition in *Aikens* that "at the close of the evidence, the [d]istrict [c]ourt . . . should have proceeded to [the question of whether the defendant intentionally discriminated

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139. *Id.* (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

140. *Id.* As evidence that his interpretation is correct, Justice Scalia pointed out that Justice Blackmun concurred in *Aikens* to state that a plaintiff need only prove pretext in order to prevail in a Title VII suit. *Id.* (citing *Aikens*, 460 U.S. at 718 (Blackmun, J., concurring)). However, noted Justice Scalia, that concurrence was only joined by one other Member of the Court. *Id.* *See supra* text accompanying note 76.

141. *St. Mary's*, 113 S. Ct. at 2752, 2755.

142. *Id.*

143. *Id.* at 2752.

144. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973). *See also supra* text accompanying notes 54-57.

145. For example, in *St. Mary's* the plaintiff's explanation was that he was fired because of race and the defendant's was that he was fired because of the accumulation and severity of rules violations. Hicks v. St. Mary's Honor Ctr., 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). *See also supra* text accompanying notes 36-39.

146. *St. Mary's*, 113 S. Ct. at 2749.

against the plaintiff] directly, just as district courts decide disputed questions of fact in other civil litigation."[147]

St. Mary's does not limit the fact-finder to the question of whether the defendant's proffered reason is true, or even to whether the defendant's reason is more likely than the plaintiff's reason. The sole issue is whether the evidence supports a finding of discrimination. If the fact-finder is convinced that the employer was more likely than not motivated by a discriminatory animus, then the plaintiff is entitled to a judgment in his favor; if not, then the defendant must prevail, regardless of the veracity of its proffered reason.

This holding is a marked retreat from the Court's dicta in *Burdine* which stated that "we presume [the employer's actions], if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[148] After *St. Mary's*, this is certainly not the case. Rather, if the employment decision is still "unexplained" in the sense that the fact-finder is unable to divine why the employment action was taken, then the plaintiff has failed to meet his burden, and the defendant is entitled to a verdict in its favor.

For example, the district court in *St. Mary's* stated that Hicks' supervisors may have been motivated more by personal animosity than by discriminatory intent in firing Hicks, but never made a specific finding that animosity was *the reason* for this firing.[149] On appeal Hicks argued (1) that the judge was required by *McDonnell Douglas* and *Burdine* to make a specific finding of why Hicks was fired; and (2) that the district judge was precluded from choosing an explanation that was never clearly offered by the defendant as a reason for the employment action.[150] The Court replied to this argument by pointing out that the judge is not required to settle on *any* specific reason for the employment decision anyway.[151] Thus, after the presumption was rebutted, the factual inquiry was not limited to the relative veracity of either party's explanation of the events at issue.[152]

However, *St. Mary's* does not authorize the fact-finder to simply hypothesize possible explanations for the employment action that do not have a basis in the record. The Civil Rights Act of 1991 provides that Title VII cases will now be heard by juries.[153] *St. Mary's* sheds little light on the question of how judges ought to instruct juries in Title VII trials.[154] In cases similar to *St. Mary's*—where both sides have offered explanations for the employment action in question and there are

147. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983) (footnote omitted).

148. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

149. *St. Mary's*, 756 F. Supp. at 1251.

150. Respondent's Brief at 141-49, *St. Mary's* (No. 92-602).

151. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2753-54 (1993).

152. *Id.*

153. Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a-(c) (1988 & Supp. 1992) (providing jury trial right in disparate treatment Title VII suits).

154. The Court mentioned the effect of the Civil Rights Act of 1991 only briefly, stating: "Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review." *St. Mary's*, 113 S. Ct. at 2756.

other possible nondiscriminatory reasons existent in the record—district court judges will face the question of whether to limit the extent to which juries may roam the record in their attempt to decide what actually motivated the employer.

The *McDonnell Douglas* framework contemplates a scheme whereby the plaintiff should have a "full and fair opportunity" to confront the other possible explanations for the employment action.[155] Thus, juries deciding employment discrimination cases should be instructed to focus specifically on the explanations offered by the defendant and those which the judge decides are adequately presented in the record.[156]

Of course, the jury is not required to find any specific reason for the defendant's actions. However, where the jury is unable to discern an explanation for the defendant's motivation, this lack of evidence explaining the employer's motivation should provide an added inference that the defendant-employer was in fact motivated by a discriminatory animus. This inference is only natural because employers are certainly in a better position to bring the true, nondiscriminatory reason (if there is one) for the employment action to the attention of the jury.[157] Of course, if the jury specifically disbelieves the defendant's proffered reason for the employment action, the jury should be instructed that they may infer the defendant's liability based on the defendant's lack of candor.[158]

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155. *Id.* at 2747.

156. A possible test for whether an explanation suggested by the record should be considered by the jury is whether there is sufficient evidence in the record to support a finding of that explanation if the jury were required to do so. As the standard for sufficiency is whether a reasonable juror could find the existence of the fact based on the evidence presented, this approach would only exclude consideration of evidence of explanations that were ultimately irrelevant anyway. *See* FED. R. EVID. 104(b).

157. *See* Brief of the Lawyer's Committee for Civil Rights Under Law and Others As Amici Curiae in Support of Respondent at 25, *St. Mary's* (No. 92-602) (citing Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939) (failure of defendant to call witnesses under his control to contradict allegations of their unlawful conduct "is itself persuasive that their testimony, if given, would have been unfavorable"); 2 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 291 (Chadbourn rev. ed. 1979) ("The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to its possessor . . . ."); 2 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.16 (3d ed. 1977) ("If a party fails to call a person who possesses knowledge about the facts in issue, and who is reasonably available to him, and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not.")).

158. *See* McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985). The *McQueeney* Court stated:

> It has always been understood . . . that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.

Id. at 921 (quoting 2 WIGMORE, *supra* note 157, § 278(2)). *See also* 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.04 (4th ed. 1987) ("If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves."); MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 273 (2d ed. 1972) (wrongdoing by a party in connection with his case also can be recognized as an admission of conduct).

B. Employment Discrimination Plaintiffs' Evidentiary Burden in Meeting Defendants' Summary Judgment Motions

St. Mary's finally settles one question left open by *McDonnell Douglas* and *Burdine*: whether judgment for the plaintiff is compelled when he has shown that the defendant's proffered reason is false. The clear answer is no. Judgment is not compelled simply because the plaintiff shows that the defendant's proffered reasons for the employment action are untrue. The Court rejected Hicks' invitation to accept the Fifth Circuit's *Thornbrough* approach which compelled judgment for the plaintiff whenever he proved that the defendant's explanation was untrue.[159] Still, employment discrimination plaintiffs can take consolation in the fact that the Court rejected the invitation to accept the standard advanced by the defendant, St. Mary's.[160] If this rule had been adopted, plaintiffs would have had much more difficulty getting past the summary judgment stage.[161]

The rule the Court did adopt resembles the approach taken by the Seventh Circuit in *Shager*.[162] Under this approach, plaintiff-employees should be able to defeat summary judgment motions rather easily. In *St. Mary's*, the Court explicitly stated that the plaintiff could prevail without any additional evidence beyond that which would call the truth of the defendant's proffered reason for the employment action into doubt.[163] Also, even after the presumption has been rebutted, the plaintiff's prima facie case still retains probative value.[164] The Court stated that the elements constituting a prima facie case, together with the inference created by rejection of the defendant's proffered reasons "permit the trier of fact to infer . . . intentional discrimination . . . and no additional proof is required."[165] Thus, in order to withstand a defendant's summary judgment motion, an employment discrimination

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159. *See supra* text accompanying notes 83-87.

160. *See* Brief of the National Association of Manufacturers As Amicus Curiae in Support of Petitioners at 4, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (No. 92-602) (1993) ("[W]here an employment discrimination plaintiff proves only that the employer's articulated reason is not the true reason for its action, judgment as a matter of law should be properly directed for the defendant-employer . . . ."); Brief Amicus Curiae of the Chambers of Commerce of the U.S.A. in Support of Petitioners at 7, *St. Mary's* (No. 92-602) ("Plaintiffs cannot satisfy their ultimate burden simply by offering indirect evidence that demonstrates that the employer's articulated reasons for the discharge are untrue.").

161. *See, e.g.*, Dea v. Look, 810 F.2d 12 (1st Cir. 1987) (mere evidence showing untruth of defendant's proffered reason not enough to withstand defendant's summary judgment motion).

162. *See* Anderson v. Baxter HealthCare Corp., 13 F.3d 1120 (7th Cir. 1994) (noting that *St. Mary's* apparently adopted the Seventh Circuit's approach from *Shager* whereby a finding of pretext permits, but does not compel, judgment for the plaintiff); *see also supra* text accompanying notes 96-104.

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

164. *Id.*

165. *Id.* (quoting *St. Mary's*, 970 F.2d at 493).

plaintiff need only show that there is a genuine issue of material fact as to the veracity of the defendant's proffered reason.[166]

Since the Court announced its opinion in *St. Mary's*, courts have already begun to disagree on what a plaintiff must show in order to create a fact issue on the issue of pretext.[167] *Moisi v. College of the Sequoias Community College District*[168] interpreted *St. Mary's* as allowing plaintiffs who have established a prima facie case to reach the jury without offering any additional evidence that the defendant's reason is pretextual, thus making it almost impossible for defendants to prevail on summary judgment motions. In *Moisi*, a California state court, interpreting a state statute which applies the *McDonnell Douglas* framework, held that the defendant's summary judgment motion must be denied even though the plaintiff did not have

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166. Several post-*St. Mary's* decisions have borne this conclusion out. *See* Anderson v. Baxter HealthCare Corp., 13 F.3d 1120 (7th Cir. 1994); Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994) (plaintiff need only offer evidence discrediting the defendant's proferred reason in order to defeat a summary judgment motion) (citing *Anderson*); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993) ("[T]here will always be a question for the fact[-]finder once a plaintiff estalishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true."); Chu v. Samuel Geltman & Co., No. CIV.A.92-4480, 1993 WL 492747 (E.D. Pa. Nov. 17, 1993) ("[P]laintiff may defeat summary judgment by identifying evidence of record which discredits the proffered reason or tends to show the ultimate fact of discrimination."); Flynn v. Goldman Sachs & Co., No. 91 Civ. 0035 (KMW), 1993 WL 336957 (S.D.N.Y. Sept. 2, 1993) ("[I]n any case where the credibility of conflicting witnesses must be assessed in deciding material issues of fact, the court should deny summary judgment and let the trier of fact make that assessment.").

However, a few courts have stated that a mere question of fact sufficient to create a jury question on the issue of pretext is not necessarily synonymous with a question of fact sufficient to create a jury question on the issue of discrimination. *See, e.g.*, EEOC v. MCI Int'l, 829 F. Supp. 1438, 1450-51 (D.N.J. 1993) (stating that evidence proving pretext may still not be enough to avoid summary judgment); Wright v. Office of Mental Health, No. 92 Civ. 6547, 1993 U.S. Dist. LEXIS 9275 (S.D.N.Y. July 12, 1993) (even if the plaintiff were to prove the defendant's reasons were pretextual, plaintiff could not prevail without additional evidence that the discharge was race based).

The rationale of the courts requiring additional proof beyond that which would show pretext does not hold up under either summary judgment or general Supreme Court employment discrimination precedent. *See* FED. R. CIV. P. 56(c). Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Id.

The party bearing the burden of proof at trial must "establish that there is a genuine issue of material fact" in dispute in order to withstand a summary judgment motion. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-86 (1986). Clearly, in employment discrimination cases the question of whether the defendant's reason is true is material. The *St. Mary's* Court stated as much, holding that "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer . . . intentional discrimination, and . . . '[n]o additional proof of discrimination is *required*.' " *St. Mary's*, 113 S. Ct. at 2749 (emphasis added) (citations and footnotes omitted). Thus, in employment discrimination cases, a judge must always deny a defendant's summary judgment motion when the plaintiff can show that there is a genuine fact question as to the credibility of the defendant's proffered reason for the employment action.

167. *Compare* LeBlanc v. Great Am. Ins. Co., 6 F.3d 836 (1st Cir. 1993) (interpreting *St. Mary's* as requiring plaintiffs to have additional evidence of discrimination in order to withstand defendant's summary judgment motions); Bolton v. Scrivner, Inc., 836 F. Supp. 783 (W.D. Okla. 1993) (interpreting *St. Mary's* as requiring a plaintiff to show evidence of pretext before reaching trial); Griffiths v. CIGNA, No. CIV.A.91-2356, 1993 WL 452034 (E.D. Pa. Oct. 29, 1993) (interpreting *St. Mary's* as permitting a plaintiff who has established a prima facie case to reach trial and attempt to create a genuine issue of material fact by cross-examining the defendant's witnesses, but leaving the door open to a directed verdict for the defendant at the close of evidence); Moisi v. College of the Sequoias Community College Dist., 25 Cal. Rptr. 2d 165 (Ct. App. 1993) (reported in 62 U.S.L.W. 2237) (interpreting *St. Mary's* as permitting plaintiffs who have established a prima facie case to reach the jury regardless of whether they have additional evidence of discrimination or pretext).

168. 25 Cal. Rptr. 2d 165 (Ct. App. 1993).

evidence tending to disprove the defendant's proffered reason. The California court stated that as a matter of law the veracity of the employer's reason for the employment action was a question of fact which could only be resolved by the jury. Thus, the plaintiff was able to defeat the defendant's summary judgment motion even though he had *no* evidence that the defendant's proffered reason was untrue.[169]

At least one district court, in *Griffiths v. CIGNA*,[170] has also suggested that plaintiffs who have successfully established a prima facie case should not have judgment entered against them on summary judgment motion because *St. Mary's* requires that plaintiffs be afforded the opportunity to discredit the defendant through cross-examination.[171] The *Griffiths* Court, unlike the *Moisi* Court, did not state that plaintiffs who had established a prima facie case are always entitled to reach the jury. Rather, the court held that plaintiffs who have established a prima facie case are entitled to reach trial and attempt to create a genuine issue of material fact by cross-examining the defendant's witnesses, thus leaving the door open to a directed verdict for the defendant at the close of evidence.

Other courts have disagreed, requiring plaintiffs to offer evidence of pretext in order to withstand summary judgment.[172] For example, in *Bolton v. Scrivner, Inc.*,[173] a district court in Oklahoma specifically rejected the argument advanced in *Moisi*. In *Bolton*, the court granted summary judgment to the defendant-

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169. *Id.* The court stated:

> Prior to . . . *St. Mary's*, several California appellate courts and numerous federal appellate circuits have granted summary judgment in favor of an employer who came forward with nondiscriminatory reasons for the challenged conduct which were not then rebutted by specific evidence offered by the plaintiff attacking the reasons given as pretextual. In other words, when faced with a motion for summary judgment, the court [below] refused to allow the plaintiff to rest on an assertion that the nondiscriminatory reasons given were untrue or pretextual without evidence placing the reasons given at issue. However, our reading of . . . *St. Mary's* compels us to conclude these earlier decisions are no longer valid.
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> . . . .
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> [*St. Mary's*] states clearly that the truth or falsity of the employer's proffered reasons for the challenged action is for the trier of fact and that mere disbelief of the reasons offered together with the elements of the prima facie case and any inferences which might be drawn by the trier of fact is enough to prove intentional discrimination.

Id. at 171-72 (citations omitted).

170. No. CIV.A.91-2356, 1993 WL 452034 (E.D. Pa. Oct. 29, 1993).

171. *See id.* In *Griffiths*, the district court stated:

> [*St. Mary's*] compels the conclusion that defendants' production of unrebutted evidence of a lawful nondiscriminatory reason for plaintiff's dismissal at the summary judgment stage does not by itself resolve the question of credibility, which is reserved for the trier of fact. Under [*St. Mary's*], plaintiff is entitled to a full and fair opportunity to demonstrate, through presentation of his own case and cross-examination of defendants' witnesses, that the reasons proffered are not the true reasons for plaintiff's dismissal, but that an unlawfully discriminatory reason was the sole cause of his dismissal . . . . There is "no rule of law that the testimony of a discrimination plaintiff, standing alone, can never make out a case of discrimination that could withstand a summary judgment motion."

Id. (quoting Weldon v. Kraft, Inc., 896 F.2d 793, 797 (3d Cir. 1990)). The *Griffiths* Court concluded: "Undoubtedly, the holding in [*St. Mary's*] will preclude summary judgment in most employment discrimination cases, at least in those cases where as here the employee can establish a prima facie case." *Id.* at n.2, n.3.

172. *See,e.g.*, Chu v. Samuel Geltman & Co., No. CIV.A.92-4480, 1993 WL 492747, at *3 (E.D. Pa. Nov. 17, 1993) (plaintiff, in order to survive summary judgment motion, must show some evidence to cast doubt upon the proferred reason); Bolton v. Scrivner, Inc., 836 F. Supp. 783, 791 (W.D. Okla. 1993) (requiring plaintiff to produce evidence of pretext).

173. 836 F. Supp. 783 (W.D. Okla. 1993).

employer based on the plaintiff's inability to offer specific evidence that the defendant's reason was untrue.[174] The court rejected the *Moisi* standard because it would allow plaintiffs to avoid summary judgment without any evidence of pretext.[175] The court stated that after a defendant has offered its nondiscriminatory reason for the employment action, the plaintiff then has the burden of producing additional evidence of pretext. The *Bolton* Court stated that the *Moisi* standard gives employment discrimination plaintiffs a lower burden than plaintiffs have in other civil trials because the plaintiff could "ignore this burden of production and proceed to trial when he has offered no evidence that could possibly controvert the defendant's justification."[176] Thus, the court concluded that absent specific evidence of pretext an employment discrimination plaintiff cannot survive a summary judgment motion, and so held that the plaintiff could not proceed to trial.[177]

Burdine supports the approach taken by the *Moisi* and *Griffiths* Courts. *Burdine* clearly states that a plaintiff may prove pretext solely through cross-examination of the defendant's witnesses. In *Burdine*, Justice Powell stated that "there may be some cases where the plaintiff's initial evidence [of his prima facie case], combined with effective cross-examination . . . will suffice to discredit the defendant's explanation."[178] *St. Mary's* clearly states that a finding of pretext, when combined with the already-established prima facie case, will permit a judgment for the plaintiff. Thus, the argument goes, as cross-examination may be sufficient to prove pretext, and pretext may be sufficient to prove discrimination, a plaintiff should be afforded an opportunity to cross-examine the defendant's witnesses before the judge should consider a defendant's summary judgment motion.

General principles of summary judgment also support the argument that plaintiffs who have established a prima facie case should be allowed to cross-examine the defendant's witnesses before summary judgment is appropriate. Summary judgment is only appropriate where there is "no genuine issue as to any material fact."[179] In *Anderson v. Liberty Lobby*, the Court noted that a material issue of fact is one which would affect the outcome of the litigation.[180] The credibility of the defendant's proferred reason is clearly material in employment discrimination cases because *St. Mary's* holds that as a matter of law rejection of the employer's

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174. *Id.* at 785.

175. *Id.* at 790-91.

176. *Id.* (citation omitted).

177. *Id.* at 792. The *Bolton* Court did not state that a plaintiff should never be able to avoid summary judgment based on his inability to bring forth additional evidence of pretext. The *Bolton* Court opined that

> in a case where the subjective evaluation of a supervisor provides the basis for the defendant's defense, credibility might be relevant to the evaluation of pretext. However, even in such a circumstance, it would still be incumbent upon the plaintiff to provide the court with at least some basis, some rationale why it should allow this excursion into the witnesses' (and, ultimately, the defendant's) credibility.

Id.

178. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

179. FED. R. CIV. P. 56.

180. 477 U.S. 242, 248 (1986). *See also* Jansonious, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 A.B.A. SEC. LAB. & EMPLOYMENT L. 747 (1988) (available on Westlaw).

proferred reason is sufficient evidence for a finding of intentional discrimination.[181]

However, it is doubtful whether the *St. Mary's* Court intended to fashion a rule whereby plaintiffs who had made out a prima facie case would inevitably reach the jury. In fact, there is no need to rule, as a matter of law, that the evidence establishing the elements of a prima facie case of discrimination, without any additional evidence of pretext *will always*, or *will never* allow a plaintiff to reach the jury. Rather, courts should recognize that in some cases the evidence establishing the prima facie case will be sufficient to create a question of fact as to whether the defendant's reason is pretextual. In others, the evidence establishing the prima facie case may not be sufficent to cast doubt on the employer's proferred reason without some additional evidence of pretext.

In determining whether such a question of fact exists, courts should keep in mind that evaluating the credibility of witnesses is a role traditionally reserved for the fact-finder.[182] Moreover, plaintiffs using the *McDonnell Douglas* framework have already produced sufficient evidence to meet their initial production burden by establishing their initial prima facie case of discrimination.[183] Thus, summary judgment will, in many cases, be inappropriate until the plaintiff has had an opportunity to cross-examine the defendant's witnesses, and where this cross-

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

182. *See* Hardin v. Pitney Bowes, Inc., No. 78-3679 (W.D. Ky. 1978), *aff'd*, 636 F.2d 1217 (6th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981) (Rehnquist, J., dissenting). Justice Rehnquist stated:

> [I]t is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment. It is equally clear that where such issues are presented, the submission of affidavits or depositions is insufficient to support a motion for summary judgment.
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> . . . .
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> Summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned.

Hardin, 451 U.S. at 1008-10 (Rehnquist, J. dissenting). *But see* Jansonious, *supra* note 180 (asserting that the effect of the Court's holding in Anderson v. Liberty Lobby, 477 U.S. 242 (1986), is that summary judgment may be granted to employment discrimination defendants).

183. Of course, the general rule is that where all the non-moving party can point to is his claim that he will discredit the movant on cross-examination at trial, summary judgment is appropriate. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 9.3 (1985). Also, in *Anderson v. Liberty Lobby,* the Court held that summary judgment may be granted even where the defendants' intent is a key element of the plaintiff's claim. *Anderson*, 477 U.S. at 246. However, disparate treatment plaintiffs should be able to defeat defendants' summary judgment motions because they have already met their initial production burden by establishing a prima facie case by a preponderance of the evidence. Thus, the plaintiff is not relying *solely* on his contention that he can discredit the defendant on cross-examination, but is also relying on the inferential value of his already established prima facie case to cast doubt on the defendant-employer's asserted reason for the employment action.

examination raises any doubt as to the defendant's credibility, the case should be submitted to the jury.[184]

VI. *St. Mary's* As a Presumptions Case: Rule 301

St. Mary's is also notable because of the majority's reliance on Federal Evidence Rule 301 and the "classic law of presumptions" as an independent reason of why the holding of this case was correct.[185] The Court reasoned that compelling judgment for the plaintiff upon a finding that the defendant's reason was untrue amounted to shifting the burden of proof onto the defendant. Rule 301 specifically prohibits presumptions from shifting the burden of proof onto a defendant.[186] The Court's reliance on Rule 301 is confusing because neither the text nor the history of Rule 301 would seem to prevent the Court from placing the burden on the plaintiff to *disprove* the truthfulness of the defendant's explanation in disparate treatment cases.

A. Common Law History of Presumptions

Presumptions are "device[s] that require[] the trier [of fact] to draw a particular conclusion when the basic facts are established, in the absence of evidence tending to disprove the fact presumed."[187] Historically, the two primary views of how rebuttable presumptions ought to operate are those of Professor Thayer and Professor Morgan.[188]

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184. Some courts may find it useful to allow the plaintiff to cross-examine the defendant's primary witness at the summary judgment motion hearing. Rule 43(e) specifically places such use of oral testimony at summary judgment hearings within the discretion of the trial judge.

The Court may have to revisit the *McDonnell Douglas* framework yet again to answer the question of whether a prima facie case entitles the plaintiff to an opportunity to cross-examine the defendant's witnesses at trial. *See, e.g.*, Fisher v. Rutgers State Univ., 62 U.S.L.W. 3383 (3d Cir. May 27, 1993), *cert. denied*, 62 U.S.L.W. 3451 (U.S. Jan. 1, 1994). In *Fisher*, the Third Circuit affirmed a district court's grant of summary judgment to a defendant on the grounds that the plaintiff had failed to present evidence that the defendant's reason for firing her was untrue. *Fisher*, 62 U.S.L.W. 3383 (3d Cir. May 27, 1993). A petition for a Writ of Certiorari was filed. *Id.* The first question presented was whether there is a "need to clarify standards for summary judgment in 'pretext' employment discrimination cases in light of *St. Mary's v. Hicks*." *Id.* The Court denied review. *Fisher*, 62 U.S.L.W. 3451 (U.S. Jan. 1, 1994).

185. *St. Mary's*, 113 S. Ct. at 2749. For a pre-*St. Mary's* analysis of how Rule 301 should bear on Title VII claims, see Beard, *supra* note 1 (discussing why Rule 301 requires uniform treatment between disparate impact and disparate treatment claims). *But see supra* note 1 (Civil Rights Act of 1991 amended Title VII to produce a separate presumption framework for disparate impact claims).

186. Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, 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.

187. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 754 (2d ed. 1983).

188. This Note does not address so called "irrebuttable presumptions," as they are more akin to substantive rules of law and are not covered by Evidence Rule 301. 10 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 301.03 (1994).

Thayer presumptions only shift the burden of production, not the burden of persuasion.[189] Once the defendant against whom the presumption was in effect has offered evidence that would support a finding of the non-existence of the presumed fact, the presumption is rebutted and supposedly vanishes. Because the presumption is rebutted upon presentation of evidence of the fact's non-existence, regardless of whether or not the evidence is later discredited, this theory has been dubbed the "bursting bubble theory."[190]

The more expansive view of presumptions is that of Professor Morgan.[191] In Morgan's view, a presumption is created against a litigant for the same reasons that a plaintiff is saddled with the burden of persuasion.[192] Thus, the Morgan presumption shifts not only the burden of production, but also shifts the burden of persuasion, or proof, as well.[193] Most scholarly commentary prior to the adoption of Rule 301 focused on the Thayer-Morgan debate.[194]

B. Federal Rule of Evidence 301

The Advisory Committee appointed by Chief Justice Warren to formulate the Rules of Evidence for the federal courts recommended that the Federal Rules of Evidence adopt Morgan's view.[195] The Court did so and submitted it to Congress.[196] The House substantially revised the Court's rule.[197] The House version

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189. J.B. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336 (1898) (reprinted by Augustus M. Kelley, 1969). One commentator has described the difference between the burdens of production and persuasion in this way:

> "Burden" has two meanings in the law of evidence. One burden is that of producing evidence of a particular fact, sometimes called the burden of going forward with the evidence. If the party who has the burden of production fails to present evidence that would permit a finding on that factual issue, the party with that burden will lose. The burden of production is met, not by convincing the fact finder of the truth of the fact, but by satisfying the court that such a finding *could be made*. The second . . . [meaning of burden] is the burden of persuading the trier of fact that the alleged fact is true. This burden is called the burden of persuasion or the risk of nonpersuasion.

Mack A. Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Impact Cases*, 49 MO. L. REV. 17, 23-24 (1984) (citations and quotations omitted).

190. *See, e.g.*, MOORE, *supra* note 188, § 301.01[3].

191. *See* Morgan, *Instructing the Jury on Presumptions and Burdens of Proof*, 47 HARV. L. REV. 59 (1933).

192. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937).

193. *Id.* In addressing the Thayer presumption, Morgan states: "If a policy is strong enough to call a presumption into existence, it is hard to imagine it is so weak as to be satisfied by the bare recital of words on the witness stand or the reception into evidence of a writing." Morgan, *supra* note 191, at 82.

194. *See* MOORE, *supra* note 188, § 301.04[2].

195. MOORE, *supra* note 188, § 301.01[3].

196. MOORE, *supra* note 188, § 301.01[5]. The proposed rule stated:

> Rule 301 Presumptions in General
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> In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the non-existence of the presumed fact is more probable than its existence.

MOORE, *supra* note 188, § 301.01[5]. The Court rejected the Thayer approach because it gave presumptions too "slight and evanescent an effect." MOORE, *supra* note 188, § 301.01[3] (quoting Morgan & Maquire, *supra* note 192, at 913).

197. MOORE, *supra* note 188, § 301.01[6].

adopted a compromise position between the approaches of Morgan and Thayer.[198] The House version adopted Thayer's view that a presumption should only shift the burden of production, not of persuasion, to the party against whom the presumption was directed. However, the House tried to give a presumption more effect than the usual Thayer presumption by stating that after the presumption was rebutted, it should still serve as evidence of the formerly presumed fact.

The Senate rejected this version on the grounds that using the rebutted presumption as evidence of the fact was "not intellectually workable."[199] The Senate version discarded the portion of the House version which provided for the presumption to be treated as evidence. However, it retained the portion which adopted Thayer's approach – that the presumption only shifted the burden of production, not the burden of persuasion. The Senate version read:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, 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.[200]

This version was adopted as Federal Rule of Evidence 301.

The report accompanying this version pointed out that its effect was clearly to shift to the party against whom it is directed a burden of coming forward to rebut the presumption, not to shift the burden of proof onto that party.[201] The Senate Report also pointed out that even after a presumption is rebutted, the court may instruct the jury that "they may infer the existence of the presumed fact from proof

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198. The House version read:
(Matter in Court's rule stricken out by the House is in brackets, new matter in italics)
Rule 301 Presumptions in General *in Civil Actions and Proceedings*
In all *civil* [cases] *actions and proceedings* not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of [proving that the non existence of the presumed fact is more probable than its existence] *going forward with the evidence, and even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed to be considered by the trier of facts.*
MOORE, *supra* note 188, § 301.01[5].

199. MOORE, *supra* note 188, § 301.01[1]. Justice Traynor of the California Supreme Court addressed the impracticability of treating a presumption as evidence in this way: "It is impossible to weigh a rule of law on the one hand against physical objects and personal observations on the other to determine which would more probably establish the existence or non-existence of a fact." Speck v. Sarver, 128 P.2d 16, 21 (Cal. 1942). At the time *Speck* was decided, California common law required that a rebutted presumption be treated as evidence. *Id.* California's experience with this rule was so unsuccessful that the current California Evidence Code states that "a presumption is not evidence." CAL. EVID. CODE § 600 (West 1993).

200. FED. R. EVID. 301. *See also* MOORE, *supra* note 188, § 301.01[7].

201. S. REP. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7055-56.

of the basic facts giving rise to the presumption."[202] Thus, while the presumption itself is not evidence, the facts which established the presumption may, on their own, naturally provide an inference of the existence of the presumed fact.[203]

C. Majority's Reliance on Rule 301

Rule 301 is basically a default rule in that it only covers presumptions which are judicially created and which do not fall under the purview of another rule.[204] Rule 301 applied to the presumption in *St. Mary's* because there is nothing in the Civil Rights Act of 1964 that specifically provides for it.[205] While Rule 301 does apply to the presumption in this case, the Court's holding was not compelled by it.

The majority opinion in *St. Mary's* relied on Rule 301 as an independent basis for its conclusion that a finding of pretext does not mandate a finding for the plaintiff.[206] The majority was correct in stating that the presumption was rebutted by the defendant's production of a nondiscriminatory reason, regardless of whether it is later found to be untrue.[207] This finding is entirely consistent with Thayer's view

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202. *Id.* The Senate Report read, in part:

> This rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.
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> As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.
>
> Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence . . . .
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> . . . .
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> . . . The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.
>
> The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

MOORE, *supra* note 188, § 301.01[8] (quoting S. REP. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7055-56).

203. For example, the Court in *Burdine* stated:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. . . . [T]his evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

204. Rule 301 works in conjunction with Rule 302, which requires that "[i]n civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law." FED. R. EVID. 302.

A federal court, in deciding a state law claim, should look to what effect that state affords to presumptions, *not* to Rule 301. MOORE, *supra* note 188, § 302.03. Thus, federal courts may still apply presumptions that shift the burden of persuasion where the law of a particular state gives presumptions that effect. Consistent with the *Erie* doctrine, state law does not govern so called "tactical presumptions," however, because these presumptions do not operate on an element of a substantive claim or defense, but are rather procedural. MOORE, *supra* note 188, § 302.03. Thus, all tactical presumptions are governed by Rule 301. MOORE, *supra* note 188, § 302.03. An example of a "tactical presumption" is that upon proof of certain facts of putting a stamped envelope in the mail, a presumption may arise that the addressee received the letter. MOORE, *supra* note 188, § 302.04.

205. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988).

206. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2753 (1993).

207. *Id.* at 2748-49.

of presumptions, as well as the text of Rule 301.[208] The majority was also correct in relying on Rule 301 in rejecting the "resurrection" theory advanced by the Fifth Circuit in *Thornbrough*.[209] A presumption under Rule 301 is rebutted by the mere production of evidence that would dispute the presumed fact, regardless of its veracity.[210]

The *St. Mary's* Court believed that Rule 301 would not support a holding that a finding of pretext mandates a finding for the plaintiff. The majority stated that holding otherwise would be contrary to Rule 301's admonition that presumptions only shift the burden of production, not the burden of persuasion.[211] However, as the dissent pointed out, the Eighth Circuit Court below in *St. Mary's* did not hold that the burden of persuasion had shifted to the defendant to prove that its reason was the true reason for the employment action.[212] Rather, the court held that the burden of persuasion was on the plaintiff to show that the defendant's proffered reason was incorrect.[213] This was in keeping with *Burdine* which expressly stated that the plaintiff could meet his burden of persuasion by persuading the fact-finder that the defendant's proffered reasons were untrue.[214]

The majority opinion refused to acknowledge the distinction "between requiring a defendant to *prove* its legitimate nondiscriminatory reason, which is precluded by [Rule 301], and permitting a plaintiff to *disprove* it."[215] The plaintiff could still bear the risk of non-persuasion because if the plaintiff fails to persuade the fact-finder that the defendant has lied, then the plaintiff would lose.[216] Common law principles of evidence support allowing a plaintiff to prevail based on his discrediting the defendant. The practice of drawing unfavorable inferences against

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208. Rule 301 explicitly states: "[A] presumption imposes upon the party against whom it is directed the burden of going forward with evidence . . . but does not shift to such party the burden of proof . . . ." FED. R. EVID. 301.

209. Recall that in *Thornbrough* the court held that upon a finding that the proffered reason was pretextual, the presumption was "resurrected." *See supra* notes 83-87 and accompanying text.

210. WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE § 300-03 (Supp. 1990).

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

212. *Id.* at 2759 (Souter, J., dissenting).

213. *Id.* The Eighth Circuit opinion stated: "Once plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." *St. Mary's*, 970 F.2d at 492.

214. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

215. Lanctot, *supra* note 78, at 119 (footnote omitted).

216. Lanctot, *supra* note 78, at 119. The majority opinion briefly addressed this argument in a footnote. Justice Scalia stated:

> The dissent's reading leaves *some* burden of persuasion on the plaintiff, to be sure: the burden of persuading the factfinder that the employer's explanation is not true. But it would be beneath contempt for this Court, in a unanimous opinion no less, to play such word-games with the concept of "leaving the burden of persuasion upon the plaintiff."

St. Mary's, 113 S. Ct. at 2753 n.7. It is interesting to note that Justice Scalia did not state in this footnote that this would be contrary to Rule 301. Regardless of whether the *Burdine* Court intended to engage in these "word-games," Justice Scalia's statement implicitly acknowledges that the Court in *Burdine* could have limited the plaintiff's burden to disproving the defendant's proffered reason without violating the prohibition of Rule 301. Of course, this contradicts the statement in the text immediately previous to this footnote, that Rule 301 precludes the dissent's interpretation of *Burdine* that the plaintiff should prevail merely by showing that the defendant's proffered reason is pretextual. *Id.* at 2753.

a party who is found to have lied in court has "never been construed to shift the burden of proof to that party."[217] For example, where a witness is shown to have testified falsely, a fact-finder may permissibly infer that witness should be distrusted on other matters.[218]

There is nothing in Rule 301's text or in its history which mandates the majority opinion's result. Actually, the Advisory Committee's Notes to Rule 301 show that the Rule should still have some effect on the trial even after the mandatory presumption was rebutted. The Senate Report accompanying the Rule states that the jury "may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption" even after the presumption has been rebutted.[219] Also, assuming that the effect of the enacted Rule was an adoption of Thayer's approach to presumptions,[220] the Thayer approach to presumptions does not proscribe any set method of how courts should proceed after the presumption has been rebutted.

The majority's reliance on Rule 301 after the presumption has been rebutted amounts to allowing Rule 301 to rule from the grave. When the presumption is rebutted and "drops from the case," Rule 301 should "drop from the case" as well. Rule 301 is silent as to what issues the fact-finder should address after the presumption has been rebutted. The Court in *St. Mary's*, if it had so chosen, could have held that the plaintiff was entitled to judgment where he had disproved the defendant's asserted reason for the employment action without violating Rule 301.[221] Thus, Rule 301 did not necessarily support the result in *St. Mary's* at all.

The Court's reliance on Rule 301 is particularly striking because it has completely ignored the Rule in other areas of law. For example, in *Basic, Inc. v. Levinson*,[222] the Court held that in private enforcement actions brought under

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217. Lanctot, *supra* note 78, at 120 (footnote omitted).

218. *See* 2 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.04 (3d ed. 1977) ("If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves."). Also, where evidence has been destroyed while in the possession of a party, an inference is created that the evidence would be harmful to that party. *See* 2 WIGMORE, *supra* note 157, § 291 ("The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor . . . ."). An analogous inference is created when a witness in the control of another party is missing at trial; the fact-finder may infer that the witness would have testified unfavorably to that party. *See* Graves v. United States, 150 U.S. 118, 121 (1893).

219. MOORE, *supra* note 188, § 301.01 (quoting S. REP. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7055-56).

220. *See* MOORE, *supra* note 188, § 301.01. *But see* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 802-03 (11th ed. 1988) (suggesting that the Report of the Senate Committee contained in the advisory note to Rule 301, *see supra* note 202, describes something other than a Thayer presumption).

221. Arguably, the Court may place the burden of persuasion on the defendant in Title VII cases despite Rule 301. The Court has stated that Rule 301 in no way affects federal courts' ability to shift the burden of persuasion onto the defendant. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). In *Transportation Management*, the Court stated that Rule 301 "merely defines the word 'presumption.' It in no way restricts the authority of a court . . . to change the customary burdens of persuasion in a manner that otherwise would be permissible." *Id.* at 403-04 n.7. Of course, this reading of Rule 301 begs the question of why it was adopted at all. For a critique on the futility of Rule 301, see Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions – An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. U. L. REV. 892 (1982).

222. 485 U.S. 224 (1988).

section 10(b) of the Securities Exchange Act of 1934, plaintiffs are entitled to a presumption that market prices were affected by the defendant's alleged misrepresentations.[223] This presumption not only shifts the burden of production, but also shifts the burden of *persuasion* onto the defendant to prove that its alleged misrepresentation did not affect market prices.[224]

Presumptions shift the burden of persuasion in school desegregation cases as well. Where a plaintiff can point to past state enforced discrimination within a school district, a presumption arises that present racial imbalances are attributable to past discriminatory practices.[225] This presumption shifts the burden of *persuasion* onto the school district to prove that the present imbalances are attributable to factors other than race discrimination.[226] As recently as 1992, in *Freeman v. Pitts*,[227] the Court continued to apply this presumption despite the apparent conflict with Rule 301.[228] Interestingly, Justice Scalia's opinion in *Freeman* failed to even mention Rule 301.[229]

VII. CONCLUSION

Title VII disparate treatment case law has been plagued with ambiguity since the Court first established the *McDonnell Douglas* framework. The *St. Mary's* holding, that rejection of the defendant's proferred explanation does not mandate a judgment for the plaintiff, narrows the ambiguity somewhat. However, as evidenced by the divergent case law which has already emerged, questions remain as to what burden an employment discrimination plaintiff must carry in order to survive a motion for summary judgment.[230] The proper reading of *St. Mary's* is that a plaintiff may survive a summary judgment motion by showing that there is a genuine issue of material fact as to the credibility of the defendant's explanation. Also, as the *Griffiths* Court pointed out, a plaintiff who has established a prima facie case by a preponderance of the evidence should in most cases be entitled to reach trial and cross-examine the defendant's witnesses before the court should consider a defendant's summary judgment motion.[231] Thus, despite the headlines to the

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223. *Id.* at 248-49.

224. *Id.*

225. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1970).

226. *Id.*

227. 112 S. Ct. 1430 (1992).

228. *Id.* at 1447. As this presumption was created several years before Rule 301 was adopted, and it applies only to school districts operating under a district court order, the argument that the rule should alter the presumption's effect is less strong. However, it is important to note that the presumption created in *Basic* was created over 10 years after Rule 301 was adopted and applies to defendants who are not under court order as are the defendants in the school desegregation cases.

229. *Id.* at 1450-54 (Scalia, J., concurring).

230. *See supra* notes 167-77 and accompanying text.

231. *See supra* notes 170-71 and accompanying text.

contrary,[232] the holding of *St. Mary's* will not impose an undue burden on employment discrimination plaintiffs. This conclusion is especially true given that Title VII cases may now be heard by juries. As one commentator has already pointed out, "[r]arely can it be envisioned that a jury . . . will hold for a lying defendant-employer."[233]

The effect of the *St. Mary's* Court's interpretation of Rule 301 is difficult to predict. Rule 301 has been much criticized and largely ignored since its adoption.[234] Moreover, as the discussion of the *Basic* and *Freeman* cases demonstrates, the Court has completely ignored the Rule in other contexts. While the *St. Mary's* Court unequivocally relied on the Rule for its holding, the discussion of the Rule was somewhat cursory when compared to the lengthy debate over the proper interpretation of *Burdine* and *McDonnell Douglas*. Arguably, this leads to the conclusion that the inclusion of Rule 301 was more of an after-the-fact addition to bolster the majority's argument, rather than a discussion of an issue which the Court necessarily considered, and found dispositive, before making its decision. Thus, it is doubtful that the majority opinion's "discovery" of Rule 301 in *St. Mary's* will upset the current operation of presumptions in other areas of law.

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232. *See, e.g.*, Timothy M. Phelps, *Harder to Prove Job Bias – Supreme Court Sets Tougher Standard*, NEWSDAY, June 26, 1993. Of course, *St. Mary's* will hamper plaintiffs in those circuits which made a finding of pretext synonymous with a finding of intentional discrimination. However, for plaintiffs in circuits which were granting defendants' summary judgment motions even where the plaintiffs could create a fact question as to pretext, the Court's ruling will undoubtedly help them prevail.

233. John J. Ross, *The Employment Law Year in Review* (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5163, 1993) (available on Westlaw).

234. *See supra* note 221.