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Reeves v. Sanderson Plumbing Products: The Emperor Has No Clothes - Pretext Plus Is Alive and Kicking.

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ESSAY

REEVES v. SANDERSON PLUMBING PRODUCTS: THE EMPEROR HAS NO CLOTHES—PRETEXT PLUS IS ALIVE AND KICKING

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I. INTRODUCTION

Before the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*,[1] the Fifth Circuit's en banc decision in *Rhodes v. Guiberson Oil Tools*[2] established the proper standard of causation in employment discrimination cases: The plaintiff had to prove his or her protected trait was the "determinative reason" for the challenged employment action.[3] Following *Reeves*, which purported to overrule *Rhodes* and the doctrine of pretext plus,[4] the Fifth Circuit struggled with and, in large part, skirted the causation question, leaving judges and practitioners to ponder whether determinative reason was still the proper standard of causation.

Despite this apparent confusion, the Fifth Circuit has largely reaffirmed not only its commitment to the *Rhodes* pretext-plus analysis, but also the determinative-reason standard for pretext cases.[5] Thus, to avoid summary judgment in these types of cases, employment plaintiffs are required to introduce sufficient evidence from which a reasonable jury could find: (1) the employer's "proffered legitimate, nondiscriminatory reasons" are false; and (2) discrimination was the determinative reason for the employer's actions.[6]

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1. 530 U.S. 133 (2000).

2. 75 F.3d 989 (5th Cir. 1996) (en banc).

3. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc) (establishing the proper standard of causation in employment discrimination suits), *abrogated by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); *see also, e.g.*, Scott v. Univ. of Miss., 148 F.3d 493, 504 (5th Cir. 1998) (quoting *Rhodes* in its discussion of the plaintiff's burden of proof), *abrogated on other grounds by* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Walton v. Bisco Indus., Inc., 119 F.3d 368, 370 (5th Cir. 1997) (reviewing a district court's summary judgment decision that the defendant did not discriminate on the basis of gender and race under Title VII, and citing to *Rhodes* for the evidentiary burden); LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449-51 (5th Cir. 1996) (discussing the two-pronged standard, as set forth in *Rhodes*, to avoid summary judgment in an employment discrimination context). As discussed later in this Essay, the causation element is the second requirement under the two-pronged test. *See LaPierre*, 86 F.3d at 449 (discussing the causation prong in the context of evidentiary burden).

4. *See* Ratliff v. City of Gainesville, 256 F.3d 355, 362 (5th Cir. 2001) (proclaiming that the Fifth Circuit "no longer adheres to its pretext-plus requirement in light of the Supreme Court's decision in *Reeves*"); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 223 n.4 (5th Cir. 2000) (stating that "insofar as *Rhodes* is inconsistent with *Reeves*[,] we follow *Reeves*").

5. *See* Vadie v. Miss. State Univ., 218 F.3d 365, 373 n.223 (5th Cir. 2000) (comparing *Reeves* with *Rhodes*, and holding that the two cases are "consistent" with each other).

6. *Rhodes*, 75 F.3d at 994; *see also Vadie*, 218 F.3d at 373 n.223 (equating *Reeves* with *Rhodes*); *cf.* Price v. Fed. Express Corp., 283 F.3d 715, 721 n.4 (5th Cir. 2002) (citing *Vadie*

Naturally, this affirmation has caused some consternation from the plaintiff's bar. In reality, however, this renewal of *Rhodes* is correct. This Essay analyzes the history of *Rhodes*, the Supreme Court's mistaken understanding of it, and why *Rhodes* should (and does) enjoy continued validity today.

II. A Brief History of Pretext Plus

A. *From* McDonnell Douglas *to Pretext Only and Pretext Plus*

Following the Supreme Court's *McDonnell Douglas Corp. v. Green*[7] decision, the federal courts of appeals divided into two camps concerning the *proof* required to support a finding of unlawful discrimination: pretext only and pretext plus.[8] Courts following

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for approval of the district court's two-part test, which is a fact-driven equivalent of the test laid out in *Rhodes*).

7. 411 U.S. 792 (1973). *McDonnell Douglas* was the genesis of the now well-known "burden-shifting" paradigm used to analyze employment discrimination cases at the summary judgment stage. Under this analysis, the plaintiff must first allege facts that, if proved, would establish a prima facie case of discrimination. *Id.* at 802. The existence of the plaintiff's prima facie case creates a presumption of discrimination, which shifts the burden to the defendant to produce evidence that—if believed by the trier of fact—would support a finding that the employer acted for legitimate, nondiscriminatory reasons. *Id.* Once the defendant has made such a production, the presumption created by the prima facie case vanishes, and the burden shifts back to the plaintiff to point to evidence that would tend to prove the employer's proffered reasons are false *and* that the real reason for the action was intentional discrimination. *Id.* at 804. Further, absent certain circumstances, such as a showing that the employer dissembled or fabricated the proffered reason (i.e., disbelief, in combination with a suspicion of mendacity, to paraphrase Justice Scalia) coupled with a strong prima facie case or other evidence of discriminatory intent, the discrediting of the employer's proffered nondiscriminatory reasons alone will not necessarily compel judgment for the plaintiff. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). This process is not unique to discrimination actions, but is rooted in the concept, purpose, and function of evidentiary presumptions, as set forth in Federal Rule of Evidence 301. *Id.*; Fed. R. Evid. 301. It should be noted that "pretext" means "a reason put forward to conceal one's true reason." Oxford American Dictionary 528 (1980). Thus, a pretext is a shield or cloak for the true reason for an action; however, a physical cloak reveals the thing concealed after unveiling, whereas a pretext, even if proven false, does not by that fact alone disclose the true reason. By extension, one cannot logically assume that evidence tending to cast doubt on the employer's proffered legitimate, nondiscriminatory reason is also evidence that the "true reason" was unlawful discrimination: the true reason might be some other reason. For example, an embarrassing, albeit legal, reason, would not subject the employer to liability. As a result, the Supreme Court has consistently held that throughout the employment discrimination action, the burden of proving discrimination *vel non* remains at all times with the plaintiff. *E.g.*, *St. Mary's*, 509 U.S. at 518 (referencing Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)).

8. *See generally* JuLyn M. McCarty & Michael J. Levy, *Focusing Title VII: The Supreme Court Continues the Battle Against Intentional Discrimination in* St. Mary's Honor

the pretext-only approach merely required plaintiffs to disprove the employer's proffered legitimate, nondiscriminatory reason.[9] The pretext-only courts[10] mistakenly interpreted *McDonnell Douglas* to mean that the plaintiff who disproves the employer's proffered legitimate, nondiscriminatory reason "should prevail, even if he or she has offered no direct evidence of discrimination."[11]

Meanwhile, the pretext-plus courts required more from a plaintiff. These courts, including the Fifth Circuit,[12] required plaintiffs *both* to disprove the employer's proffered legitimate, nondiscriminatory reason *and* to produce sufficient evidence from which a rea-

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Center v. Hicks, 14 HOFSTRA LAB. L.J. 177 (1996) (providing a thorough historical review of the pretext only and pretext plus doctrines).

9. *Id.* at 188; *see also, e.g.*, King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)) (stating, "*Burdine* makes it absolutely clear that a plaintiff who establishes a *prima facie* case of intentional discrimination and who discredits the defendants' rebuttal should prevail"), *abrogated by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

10. *See* JuLyn M. McCarty & Michael J. Levy, *Focusing Title VII: The Supreme Court Continues the Battle Against Intentional Discrimination in* St. Mary's Honor Center v. Hicks, 14 HOFSTRA LAB. L.J. 177, 189 n.99 (1996) (listing holdings from seven federal circuits that supported a pretext-only standard of proof). According to McCarty & Levy, the following courts adopted the "pretext-only" approach: (1) *Lopez v. Metropolitan Life Insurance Co.*, 930 F.2d 157 (2d Cir. 1991); (2) *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3d Cir. 1990); (3) *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054 (8th Cir. 1988); (4) *Pitre v. Western Electric Co.*, 843 F.2d 1262 (10th Cir. 1988); (5) *Perez v. Curcio*, 841 F.2d 255 (9th Cir. 1988); (6) *Tye v. Board of Education of Polaris Joint Vocational School District*, 811 F.2d 315 (6th Cir. 1987); (7) *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633 (5th Cir. 1985). *Id.*

11. *King*, 778 F.2d at 881.

12. *See* Bienkowski v. Am. Airlines, Inc., 851 F.2d 1503, 1508 n.6 (5th Cir. 1988) (expounding the Fifth Circuit's position, which is contrary to the Third Circuit's). The Fifth Circuit proclaimed:

> The Third Circuit has held . . . that if a plaintiff's proof consists of only a refutation of the employer's legitimate nondiscriminatory reason for discipline, e.g.[,] poor performance, plaintiff may obtain a favorable verdict of age discrimination. We disagree with this view, because both the ADEA statute and the Supreme Court require that discrimination be based on age. There must be some proof that age motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of age to one ensuring dismissals only for "just cause" to all people over [forty]. "Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent, for '[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons[']' in the first place. To hold otherwise would impose on the defendant an almost impossible burden of proving "absence of discriminatory motive."

Id. (third alteration in original) (citations omitted); *see also* Brooks v. Ashtabula County Welfare Dep't, 717 F.2d 263, 267 (6th Cir. 1983) (adopting the pretext-plus standard).

sonable jury could conclude that discrimination was the determinative reason for the employer's actions.[13] Most importantly, the Supreme Court confirmed the accuracy of the pretext-plus standard in *St. Mary's Honor Center v. Hicks*.[14]

B. St. Mary's Honor Center *and the Birth of Pretext Plus*

In *St. Mary's Honor Center*, after a bench trial, the district court found the employer's proffered legitimate, nondiscriminatory reasons were not the true reasons for the adverse employment action.[15] Despite this finding, the district court held the plaintiff failed to carry the ultimate burden of proving race was the determining factor behind the adverse employment action, and entered judgment for the employer.[16] Following its pretext-only approach, the Eighth Circuit set this determination aside, reasoning that once the plaintiff proved all the employer's submitted reasons for the employment action were pretextual, the plaintiff was "entitled to judgment as a matter of law."[17] The following excerpt from the Eighth Circuit's analysis explains the reasoning behind its decision:

> Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.[18]

Justice Scalia, writing for the majority of the Supreme Court, disagreed. First, he reasoned, the employer's proffer of legitimate, nondiscriminatory reasons *did* place it "in a 'better position than if it had remained silent.'"[19] For, as Justice Scalia noted, the defen-

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13. *See* JuLyn M. McCarty & Michael J. Levy, *Focusing Title VII: The Supreme Court Continues the Battle Against Intentional Discrimination in* St. Mary's Honor Center v. Hicks, 14 HOFSTRA LAB. L.J. 177, 189 (1996) (summarizing the pretext-plus standard).

14. 509 U.S. 502, 511 (1993) (rejecting a finding of discrimination based solely on defendant's inability to prove the veracity of its proffered reasons for an adverse employment action).

15. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993).

16. *Id.*

17. *Id.*

18. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993).

19. *St. Mary's Honor Ctr.*, 509 U.S. at 509 (quoting from the prior opinion in the Eighth Circuit).

dant's burden is one of production, not persuasion.[20] As such, the proffered reasons shifted the burden back to the plaintiff to prove the employer's proffered reasons were false, and the real reason for the challenged action was unlawful discrimination.[21] "The defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [him]' because of his race."[22]

Turning to the factfinder's role following this proffer by the employer, Justice Scalia wrote:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . .[23]

Consequently, according to the majority opinion, "the [c]ourt of [a]ppeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*.'"[24] Despite the Supreme Court's seeming approval, Justice Scalia ultimately criticized the Eighth Circuit's holding. According to Justice Scalia, the court of appeals improperly held that "rejection of the defendant's proffered reasons *compels* judgment for the plaintiff."[25] To Justice Scalia's disdain, the Eighth Circuit's rationale "disregards the fundamental principle of [Federal] Rule [of Evidence] 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"[26] As Justice Scalia artfully summarizes:

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20. *See id.* (noting that a defendant's initial burden is met merely by producing a legitimate reason for the plaintiff's termination).

21. *See id.* (explaining the plaintiff's burden of persuasion when confronted with an employer's proffered nondiscriminatory reasons for termination).

22. *Id.* at 511 (alteration in original) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

23. *Id.*

24. *St. Mary's Honor Ctr.*, 509 U.S. at 511 (third alteration in original) (quoting Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 493 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993)).

25. *Id.*

26. *Id.*

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.* We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.[27]

Thus, the Court recognized that rejecting the employer's proffered reasons *may*, but does not *require*, the factfinder to determine the employer unlawfully discriminated. However, simply *disbelieving* the proffered reason is not enough to hold the employer liable for unlawful discrimination. In the Court's own words, "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."[28] While the evidence disproving the employer's proffered legitimate reason, standing alone, *may* be sufficient to allow the factfinder to infer the employer unlawfully discriminated, that evidence must be probative of the ultimate issue of illegal discrimination—"the ultimate question [is] discrimination *vel non.*"[29]

Therefore, the Supreme Court in *St. Mary's Honor Center* adopted what came to be known as the "pretext-plus" analysis as the law of the land. According to *St. Mary's Honor Center*, to succeed in proving unlawful discrimination, the employment plaintiff must disprove the employer's legitimate, nondiscriminatory reasons, while simultaneously persuading the trier of fact that unlawful discrimination was the real reason for the challenged employment action.

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27. *Id.* at 514-15.

28. *Id.* at 515.

29. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993) (alteration in original) (quoting Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)).

III. THE FIFTH CIRCUIT STANDARD—TRUE TO *ST. MARY'S HONOR CENTER*

With *St. Mary's Honor Center* having decided the *evidentiary* standard of proof, the Fifth Circuit set about addressing the question of *causation*. Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act all prohibit employment decisions made "because of" the relevant protected trait.[30] Although improperly credited with establishing pretext plus,[31] *Rhodes v. Guiberson Oil Tools* merely sought to answer the question: "What does 'because of' mean?"[32]

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30. *See* Age Discrimination in Employment Act of 1967 § 4(a)-(c), 29 U.S.C. § 623(a)-(c) (2000) (prohibiting discrimination "because of" someone's age); Civil Rights Act of 1964 § 703(a)-(c), 42 U.S.C. § 2000e-2(a)-(c) (2000) (prohibiting discrimination "because of such individual's race, color, religion, sex, or national origin"); Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (2000) (providing the general rule against discrimination and stating that discrimination "because of the disability of [an] individual" is prohibited); *see also* Bienkowski v. Am. Airlines, Inc., 851 F.2d 1503, 1508 n.6 (5th Cir. 1988) (discussing the state of the law under the Age Discrimination in Employment Act as one of "preventing discrimination *because of* age" (emphasis added)).

31. *Cf.* Ratliff v. City of Gainesville, 256 F.3d 355, 362 (5th Cir. 2001) (discussing the employer's reliance on *Rhodes* for the Fifth Circuit's strict adherence to the pretext-plus standard). As noted, in actuality, the Fifth Circuit adopted the pretext-plus standard in *Bienkowski v. American Airlines, Inc. Compare Bienkowski*, 851 F.2d at 1508 n.6 (5th Cir. 1988) (adopting the pretext-plus standard in the Fifth Circuit), *with* Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 989 (5th Cir. 1996) (en banc) (addressing the question of causation in employment discrimination suits—eight years after *Bienkowski*), *abrogated by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000). Ironically, only five Fifth Circuit cases even *mention* the term "pretext plus." *See* Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 574 (5th Cir. 2004) (mentioning *Reeves* and *Ratliff* in its discussion of pretext plus); Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 n.3 (5th Cir. 2002) (noting the rejection of the "pretext-plus" standard in *Reeves*); *Ratliff*, 256 F.3d at 359 (stating that the appellant's contention that the trial judge erred in giving the jury pretext-plus instructions instead of permissive pretext-only instructions); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 223 (5th Cir. 2000) (stating that the "pretext-plus" requirement is contrary to the *Reeves* holding); Marcantel v. La. Dep't of Transp. & Dev., 37 F.3d 197, 199 n.15 (5th Cir. 1994) (citing 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)). Moreover, of these five cases, the Fifth Circuit decided only one, *Marcantel*, before *Reeves*.

32. *Compare Rhodes*, 75 F.3d at 993-94 (addressing the issue under a sufficiency-of-the-evidence analysis and determining that the evidence must show that "age was a determinative *reason* for the employment decision" (emphasis added)), *with* WEBSTER'S NEW WORLD DICTIONARY 123 (3d College ed. 1988) (defining "because of" to mean "by *reason* of" (emphasis added)).

In *Rhodes*, the employer discharged the plaintiff, who at the time was fifty-six years old.[33] In a severance report, the employer stated it had discharged him because of a reduction in work force.[34] Within two months, however, the employer hired a forty-two-year-old salesman to do the same job.[35] The plaintiff sued, alleging a violation of the Age Discrimination in Employment Act.[36] The jury found the employer terminated the plaintiff because of his age.[37] On appeal, the employer challenged the sufficiency of the evidence, and a divided panel of the Fifth Circuit agreed that the evidence was insufficient to support the jury finding.[38] Accordingly, the court reversed and rendered judgment for the defendant.[39]

Subsequent to its holding, the Fifth Circuit reconsidered the case en banc to determine "the sufficiency question in light of the Supreme Court's [then] recent decision in *St. Mary's Honor Center v. Hicks*."[40] The Fifth Circuit centered its reconsideration around the Supreme Court's statement in *St. Mary's Honor Center* that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) . . . together with the elements of the prima facie case," *may*, but do not compel, a finding of "intentional discrimination."[41] Accordingly, the *Rhodes* court sought to address "whether the [Supreme] Court intended that in all such cases in which an inference of discrimination is permitted a verdict of discrimination is necessarily supported by sufficient evidence."[42]

Concluding there was no "categorical answer," the Fifth Circuit stated, "[t]he answer lies in our traditional sufficiency-of-the-evi-

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33. *Rhodes*, 75 F.3d at 992.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *See Rhodes*, 75 F.3d at 992 (reexamining the *Rhodes* case en banc and summarizing its prior disposition in the Fifth Circuit).

39. *Id.*

40. *Id.*

41. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); *see also Rhodes*, 75 F.3d at 993 (finding that when the evidence is sufficient to permit an inference of discrimination the evidence will "ordinarily," but not always, be adequate enough to support a verdict of discrimination).

42. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc).

dence analysis."[43] Testing jury verdicts and motions for summary judgment for sufficiency of the evidence under *Boeing Co. v. Shipman*,[44] the court held, "[t]here must be a conflict in substantial evidence to create a jury question."[45] The court defined "substantial evidence" as "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions."[46]

As a result of the *Boeing* standard, the court noted: While the protected trait (in this case, age) "need not be the sole reason for the adverse employment decision . . . 'a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in . . . [the employer's decisionmaking process] and had a determinative influence on the outcome.'"[47] Ultimately, the central holding of *Rhodes* followed:

> To sustain a finding of discrimination, circumstantial evidence must be such as to allow a rational factfinder to make a reasonable inference that age was a determinative reason for the employment decision. The factfinder may rely on *all* the evidence in the record to draw this inference of discrimination. In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will *often*, *perhaps usually*, permit a finding of discrimination without additional evidence. Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.[48]

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43. *Id.*

44. 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc) (defining substantial evidence as evidence that might cause reasonable persons to reach different conclusions and holding that a conflict in substantial evidence is necessary to create a question for the jury), *overruled en banc on other grounds by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997).

45. *Rhodes*, 75 F.3d at 993 (alteration in the original) (quoting Boeing Co. v. Shipman, 411 F.2d 365, 375 (5th Cir. 1969) (en banc)).

46. *Id.* (quoting *Boeing*, 411 F.2d at 374).

47. *Id.* at 994 (alteration and second omission in the original) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

48. *Id.* (emphasis added).

Additionally, the court commented that the amount of evidence necessary to sustain an inference of discrimination would vary from case to case.[49] In this regard, the court instructed plaintiffs to provide "substantial evidence" not only to rebut the employer's proffered reasons, but also for the jury to infer discriminatory intent.[50] According to the court, if the plaintiff does not meet this evidentiary burden, "a jury cannot reasonably infer discriminatory intent."[51] As a result, *Rhodes* not only announced the Fifth Circuit's standard of causation, but also set forth the evidentiary standard for pretext-plus cases following *St. Mary's Honor Center.*

IV. ALONG CAME *REEVES*—*RHODES* GETS A BAD RAP

Much has been made of *Reeves*'s impact on the employment law landscape. As a result of the *Reeves* decision, the Supreme Court has been characterized as having rejected pretext plus,[52] but in reality the Supreme Court merely reaffirmed it and, by implication, reaffirmed *Rhodes*. Briefly, the *Reeves* Court held, "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[53] More significant, however, is the following excerpt of the Court's opinion:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima fa-

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49. *Id.*

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

51. *Id.*

52. Roger T. Brice et al., *Motions for Summary Judgment After* Reeves v. Sanderson Plumbing, *in* 31ST ANN. INST. ON EMP. L., vol. 1, at 329, 334 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-680, 2002); Marcia L. McCormick, *Truth or Consequences: Why the Rejection of the Pretext Plus Approach to Employment Discrimination Cases in* Reeves v. Sanderson Plumbing *Establishes the Better Legal Rule*, 21 N. ILL. U. L. REV. 355, 377 (2001); *see also* James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999-2000 Term,* 16 LAB. LAW. 151, 191 (2000) ("The Court dismissed the pretext-plus standard as 'misconceiv[ing] the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.'" (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146 (2000))). This conclusion, which took the quoted passage from *Reeves* entirely out of context, clearly misconceived the fact that the Court was simply taking the Fifth Circuit panel to task for failing to consider all the evidence in the record while making its decision.

53. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

> cie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision . . . or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.[54]

While overturning the Fifth Circuit's panel decision in *Reeves*, the Court wrote that the panel wrongly assumed "that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination."[55] Referring to its decision in *St. Mary's Honor Center*, the *Reeves* Court labeled the Fifth Circuit's assumption a misconception of "the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence."[56] From here, the Supreme Court in *Reeves* merely reiterated what it had already made clear in *St. Mary's Honor Center*. The Court stated:

> There we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." In other words, "[i]t is not enough . . . to *dis* believe [sic] the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."[57]

Subsequently, the *Reeves* Court further explained the *St. Mary's Honor Center* holding by adding, "[W]e reasoned that it is *permis-*

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54. *Id.* Or, as more strongly stated in *St. Mary's*, "[I]t is a mockery of justice to say that if the jury believes the reason [the defendant] set forth is probably not the 'true' one, all the other utterly compelling evidence that discrimination was *not* the reason will then be excluded from the jury's consideration." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514 n.5 (1993).

55. *Reeves*, 530 U.S. at 146.

56. *Id.*

57. *Id.* at 146-47 (first alteration and omissions in original) (citations omitted) (quoting *St. Mary's*, 509 U.S. at 519, 524).

sible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."[58]

In sum, while many mistakenly consider *Reeves* to reject the pretext-plus analysis—consequently overruling *Rhodes*—in actuality, *Reeves* was merely a Supreme Court disapproval of the Fifth Circuit panel's evidentiary analysis.[59] Pretext plus, as originally espoused in *St. Mary's Honor Center* and wrongfully credited to *Rhodes* for its establishment in the Fifth Circuit,[60] has never required the employee to produce two sets of evidence—one set to disprove the employer's proffered reason, and another, separate set to prove the real or true reason for the employer's actions was discrimination. Pretext plus merely requires proof of unlawful discrimination.

V. *REEVES* UNMASKED—THE RESURGENCE OF *RHODES* AND PRETEXT PLUS

Despite commentators hailing *Reeves* as having dispatched pretext plus,[61] the Court's creation of the doctrine in *St. Mary's Honor Center* means it only misstated the meaning of pretext plus in *Reeves*, rather than discarded it.[62] The Supreme Court's *Reeves* de-

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58. *Id.* at 147.

59. *See id.* at 153-54 (holding that because petitioner established a prima facie case of discrimination, introduced sufficient evidence to refute respondent's explanation, and provided evidence of age-based discrimination, the jury had sufficient evidence to find for the employee). In fact, much of the misunderstanding of *Reeves*'s effect on *Rhodes* may come from the synopsis of *Rhodes* and *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc), where the *Reeves* Court stated that both courts held a plaintiff must introduce ample evidence for a jury to find that the employer's reason for the complained-of action was false, and that the true reason was discrimination. *See Reeves*, 530 U.S. at 140 (claiming that the Supreme Court granted certiorari to resolve a split in the courts of appeal, and equating *Rhodes* with *Fisher* in its citation). In reality, that is *exactly* what both *St. Mary's* and *Reeves* hold.

60. *See supra* note 31 (discussing the establishment of pretext-plus in the Fifth Circuit).

61. *See supra* note 52 (citing commentators).

62. *See Reeves*, 530 U.S. at 140 (proclaiming that the Supreme Court granted certiorari to address a split in the courts of appeal concerning "whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination"). Whether the Court's poorly written opinion truly resolved this conflict is questionable at best, because it fails to accurately state the nature of the circuit conflict. Certainly, the opinion did not outright reject the notion that showing the falsity of an employer's proffered reasons automatically results in victory for the discrimination plaintiff. In that sense, at least, the Court failed to resolve

cision was merely a disapproval of one panel's decision—not an entire doctrine.[63] *Reeves*'s central teaching is identical to Justice Scalia's majority opinion in *St. Mary's Honor Center*, and the Fifth Circuit's en banc *Rhodes* decision is fully in tow with both: The jury may, but is not required to, infer unlawful discrimination from the evidence disproving the veracity of the employer's proffered legitimate, nondiscriminatory reason.

Immediately following in *Reeves*'s wake, most Fifth Circuit panels—at least those addressing either the plaintiff's evidentiary burden or the standard of causation—avoided citing *Rhodes* for any proposition.[64] This initial distancing from *Rhodes* gave the appearance of calling into question *Rhodes*'s determinative-reason standard of causation and, ostensibly, *Rhodes*'s validity for any material proposition of employment law.

Nevertheless, allegiance to *Rhodes* and pretext plus returned not long after *Reeves*.[65] As the Fifth Circuit quickly recognized, "*Rhodes* is consistent with *Reeves* and continues to be the governing standard" in the Fifth Circuit.[66] Again, this recognition of *Rhodes*'s validity is because "discrimination suits still require evi-

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any conflict at all. The death of pretext plus would result only from a holding that falsity of the proffered reason in *every* case hands the decision to the plaintiff. Justice O'Connor's desultory opinion for the Court failed to deliver any such *coup de grace*. Indeed, as well known and acknowledged by the Court, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148.

63. *Id.* at 146 (disapproving the Fifth Circuit panel's decision to dismiss evidence the plaintiff adduced in support of his prima facie case). To the Supreme Court's disapproval, "the [c]ourt of [a]ppeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision." *Id.* (citing Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 693-94 (5th Cir. 1999)).

64. *See* Blow v. City of San Antonio, 236 F.3d 293 (5th Cir. 2001) (failing to cite *Rhodes* as support for the court's opinion); Evans v. City of Bishop, 238 F.3d 586, 590-92 (5th Cir. 2000) (choosing not to use *Rhodes* in its discussion of a plaintiff's evidentiary burden for a suit brought under Title VII and the Age Discrimination in Employment Act); Lacy v. Sitel Corp., 227 F.3d 290, 293-94 (5th Cir. 2000) (addressing the standard of causation without citing *Rhodes* as support for the court's opinion).

65. *See* Brown v. Kinney Shoe Corp., 237 F.3d 556, 564 (5th Cir. 2001) (citing *Rhodes* for governing standards).

66. Vadie v. Miss. State Univ., 218 F.3d 365, 373 n.23 (5th Cir. 2000). Indeed, in *Vadie,* the Fifth Circuit concluded that the real problem the Supreme Court had with its panel decision in *Reeves* was that it "was simply inconsistent with [its] en banc decision in *Rhodes*." *Id.*

dence of discrimination."[67] Thus, merely disproving the employer's proffered legitimate, nondiscriminatory reason (i.e., pretext only) is not enough to sustain a jury verdict for the employment plaintiff. Rather, the employee must produce sufficient evidence from which a reasonable jury could also conclude that intentional discrimination was the reason for the employer's actions (i.e., pretext plus).

Ratliff v. City of Gainesville[68] and *Kanida v. Gulf Coast Medical Personnel, LP*[69] further illustrate the artificial conundrum created by *Reeves*. In *Ratliff*, an age-discrimination case, the Fifth Circuit addressed the district court's refusal to give a permissive inference instruction as part of the jury charge. The plaintiff sought, and the district court refused, an instruction that read: "If the Plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you may presume that the employer was motivated by age discrimination."[70] The plaintiff also challenged the district court's instruction that, before the jury could find for the plaintiff, the plaintiff must prove that (1) the defendant's proffered reasons were false, and (2) "a determining or motivating factor for his non-hire was his age."[71]

Relying on *Reeves*, the Fifth Circuit held the district court erred by not giving the permissive inference instruction.[72] Other than finding the plaintiff's argument "persuasive, in light of the Supreme Court's admonition in *Reeves*,"[73] the court provided virtually no discussion of its rationale. The court also held the district court erred in giving what the plaintiff referred to as a "'pretext[-

67. Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000); *see also* Price v. Fed. Express Corp., 283 F.3d 715, 721 n.4 (5th Cir. 2002) (stating, "*Reeves* does not relieve a plaintiff of his burden to present evidence that will permit a rational factfinder to infer intentional discrimination"); Raggs v. Miss. Power & Light Co., 278 F.3d 463, 468 (5th Cir. 2002) (declaring, "evidence of pretext is not enough where the plaintiff has created only a weak issue of fact as to whether the employer's reason is untrue, and there is 'abundant and uncontroverted independent evidence that no discrimination [ ] occurred'" (alteration in original) (quoting *Reeves*, 530 U.S. at 148)).

68. 256 F.3d 355 (5th Cir. 2001).

69. 363 F.3d 568 (5th Cir. 2004).

70. Ratliff v. City of Gainesville, 256 F.3d 355, 359 (5th Cir. 2001) (quoting the trial court's jury instructions).

71. *Id.* (taken from an excerpt of the trial court's jury charge).

72. *See id.* at 360 (finding persuasive the plaintiff's arguments that the trial court erred).

73. *Id.*

]plus' instruction."[74] Although it noted "*Rhodes* was found to be generally consistent with *Reeves*,"[75] the court went on to announce it "no longer adheres to its pretext-plus requirement in light of the Supreme Court's decision in *Reeves*."[76] Again, other than providing string cites, the court did little to explain how the instruction given deviated from *Reeves*, *Rhodes*, or *St. Mary's Honor Center.*

Recently, in *Kanida*, a Fair Labor Standards Act case, the Fifth Circuit again addressed the district court's failure to give the permissive-inference instruction that the *Ratliff* court held mandatory.[77] The *Kanida* court chose to highlight the fact that this type of instruction is "only an evidentiary instruction, and to prevail employees must prove that the employer's actions were taken because of the prohibited motivation."[78] However, because *Ratliff* bound the panel, the *Kanida* court grudgingly held the district court erred in failing to give the permissive inference instruction.[79] Nonetheless, unlike its sister panel, the *Kanida* court found that the failure to give the instruction amounted to harmless error.[80]

While expressing its dissatisfaction with *Ratliff*'s required permissive inference instruction and urging en banc reconsideration of its holding, the *Kanida* court correctly noted: "*Reeves* did not change what a plaintiff must ultimately prove to prevail on their claim—that the adverse employment action was motivated by ac-

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74. *See id.* at 359, 361-62 ("[B]ecause the jury instructions failed to conform to *Reeves* or to our precedent post-*Reeves*, we find that the district court erred"). Interestingly, the court addressed and agreed with the plaintiff's argument that the district court erred by not providing a pretext-plus instruction, but refused to recognize that this instruction was a "pretext-plus instruction" or that *Rhodes* was still good law. *Id.*

75. *Ratliff*, 256 F.3d at 362 (referencing *Vadie*'s approval of *Rhodes*).

76. *Id.*

77. *See* Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 573 (5th Cir. 2004) (stating the appellant's argument).

78. *Id.*

79. *See id.* at 574-77 (discussing the court's commitment to precedence, yet expressing the court's dissatisfaction with the precedent (i.e., *Ratliff*)). The court further held as harmless error the lower court's failure to give the permissive inference standard. *See id.* at 578 (noting that it was unnecessary because the improper "pretext-plus" instruction had provided reversible error).

80. *Compare Ratliff*, 256 F.3d at 364 (holding that the district court erred by failing to give the inference instruction, and reversing the case in part), *with Kanida*, 363 F.3d at 578-79 (finding that the district court's failure to give the jury instruction "does not rise to the level of reversible error in this case").

tual discriminatory intent."[81] Thus, district courts should "instruct the jury to consider the ultimate question of whether a defendant took the adverse employment action against a plaintiff because of her protected status."[82] Most importantly, the *Kanida* panel recognized the ultimate teaching of both *St. Mary's Honor Center* and *Reeves*: "To prevail, a plaintiff must show actual discriminatory intent; successfully rebutting the defendant's asserted justifications may not itself be sufficient."[83] That conclusion is *precisely* what the real pretext plus stands for—a plaintiff must disprove the defendant's proffered reason (i.e., pretext) while still showing the real reason was discrimination (i.e., plus).

VI. Determinative Reason Reaffirmed As Proper Causation Standard

As for the proper standard of causation, it was not until *Rachid v. Jack in the Box, Inc.*,[84] the Fifth Circuit's first post-*Desert Palace, Inc. v. Costa*[85] decision, that the court reaffirmed *Rhodes*'s determinative-reason standard of causation.[86] According to the court, "[U]nder the pretext prong of the *McDonnell Douglas* analysis, the plaintiff aims to prove that discriminatory motive was the determinative basis for his termination, [while] under the mixed-motives framework the plaintiff can recover by demonstrating that the protected characteristic . . . was a motivating factor in the employment decision."[87] Once again, determinative reason was solidly confirmed as the proper standard of causation in pretext employment cases.

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81. *Kanida*, 363 F.3d at 575 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)).

82. *Id.* at 576.

83. *Id.* (referencing *Reeves*, 530 U.S. at 141).

84. 376 F.3d 305 (5th Cir. 2004).

85. 539 U.S. 90 (2003). In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the plaintiff alleged intentional gender discrimination under Title VII after she was fired from her job as a warehouse worker where she was the only female worker. *Desert Palace*, 539 U.S. at 95. The Court affirmed the lower court's holding that the plaintiff was not required to show direct evidence of the alleged discrimination. *Id.* at 102. Instead, the Court held that Title VII plaintiffs can prove employment discrimination in mixed-motive cases—where the defendant had both an impermissible and a permissible motive for its action—circumstantially, without ever presenting direct evidence of intentional discrimination. *Id.*

86. Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004).

87. *Id.* at 310.

More recent decisions also confirm that pretext cases are treated differently from a causation standpoint than mixed-motive cases. In *Machinchick v. PB Power, Inc.*,[88] the court discussed the distinction between pretext and mixed-motive cases, as well as the attendant differing causation standards.[89] Under mixed-motive analysis, "a plaintiff need only prove that discriminatory animus was a 'motivating factor' in an adverse employment decision."[90] To the contrary, when the plaintiff proceeds with a pretext case (i.e., alleging that the defendant's reasons are a pretext for illegal discrimination), he or she must produce evidence that "discriminatory animus was the 'determinative basis for his termination.'"[91]

In another recent pronouncement, *Septimus v. University of Houston*,[92] the Fifth Circuit discussed causation standards in retaliation cases.[93] The Fifth Circuit has historically analyzed retaliation cases under a completely different causation standard—to prove causation, the plaintiff must show that, but for the protected activity, he or she would not have experienced the adverse employment action.[94] While discussing this standard, however, the court noted that "[b]ecause this is a circumstantial evidence 'pretext' case, the standard of proof applied in . . . other mixed-motive cases is not controlling."[95] Clearly, at least in the Fifth Circuit's view, pretext cases have a different causation standard, and this standard is "a lesser burden of proof."[96]

VII. CONCLUSION

Reeves is simply not the watershed case many have proclaimed (and still proclaim) it to be. *Reeves* merely disapproved of one cir-

88. 398 F.3d 345 (5th Cir. 2005).
89. Machinchick v. PB Power, Inc., 398 F.3d 345 (5th Cir. 2005).
90. *Id.* at 351-52 (quoting *Rachid*, 376 F.3d at 309-10).
91. *Id.* at 351 (citing *Rachid*, 376 F.3d at 310).
92. 399 F.3d 601 (5th Cir. 2005).
93. Septimus v. Univ. of Houston, 399 F.3d 601, 607-09 (5th Cir. 2005).
94. *Id.* at 608.
95. *Id.*
96. *Id.* (citing Pineda v. United Parcel Serv., Inc., 360 F.3d 483, 488, 490 n.6 (5th Cir. 2004)). The authors have previously noted the probable reasons for this differing treatment. *See* Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Discrimination Cases to Motivating Factor*, 36 ST. MARY'S L.J. 395, 405 (2005) (discussing the rationale behind the Fifth Circuit's two different standards).

cuit court panel's review of the sufficiency of the evidence supporting a jury's verdict in a single case. Viewed in this light, the holding added very little to the body of law in discrimination cases. In reality, *Reeves* is merely a recitation of *St. Mary's Honor Center*, which *Rhodes* faithfully followed. As such, *Rhodes* not only remains good law in the Fifth Circuit, but its determinative-reason standard of causation in discrimination cases also continues to be valid. The Fifth Circuit, through *Rachid*, has now reconfirmed both concepts. The fact that not a single Fifth Circuit panel convened between *Reeves* and *Rachid* was able (or willing) to clearly re-articulate these standards is, perhaps, testament to the Fifth Circuit's approval of *Rhodes* in the first place. As such, *Rhodes*, and its articulation of the *St. Mary's Honor Center* concept of "pretext plus," continues as good law.[97]

In light of this analysis, the only thing that can truly be said of *Reeves* is that it was poorly written. *Reeves* does not articulate any new theory of law and certainly offers little to clarify any existing law, much less resolve any conflict among the circuits. Notwithstanding *Reeves*'s alleged overruling of pretext plus, the Court completely bungled the concept of pretext plus and, by association, clearly established employment law concerning the plaintiff's burden of proof. Therefore, as implicitly recognized by subsequent Fifth Circuit opinions, the Court's confusing opinion in *Reeves* adds nothing to the fabric of employment law.

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97. Perhaps part of the difficulty with "pretext plus" is its name. "Pretext plus," as the Court explained in *St. Mary's* and *Rhodes*, does not mean the plaintiff must show the employer's proffered reason is pretext, *and then* produce separate evidence of discriminatory intent. It merely means that, after the pretext step in the *McDonnell Douglas* analysis, there must be sufficient evidence in the record from which a reasonable jury could find that the employer's proffered reason is pretextual, *and* that the real reason for the adverse employment action was discrimination. Indeed, *Reeves* recognizes as much:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. . . . For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).