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DUBIOUS PROTECTED CLASS DISTINCTIONS: ELIMINATING THE ROLE OF REPLACEMENT IDENTITY IN A DISCHARGED TITLE VII PLAINTIFF'S CASE

Abstract: Title VII prohibits employers from discharging an employee on the basis of the individual's race, color, religion, sex, or national origin. In cases involving an allegation of discriminatory discharge, the federal circuit courts of appeals have disagreed on whether to consider in the prima facie case the identity of the person the defendant employer has hired to replace the plaintiff. The majority of these courts have held that courts should not require the plaintiff to prove that a person outside of the plaintiff's protected class replaced the plaintiff in order to establish a prima facie case for employment discrimination. This Note argues that, because the underlying policy of Title VII is to protect individuals, not classes of individuals, from employment discrimination, consideration of replacement identity has no valid place in a discriminatory discharge case brought under Title VII.

INTRODUCTION

Recognizing the importance and centrality of employment in Americans' lives and livelihood, Congress passed Title VII as part of the Civil Rights Act of 1964.[1] Title VII prohibits employers from failing or refusing to hire any individual, discharging any employee, or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of the individual's race, color, religion, sex, or national origin.[2]

A Title VII violation generally falls under one of two categories: disparate impact or disparate treatment.[3] Disparate impact cases involve claims that an employer's facially neutral policy disproportionately affects employees within a protected group and cannot be justified by a business necessity.[4] In contrast, disparate treatment claims allege that the employer has intentionally discriminated

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[1] *See* 42 U.S.C. § 2000e-2(a) (2000).

[2] *See id.*

[3] *See, e.g.*, Cumpiano v. Banco Santander P.R., 902 F.2d 148, 156 (1st Cir. 1990).

[4] *See id.*

against individual employees based on race, color, religion, sex, or national origin.[5]

Disparate treatment cases may be further broken down into cases that involve failure to hire, discriminatory discharge cases, and cases that involve the terms, conditions, and privileges of employment.[6] In cases involving an allegation of discriminatory discharge, the federal circuit courts of appeals have disagreed on whether to consider in the prima facie case the identity of the person the defendant employer has hired to replace the plaintiff.[7] Some courts have required the plaintiff to show that someone who is not a member of the plaintiff's protected class replaced the plaintiff as an element of the prima facie case.[8]

Thus, in these courts, if the plaintiff is an outspoken Korean-American woman alleging that her employer discharged her based on her race, the court may rule against her on a summary judgment motion if her employer subsequently replaced her with a Japanese-American employee, because she has failed to establish a required element of her prima facie case.[9] Alternatively, if the same plaintiff alleged gender discrimination, the employer may escape liability by hiring a female employee whom it perceived as more demure.[10]

Other courts have not strictly required this showing of replacement outside the plaintiff's protected class but have nevertheless considered the identity of the plaintiff's replacement.[11] Some courts consider replacement identity to be a factor in the prima facie case while others consider it in the plaintiff's ultimate burden of persuading the trier of fact that the employer had a discriminatory purpose in discharging the plaintiff.[12]

The majority of the federal circuit courts of appeals have held that courts should not require the plaintiff to prove that a person outside the plaintiff's protected class replaced the plaintiff in order to

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[5] *See id.*

[6] *See* 42 U.S.C. § 2000e-2(a)(1).

[7] *See* Elizabeth Clack-Freeman, *Title VII and Plaintiff's Replacement: A Prima Facie Consideration?*, 50 BAYLOR L. REV. 463, 469 (1998).

[8] *See, e.g.*, Brown v. McLean, 159 F.3d 898, 905 (4th Cir. 1998); Talley v. Bravo Pitino Rest., Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995).

[9] *See Brown*, 159 F.3d at 905; *Talley*, 61 F.3d at 1246.

[10] *See Brown*, 159 F.3d at 905; *Talley*, 61 F.3d at 1246.

[11] *See, e.g.*, Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1556 n.12 (11th Cir. 1995); Walker v. St. Anthony's Med. Ctr., 881 F.2d 554, 558 (8th Cir. 1989); Simens v. Reno, 960 F. Supp. 6, 8, 10 (D.D.C. 1997).

[12] *See, e.g.*, Kendrick v. Penske Transport. Servs., Inc., 220 F.3d 1220, 1228–29 (10th Cir. 2000); *St. Anthony's*, 881 F.2d at 558.

establish a prima facie case for employment discrimination.[13] This Note argues that consideration of replacement identity has no valid place in a discriminatory discharge case brought under Title VII.[14]

Part I of this Note outlines the evidentiary framework and the elements of the prima facie case that the United States Supreme Court established for Title VII cases in 1973 in *McDonnell Douglas Corp. v. Green*.[15] Part II discusses the various federal circuit courts' treatments of replacement identity, including those that have imposed a strict replacement requirement for the plaintiff's prima facie case.[16] Part II also includes a discussion of the federal circuit courts of appeals that state a replacement requirement but do not treat the issue as dispositive.[17]

In addition, Part II discusses the federal circuit courts of appeals that do not strictly require replacement outside the protected class but make replacement identity a consideration, either as a factor in the prima facie case or as a factor in the plaintiff's ultimate burden of persuasion.[18] Finally, this Part discusses the cases in which the federal circuit courts of appeals have found the replacement requirement to be inconsistent with the policies and purposes of Title VII because Title VII seeks to protect individuals, rather than classes of persons, from employment discrimination.[19]

Part III focuses on the United States Supreme Court's sparse treatment of the replacement requirement, including its role in the age discrimination context.[20] Finally, Part IV contends that the same arguments that support the elimination of the replacement requirement in the prima facie case also support its removal from consideration in the plaintiff's ultimate burden of persuasion.[21] This Part also explores the importance of focusing the debate surrounding the discharged plaintiff's replacement on the ultimate inquiry of discrimina-

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[13] *See, e.g.*, *Kendrick*, 220 F.3d at 1228–29; Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 353 (3d Cir. 1999); *St. Anthony's*, 881 F.2d at 558; *see also* Clack-Freeman, *supra* note 7, at 470.

[14] *See infra* notes 184–229 and accompanying text.

[15] *See* 411 U.S. 792, 802–05 (1973); *infra* notes 23–31 and accompanying text.

[16] *See infra* notes 32–155 and accompanying text.

[17] *See infra* notes 52–71 and accompanying text.

[18] *See infra* notes 72–105 and accompanying text.

[19] *See infra* notes 106–155 and accompanying text.

[20] *See infra* notes 156–183 and accompanying text.

[21] *See infra* notes 184–229 and accompanying text.

tory motive, as well as the reasons why protected class categories are misleading from an evidentiary standpoint.[22]

I. The Elements of Employment Discrimination As Set Forth In *McDonnell Douglas Corp. v. Green*

A. *Title VII Evidentiary Framework*

An employee alleging employer discrimination on an impermissible basis often has no direct evidence to prove it.[23] Recognizing this difficulty, in 1973, in *McDonnell Douglas Corp. v. Green*, the United States Supreme Court established a three-step, burden-shifting evidentiary framework for employment discrimination cases brought under Title VII.[24]

First, the plaintiff must establish a prima facie case by showing: (1) membership in a racial minority; (2) application and qualification for a job for which the employer was seeking applicants; (3) rejection despite qualifications; and (4) continuation by employer to seek applicants with similar qualifications after rejecting the plaintiff.[25]

Second, if the plaintiff shows all four elements, the burden shifts to the defendant employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[26] The defendant need not prove the truth of its claim at this stage; it must merely state a permissible reason for the plaintiff's rejection or discharge.[27] Third, once the employer has stated a reason, the burden then shifts back to the plaintiff to prove that the employer's stated reason is merely a pretext for its discriminatory motives.[28]

B. *Title VII Prima Facie Case*

In articulating the required elements for the plaintiff's prima facie case in Title VII disparate treatment cases, the Supreme Court focused on discriminatory hiring because *McDonnell Douglas* involved a

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[22] *See infra* notes 184–229 and accompanying text.

[23] *See* David G. Harris, *Employment Law:* O'Connor v. Consolidated Coin Caterers Corp.*—Eliminating the Replacement Outside the Protected Class Element in ADEA Hiring and Replacement Cases*, 50 Okla. L. Rev. 282, 289 (1997).

[24] *See* 411 U.S. 792, 802–05 (1973).

[25] *Id.* at 802.

[26] *Id.*

[27] *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L. Rev. 659, 665 (1998).

[28] *See McDonnell Douglas*, 411 U.S. at 804.

black plaintiff whose application for employment was rejected by the defendant.[29] The Court did not address what is required for cases that involve discriminatory termination, but most federal circuit courts of appeals that have addressed the issue of prima facie elements in the discharge context have adapted the elements set out in *McDonnell Douglas* to fit the different factual circumstances.[30] Thus, in these courts, a prima facie case for a plaintiff alleging discriminatory discharge must show: (1) membership in a protected class; (2) qualification for the position and satisfaction of its normal requirements; (3) the defendant employer discharged the plaintiff; and (4) after the discharge, the employer sought a replacement with qualifications similar to those of the plaintiff.[31]

II. Federal Appellate Courts' Treatment of Replacement Identity in Title VII Discriminatory Discharge Suits

In place of the fourth requirement adapted from the 1973 *McDonnell Douglas Corp. v. Green* prima facie elements, some courts require the plaintiff to show that the defendant replaced the plaintiff with someone outside of the plaintiff's protected class.[32] The fourth requirement of the prima facie case in discriminatory discharge cases has been the source of much disagreement among the circuits and has led to intra-circuit inconsistencies as well.[33] One likely cause for this confusion and disagreement is footnote thirteen of *McDonnell Douglas*, in which the United States Supreme Court qualified the elements of the prima facie case by stating, "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations."[34] As a result of the wide latitude the Supreme Court gave the lower courts, the fourth require-

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[29] *See id.* at 794, 802.

[30] *See, e.g.*, Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994); Cumpiano v. Banco Santander P.R., 902 F.2d 148, 153 (1st Cir. 1990).

[31] *See, e.g.*, *Williams*, 14 F.3d at 1308; *Cumpiano*, 902 F.2d at 153.

[32] *See, e.g.*, Brown v. McLean, 159 F.3d 898, 905 (4th Cir. 1998); Talley v. Bravo Pitino Rest., Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995); Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1556 (11th Cir. 1995); Edwards v. Wallace Cmty. Coll., 49 F.3d 1517, 1521 (11th Cir. 1995).

[33] *See* Clack-Freeman, *supra* note 7, at 465; Christina M. Sautter, *A Matter of Class: The Impact of* Brown v. McLean *on Employee Discharge Cases*, 46 Vill. L. Rev. 421, 430 (2001).

[34] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

ment has taken on a variety of different versions in federal circuit courts of appeals opinions.[35]

A. *Replacement Requirement: An Element of the Prima Facie Case*

A minority of the federal circuit courts of appeals have required the plaintiff to show replacement by someone outside the plaintiff's protected class in order to establish a prima facie case.[36] A subset of these courts provide an alternative showing to the replacement requirement that would satisfy the fourth element.[37]

In 1998, in *Brown v. McLean*, the United States Court of Appeals for the Fourth Circuit held that a male plaintiff alleging sex discrimination could not make out a prima facie case of discriminatory termination because a man replaced him.[38] *Brown* involved a male city employee whose position, Administrator of Telephone Facilities, was eliminated pursuant to recommendations that his new supervisor (a woman) and her transition team made to the city council.[39] The recommendations suggested the addition of a new position, Director of Communications Services, that would include duties held by the plaintiff.[40] A man was provisionally appointed to this position and began working in the plaintiff's old office.[41]

In affirming the district court's grant of summary judgment against the plaintiff, the appellate court stated that a plaintiff alleging discriminatory discharge must ordinarily show that someone who is not a member of the same protected class filled the plaintiff's position.[42] The court then noted some exceptions to this requirement in limited situations, including age discrimination cases where a plaintiff is replaced by a significantly younger person who is also in the protected class of persons over age forty.[43] Other exceptions included situations in which there is a significant lapse of time between the plaintiff's application and the employer's decision to hire another individual within the same protected class, and where the employer

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[35] *See* Clack-Freeman, *supra* note 7, at 465.

[36] *See, e.g.*, *Brown*, 159 F.3d at 905; *Talley*, 61 F.3d at 1246.

[37] *See Talley*, 61 F.3d at 1246; Mitchell v. Toledo Hosp., 964 F.2d 577, 582–83 (6th Cir. 1992).

[38] 159 F.3d at 905.

[39] *Id.* at 900–01.

[40] *Id.* at 901.

[41] *Id.*

[42] *Id.* at 905.

[43] *Brown*, 159 F.3d at 905.

hires another person in the protected class to disguise discrimination against the plaintiff.[44]

Finding that the plaintiff's case did not fit any of the exceptions, the court held that he failed to establish a prima facie case.[45] Commentators have criticized the court's decision in *Brown*, however, for improper reliance on the "exceptions."[46] Many courts that have examined the circumstances or possibilities the Fourth Circuit noted as exceptions have not characterized them as exceptions, but rather used them to support the elimination of the replacement requirement.[47]

Some courts have provided an alternative to the replacement requirement in the prima facie case by allowing the plaintiff to show that the employer treated similarly situated employees outside of the protected class more favorably.[48] In 1995, in *Talley v. Bravo Pitino Restaurant, Ltd.*, the United States Court of Appeals for the Sixth Circuit examined a case in which the defendant discharged the plaintiff, who was black, and replaced him with a white person.[49] The plaintiff alleged race discrimination and the court held that he satisfied the fourth prong of the *McDonnell Douglas* test because he presented evidence that his position was filled by a white person.[50] The court found that the plaintiff may satisfy the fourth prong of his prima facie case by showing either that his replacement was outside of the protected class or that his employer treated similarly situated employees outside of the protected class more favorably.[51]

B. *Replacement Requirement: Not Dispositive*

Some courts, while stating the replacement requirement as the fourth prong of the prima facie case, do not strictly apply the requirement.[52] For example, in 1995, in *Edwards v. Wallace Community College*, the United States Court of Appeals for the Eleventh Circuit decided a case in which a subsequently hired black employee assumed the black plaintiff's duties after her discharge.[53] Although the court

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[44] *Id.* at 905–06.

[45] *Id.* at 906.

[46] *See* Sautter, *supra* note 33, at 446–47.

[47] *See* Howard v. Roadway Express, Inc., 726 F.2d 1529, 1535 (11th Cir. 1984); *see also* Sautter, *supra* note 33, at 446–47.

[48] *See, e.g.*, *Talley*, 61 F.3d at 1247; *Mitchell*, 964 F.2d at 582–83.

[49] 61 F.3d at 1244.

[50] *Id.* at 1248.

[51] *Id.* at 1247.

[52] *See, e.g.*, *NationsBank*, 53 F.3d at 1556 n.12; *Edwards*, 49 F.3d at 1521.

[53] *See* 49 F.3d at 1521 n.6.

stated that the plaintiff must satisfy the prima facie element by showing that a non-minority filled her former position, the court acknowledged that a prima facie case is not wholly dependent upon the plaintiff's meeting this requirement.[54]

In fact, the court stated that even if the employer had replaced the plaintiff with a minority employee, the plaintiff may still establish a prima facie case.[55] The court found that under these circumstances, a court must decide whether "the fact that a minority was hired overcomes the inference of discrimination otherwise created by the evidence presented by the plaintiff."[56] Some of the factors the court found important in this determination were similar to the exceptions the Fourth Circuit noted in *Brown*: the length of time between the discharge and replacement; whether the replacement occurred after the plaintiff filed a complaint; and, if the hired person had a history with the employer, whether it was a positive one.[57]

Addressing the facts before them, the Eleventh Circuit held that the black plaintiff failed to make out a prima facie case for race discrimination because a subsequently hired black employee assumed the plaintiff's duties when the employer discharged her and the plaintiff failed to present any evidence that the filling of the vacancy by a minority was pretextual.[58] Thus, the court found that because the plaintiff did not present evidence that showed the employer used the hiring of another minority employee to disguise discriminatory intent, she failed to make out a prima facie case.[59]

In 1995, the Eleventh Circuit decided *Walker v. NationsBank of Florida N.A.*, and again explicitly stated the replacement requirement.[60] Finding that the female plaintiff had been replaced by a man, the court held that the plaintiff had established a prima facie case.[61] Although the fourth element was not at issue in *Edwards*, the court noted in a footnote that courts should avoid an overly strict formulation of the prima facie case.[62] Instead, the better way of making the prima facie determination was to inquire whether an ordinary person would reasonably infer discrimination if the facts presented remain

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[54] *See id.* at 1521.
[55] *See id.*
[56] *Id.*
[57] *See Brown*, 159 F.3d at 905–06; *Edwards*, 49 F.3d at 1521.
[58] *Edwards*, 49 F.3d at 1521.
[59] *See id.*
[60] *See* 53 F.3d at 1556, 1559.
[61] *Id.* at 1556.
[62] *See id.* at 1556 n.12.

unrebutted.[63] Thus, although the court stated the requirement in clear terms, in explaining the requirement, the court characterized it as a more nebulous "inference of discrimination" finding.[64]

Similarly, in 1997, in *Simens v. Reno,* the United States District Court for the District of Columbia stated a replacement requirement at the outset but later suggested that this element of proof was not dispositive.[65] The plaintiff in *Simens* was a female special agent for the Federal Bureau of Investigation who alleged that her employer failed to promote her because of her gender.[66] The defendant later filled the position for which the plaintiff applied with another woman.[67] The district court stated that, to make out a prima facie case, the plaintiff must show that the defendant employer promoted other employees who were not members of the protected group at the time it denied the plaintiff's request for a promotion.[68]

Holding that the plaintiff failed to establish a prima facie case, the district court reasoned that not requiring the plaintiff to make such a showing regarding her replacement "would give complete weightlessness to an already light plaintiff's burden."[69] Although acknowledging the possibility that a plaintiff may still create an inference of discrimination without showing that her replacement was not a member of her protected class, the district court emphasized that, in the absence of such a showing, a plaintiff must put forth evidence of a commensurately forceful nature "to create the same inference of discrimination that would arise had the job or the promotion been given to a man."[70] Thus, although the court did not strictly apply the replacement requirement, it gave much weight to the strength of the requirement in creating an inference of discrimination.[71]

C. *Replacement Identity: A Consideration*

A majority of the federal circuit courts of appeals have held that a plaintiff claiming discriminatory discharge need not prove that the plaintiff's employer replaced the plaintiff with someone outside the

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[63] *See id.*
[64] *See id.*
[65] *See* 960 F. Supp. 6, 8, 10 (D.D.C. 1997).
[66] *Id.* at 7–8.
[67] *Id.*
[68] *Id.* at 8.
[69] *Id.* at 9, 10.
[70] *See Simens,* 960 F. Supp. at 10.
[71] *See id.*

plaintiff's protected class to establish a prima facie case.[72] Many of these courts, however, state that whether the employer replaces the plaintiff with someone inside or outside the protected class may be a factor.[73] Thus, while the fact that the plaintiff's employer replaced the plaintiff with someone within the same protected class would not be grounds for dismissing the case, the identity of the plaintiff's replacement may serve to weaken or strengthen the inference of discrimination that the plaintiff seeks to establish in a prima facie case.[74]

For example, in 1985, in *Meiri v. Dacon*, the United States Court of Appeals for the Second Circuit explicitly stated that requiring a plaintiff in a discriminatory discharge case to prove that her employer hired someone outside her protected class was inappropriate and at odds with the policies underlying Title VII.[75] The plaintiff in this case was an Orthodox Jew who alleged that she was discriminatorily discharged based on her religion.[76] Her employer sought a replacement for her for one year, after which point her duties were assumed by other employees and her position was ultimately eliminated.[77]

In holding that the replacement requirement was inappropriate for Title VII prima facie cases, the court reasoned that, often, the relevant protected class was difficult to identify.[78] Applying this difficulty to the case before it, the court stated that it was unsure whether the plaintiff's protected class consisted of those who were followers of Orthodox Judaism or followers of Judaism generally.[79] Thus, emphasizing that the "elements of proof in employment discrimination cases were not intended to be 'rigid, mechanized or ritualistic,'" the court held that the fact that someone outside her protected class did not replace the plaintiff did not prevent her from showing an inference of discrimination in her prima facie case.[80] Nevertheless, the court suggested that the identity of a plaintiff's replacement was a relevant consideration in the prima facie case when it

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[72] *See, e.g.*, Kendrick v. Penske Transport. Servs., Inc., 220 F.3d 1220, 1228–29 (10th Cir. 2000); Walker v. St. Anthony's Med. Ctr., 881 F.2d 554, 558 (8th Cir. 1989); *see* Clack-Freeman, *supra* note 7, at 470.

[73] *See Kendrick*, 220 F.3d at 1228–29; *St. Anthony's*, 881 F.2d at 558.

[74] *See Kendrick*, 220 F.3d at 1229 n.8; Meiri v. Dacon, 759 F.2d 989, 996 (2d Cir. 1985).

[75] *See* 759 F.2d at 995–96.

[76] *Id.* at 992.

[77] *Id.* at 993 n.3.

[78] *See id.* at 995–96.

[79] *See id.* at 996.

[80] *See Meiri*, 759 F.2d at 996 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

stated that the fact that a non-Jew did not replace the plaintiff may weaken the inference of discrimination.[81]

In 2000, in *Kendrick v. Penske Transportation Services, Inc.*, where an employer discharged a black truck driver and subsequently hired two black drivers, the United States Court of Appeals for the Tenth Circuit held that the plaintiff had established a prima facie case.[82] The court dispelled the significant amount of confusion that past decisions of the court may have created in suggesting that a plaintiff needed to show that the replacement was outside the plaintiff's class.[83] The court reasoned that the prima facie elements established in *McDonnell Douglas* did not include such a requirement and pointed out that showing replacement outside the protected class was not the only way to create an inference of discriminatory discharge.[84]

Despite its holding that a plaintiff need not show replacement outside the protected class in the prima facie case, the court stated in a footnote that the identity of the plaintiff's replacement may still be relevant.[85] In footnote eight, the court noted that a plaintiff may provide evidence that the employer hired someone outside the protected class to replace the plaintiff in the plaintiff's prima facie case.[86] Furthermore, according to the court, courts may appropriately consider evidence concerning the treatment of persons outside the protected class in the third stage of the evidentiary framework, when the plaintiff must prove the employer's proffered reason for discharging the plaintiff was pretextual.[87]

Similarly, in 1997, in *Nieto v. L&H Packing Co.*, the United States Court of Appeals for the Fifth Circuit stated that there was no replacement requirement in the plaintiff's prima facie case.[88] The identity of the plaintiff's replacement, however, was material to the ultimate question of discriminatory intent.[89] In this case, the plaintiff was a Hispanic man who alleged national origin discrimination after the

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[81] *See id.*
[82] 220 F.3d at 1223, 1224, 1226.
[83] *See id.* at 1226 n.5.
[84] *See id.* at 1226 n.5, 1229.
[85] *See id.* at 1229 n.8.
[86] *Id.*
[87] *See Kendrick*, 220 F.3d at 1229 n.8.
[88] *See* 108 F.3d 621, 624 n.7 (5th Cir. 1997).
[89] *See id.*

defendant discharged him.[90] The employer promoted another Hispanic employee to replace the plaintiff.[91]

The court found that replacement of the plaintiff by another Hispanic employee, while not outcome determinative, was an important factor in deciding whether the defendant discriminatorily discharged the plaintiff.[92] The court also found it significant that the defendant employer's workforce was comprised primarily of minorities.[93] The court noted that seventy-two percent of the employer's new hires were Hispanic and ninety-three percent of recently promoted employees were also Hispanic.[94] Ultimately, the court affirmed the district court's grant of summary judgment for the defendant.[95]

Likewise, in 2000, in *Williams v. Trader Publishing Co.*, the Fifth Circuit held that the plaintiff in a Title VII case did not need to show that her employer replaced her with someone outside her protected class.[96] In this case, the plaintiff was a woman who alleged that her employer discharged her due to gender discrimination in violation of Title VII.[97] The defendant employer contended that the plaintiff could not establish a prima facie case because she could not prove that her employer replaced her with a member of a non-protected class.[98] The court found that, although replacement with a person outside the plaintiff's protected class is evidence of discriminatory intent, it is not essential to the establishment of a prima facie case under Title VII.[99]

Three months prior to its decision in *Williams*, in 2000, in *Byers v. Dallas Morning News, Inc.*, the Fifth Circuit gave greater weight to replacement identity in the case of a white plaintiff alleging reverse race discrimination.[100] In this case, the plaintiff's direct supervisor was a black man who participated in the decision to terminate the plaintiff, a white man.[101] After the employer discharged the plaintiff, a white

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[90] *Id.* at 623.
[91] *Id.* at 624.
[92] *See id.*
[93] *See Nieto*, 108 F.3d at 623–24.
[94] *See id.* at 624 n.6.
[95] *Id.* at 625.
[96] 218 F.3d 481, 485 (5th Cir. 2000).
[97] *Id.* at 483.
[98] *See id.* at 485.
[99] *See id.*
[100] *See* 209 F.3d 419, 427 (5th Cir. 2000).
[101] *Id.* at 422, 423.

employee assumed most of the plaintiff's job responsibilities.[102] Subsequently, another white employee filled the plaintiff's position.[103]

The court held that the plaintiff failed to establish a prima facie case of race discrimination under Title VII because he failed to meet the fourth prong of the prima facie case.[104] While acknowledging its holding in *Nieto* that the plaintiff may establish a prima facie case even where an employee has been replaced by someone of the same race, the court emphasized that replacement by someone within one's protected class is nevertheless relevant to the question of discriminatory intent.[105]

D. *Replacement Requirement: Inconsistent with Title VII*

In addition to holding that a showing of replacement outside the protected class is not necessary to establish a prima facie case, many courts find that such a requirement is at odds with the purpose of Title VII.[106] Because Title VII is intended to protect individuals, rather than classes of individuals, from employment discrimination, requiring a plaintiff to show that the employer has not treated any member of the plaintiff's class in an unbiased manner misses the crux of Title VII's purpose.[107] In addition, the fact that the employer hires someone within the plaintiff's class often leads to the mistaken assumption that the employer did not discharge the plaintiff with discriminatory intent.[108]

In 1984, in *Howard v. Roadway Express, Inc.*, the United States Court of Appeals for the Eleventh Circuit discussed these possibilities.[109] In *Howard*, the plaintiff was a part-time black employee who claimed that his application for regular employment was rejected because of his race.[110] The plaintiff's application was rejected in July 1976, he filed a charge with the Equal Employment Opportunity

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 426–27.

[105] *See Byers*, 209 F.3d at 427.

[106] *See, e.g.*, Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 355 (3d Cir. 1999); Cumpiano v. Banco Santander P.R., 902 F.2d 148, 156 (1st Cir. 1990); *Howard*, 726 F.2d at 1536.

[107] *See* Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996); *Howard*, 726 F.2d at 1536.

[108] *See Carson*, 82 F.3d at 158; Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994); *Howard*, 726 F.2d at 1535.

[109] *See* 726 F.2d at 1535.

[110] *Id.* at 1530, 1531.

Commission ("EEOC") in December 1976, and the employer hired another black person for regular employment in June 1977.[111]

The United States District Court for the Middle District of Georgia granted the defendant's motion for summary judgment, stating that precedent had established "that there [could] be no racial discrimination against a black person who [was] not selected for a job when the person who [was] selected for the job [was] black."[112] Thus, the court found that the plaintiff could not make out a prima facie case because the plaintiff's replacement was black.[113]

In reversing the district court's decision, the Eleventh Circuit held that the fact that the defendant employer hired someone within the plaintiff's protected class did not prevent the plaintiff from creating an inference of discrimination.[114] The court stated that the fact that the employer hired the second employee eleven months after it rejected the plaintiff's application diminished the reliability of the second hiring as an indicator of the employer's intent when it rejected the plaintiff.[115] The court also pointed out that, because the employer hired a black person after the plaintiff filed his charge with the EEOC, the second hiring by the employer could have been an attempt to disguise an act of discrimination.[116] Finally, the court concluded that Title VII's purpose was to guarantee individuals, rather than groups or classes, equal employment opportunity.[117]

Similarly, in 1999, in *Pivirotto v. Innovative Systems, Inc.*, the United States Court of Appeals for the Third Circuit held that a plaintiff alleging discriminatory discharge need not prove that she was replaced by someone outside her protected class to establish a prima facie

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[111] *Id.* at 1530–31.

[112] *Id.* at 1534.

[113] *See id.*

[114] *See Howard*, 726 F.2d at 1534.

[115] *See id.* at 1535.

[116] *See id.*

[117] *Id.* at 1536. Here, the court applied the reasoning of the United States Supreme Court in 1982 in *Connecticut v. Teal*, a disparate impact case in which the Court "struck down a racially discriminatory promotion examination notwithstanding the fact that the ultimate result of the promotional process was an appropriate racial balance." *See id.* In *Teal*, the Court stated that the principal focus of Title VII was "the protection of the individual employee, rather than the protection of the minority group as a whole." *See* 457 U.S. 440, 453–54 (1982). The Supreme Court stated that an employer may not discriminate against specific employees with impunity merely because it favorably treated other members in the same protected class as the employees. *See Howard*, 726 F.2d at 1536 (citing *Teal*, 457 U.S. at 455).

case.[118] In this case, the plaintiff's employer fired her but did not immediately replace her.[119] Instead, a male employee assumed her responsibilities.[120] The court reasoned that the original fourth requirement in the hiring context laid out in *McDonnell Douglas* was not that the plaintiff show that the employer hired someone outside the plaintiff's protected class but rather that the employer continued to seek applicants for the position.[121] The court also made reference to footnote thirteen of *McDonnell Douglas*, which stated that because the facts vary in each Title VII case, the prima facie elements set out will not necessarily be applicable to every case.[122]

In addition, the court focused on the Supreme Court's explication of the purpose of the prima facie case in Title VII employment discrimination cases.[123] One main purpose of the prima facie case, according to the Third Circuit, is "to eliminate the most obvious, lawful reasons for the defendant's action."[124] Requiring a plaintiff to show the employer replaced the plaintiff with someone outside the plaintiff's protected class, however, does not eliminate any lawful reason why the employer may have discharged the plaintiff.[125] The court further stated that even if a plaintiff were replaced by someone within the plaintiff's class, this fact alone would not necessarily eliminate the possibility that the employer discriminated against the plaintiff.[126]

To further bolster its holding that the replacement requirement was inconsistent with Title VII, the court listed a series of circumstances in which an employer may have replaced the plaintiff with someone within the plaintiff's protected class but may have nevertheless discriminated against the plaintiff in discharging the plaintiff.[127] One such situation is when an employer sets a higher standard for employees who belong to a certain class than for those who are outside of the protected class.[128]

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[118] *See* 191 F.3d at 347.

[119] *Id.* at 349.

[120] *Id.*

[121] *See id.* at 352.

[122] *See id.*

[123] *See Pivirotto*, 191 F.3d at 352–53.

[124] *Id.* at 352. Examples of lawful reasons include that the employer did not fill the position that an applicant sought for economic reasons, the applicant was not qualified, or the employer did not actually take any adverse action, such as failure to hire or termination. *See id.*

[125] *See id.* at 353.

[126] *See id.*

[127] *See id.* at 353–54.

[128] *See Pivirotto*, 191 F.3d at 353.

An example of a situation where such a double standard is used to discriminate on the basis of gender is when an employer discharges a woman when she makes a few mistakes but retains a man who makes a greater number of errors.[129] The employer may replace the fired woman with another woman he hopes will meet his higher standard for female employees.[130] If a court were to dismiss the plaintiff's case because she could not show that she was replaced by a man, such a plaintiff with a meritorious claim would not be able to have her day in court.[131]

A second example that the court posited is where the employer maintains particular, stereotypical expectations of women.[132] Thus, the employer may fire a female employee who does not behave in a feminine, passive, or delicate manner and replace her with someone who it believes more aptly fits its description of an ideal female employee.[133] This employer could also escape judgment for its discriminatory double standard in a court that strictly applies the replacement requirement.[134]

For example, in 1996, in *Carson v. Bethlehem Steel Corp.*, the United States Court of Appeals for the Seventh Circuit provided an illustration of a situation in which the replacement requirement would wrongly weed out a case against an employer who discharged the plaintiff with discriminatory intent.[135] The court stated:

> Suppose an employer evaluates its staff yearly and retains black workers who are in the top quarter of its labor force, but keeps any white in the top half. A black employee ranked in the 60th percentile of the staff according to supervisors' evaluations is let go, while all white employees similarly situated are retained. This is race discrimination, which the employer cannot purge by hiring another person of the same race later.[136]

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[129] *See id.* at 353–54.
[130] *See id.* at 354.
[131] *See id.*
[132] *See id.* at 354.
[133] *See Pivirotto*, 191 F.3d at 354.
[134] *See id.*
[135] *See* 82 F.3d at 158.
[136] *Id.*

Because the possibility of such discrimination exists, the court concluded that the replacement requirement is neither sufficient nor necessary to establish an inference of discrimination.[137]

The court emphasized that the central inquiry in a discriminatory discharge case was "whether the employer would have taken the same action had the employee been of a different race (age, sex, religion, national origin, etc.) and everything else had remained the same."[138] As the court illustrated in the above example, whether the employer subsequently hired another person who belongs to the plaintiff's protected class after discharging the plaintiff is not helpful in determining whether the employer had discriminatory motives when terminating the plaintiff's employment.[139]

In 1999, in *Perry v. Woodward*, the United States Court of Appeals for the Tenth Circuit provided further examples of allegations of wrongfully motivated discharges that would be dismissed if a court applied the replacement requirement.[140] The court hypothesized that an employer may "hire and fire minority employees in an attempt to prevent them from vesting in employment benefits or developing a track record to qualify for promotion."[141] In addition, an employer may prefer demure women to those it perceives as "feminist" or it may hire a black employee whom it perceives "know[s] his place" to replace another black employee who is less willing to cooperate with the employer's stereotypical ideals.[142]

The facts of *Perry* give an example of a plaintiff with a meritorious claim who would be precluded from establishing a prima facie case if the replacement requirement were imposed.[143] The plaintiff who alleged race discrimination was a Hispanic employee whom the employer replaced with another Hispanic person.[144] Despite the fact that the defendant employer hired another Hispanic person, the record was rife with examples of racist remarks made by the plaintiff's supervisor.[145] During one staff meeting, the supervisor allegedly announced that Hispanics needed more education.[146] In addition, the supervisor

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[137] *See id.* at 158–59.
[138] *See id.* at 158.
[139] *See id.* at 159.
[140] *See* 199 F.3d 1126, 1137 (10th Cir. 1999).
[141] *See id.*
[142] *See id.*
[143] *See id.* at 1130–31.
[144] *Id.* at 1131, 1140.
[145] *See Perry*, 199 F.3d at 1130–31.
[146] *Id.* at 1130.

called another employee a "dirty Mexican," commented on the bad odor of Mexicans, and threatened to make the Hispanic employees "so miserable, that they will leave, one at a time."[147] Finally, the supervisor admitted to another employee that he did not like Hispanics because they were "hot blooded and [her] ex-husband left [her] for a hot blooded Mexican."[148]

Finally, the court disagreed with courts that require a plaintiff who fails to satisfy the replacement requirement to come forward with additional evidence that would counteract this failure, or provide the same inference of discrimination that a showing of replacement outside the protected class would create.[149] The court reasoned that courts which have required this showing have not given any examples of evidence that would be sufficient to give rise to such an inference and this vague requirement is too nebulous for courts to apply.[150]

In 1990, in *Cumpiano v. Banco Santander Puerto Rico,* in holding that a plaintiff alleging discriminatory termination based on her pregnancy did not need to show that she was replaced by a nonpregnant person, the United States Court of Appeals for the First Circuit gave another reason why a replacement requirement is inappropriate for discriminatory discharge cases.[151] The court noted that examining an employer's history or track record of hires or discharges was important when attempting to ascertain whether a pattern of discrimination has developed.[152] This pattern is a crucial element of proof in a disparate impact case where the plaintiff's duty is to show that, despite a facially neutral employment policy, the impact of the policy unfavorably affects members of a protected class.[153] In a disparate treatment case, however, the focus is on how a defendant employer treated a specific employee.[154] Thus, the court echoed the conclusion of the Eleventh Circuit in *Howard* that the purpose of Title VII as applied to discriminatory discharge cases was to protect individuals, not groups, from discrimination.[155]

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[147] *Id.* at 1130, 1131.
[148] *Id.* at 1131.
[149] *See id.* at 1139.
[150] *See Perry,* 199 F.3d at 1139.
[151] *See* 902 F.2d at 156.
[152] *See id.*
[153] *See id.*
[154] *See id.*
[155] *See id.*; *Howard,* 726 F.2d at 1536.

III. United States Supreme Court's Treatment of the Replacement Requirement

The United States Supreme Court has never directly addressed the question of whether a Title VII plaintiff must show that the defendant employer hired someone outside the plaintiff's protected class to replace the plaintiff to establish a prima facie case.[156] Nevertheless, federal appellate courts have applied two Supreme Court cases to Title VII discharge cases.[157]

In 1993, in *St. Mary's Honor Center v. Hicks*, the United States Supreme Court considered a disparate treatment case where an employer discharged a black correctional officer and replaced him with a white person.[158] In this case, the employer's asserted reason for discharging the plaintiff was at issue.[159] When setting out the prima facie case from *McDonnell Douglas Corp. v. Green*, the Court accepted the district court's finding that the fourth element had been satisfied because the plaintiff's position remained open and the defendant ultimately filled the position with a white man.[160]

Some lower courts have used the *Hicks* opinion to support the principle that a plaintiff must show that a person outside the plaintiff's protected class replaced the plaintiff.[161] Justice David Souter, however, in his dissent, pointed out in a footnote that, although the majority opinion mentioned that the plaintiff was replaced by someone outside his class, the issue of whether a plaintiff must show such a replacement was not before the Court and that it has never directly addressed the materiality of the identity of the plaintiff's replacement in a Title VII case.[162]

Three years after *Hicks*, in *O'Connor v. Consolidated Coin Caterers Corp.*, the Supreme Court held that in age discrimination cases brought under the Age Discrimination in Employment Act ("ADEA"), whether the employer replaced the plaintiff with someone outside the

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[156] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 527 n.1 (1993).

[157] *See, e.g.*, Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 353 (3d Cir. 1999); Brown v. McLean, 159 F.3d 898, 905 (4th Cir. 1998); Simens v. Reno, 960 F. Supp. 6, 8–9 (D.D.C. 1997). The first Supreme Court case mentioned a Title VII plaintiff's replacement and the second case dealt with the replacement requirement in an age discrimination context. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–13 (1996); *Hicks*, 509 U.S. at 506.

[158] 509 U.S. at 504, 506.

[159] *Id.* at 509.

[160] *See id.* at 506.

[161] *See, e.g.*, *Brown*, 159 F.3d at 905.

[162] *Hicks*, 509 U.S. at 528 n.1.

protected class was not a proper element of the prima facie case.[163] In *O'Connor*, the plaintiff was fifty-six years old and, after firing him, the employer replaced him with a forty year-old person.[164] The Court stated that there must be some "logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'"[165] Therefore, the Court held that because the fact that a plaintiff was replaced by someone who is also forty or over lacks probative value, it is not an appropriate element in the prima facie case.[166]

The Court emphasized that whether someone who was in the plaintiff's protected class replaced the plaintiff was irrelevant because the ADEA prohibited discrimination due to an employee's age rather than due to the employee being within the protected class of persons aged forty and over.[167] The more reliable indicator of age discrimination was whether the plaintiff's replacement was "substantially younger" than the plaintiff.[168]

Lower courts have disagreed about whether the *O'Connor* holding is applicable to the Title VII context.[169] In *Simens v. Reno*, the United States District Court for the District of Columbia found, in 1997, that the *O'Connor* holding was not transferable to a Title VII sex discrimination case.[170] In this case, the defendant employer did not select the female plaintiff for a position, but rather employed another woman.[171] The district court asserted that the *O'Connor* opinion itself stated that its holding did not apply to Title VII cases by emphasizing that a discrimination inquiry under the ADEA does not focus on the plaintiff's membership in a protected class.[172] The district court pointed out that the Supreme Court found significant the degree of age disparity between the plaintiff and plaintiff's replacement.[173] The characteristics included in Title VII, such as race and gender, are dis-

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[163] *See* 517 U.S. at 313.

[164] *See id.* at 309, 310.

[165] *See id.* at 311–12 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981)).

[166] *See id.* at 312.

[167] *See id.*

[168] *O'Connor*, 517 U.S. at 313.

[169] *See, e.g.*, Stella v. Mineta, 284 F.3d 135, 145 (D.C. Cir. 2002); Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996); *Simens*, 960 F. Supp. at 8.

[170] *See* 960 F. Supp. at 8.

[171] *Id.* at 7–8.

[172] *See id.* at 8.

[173] *See id.* at 9.

crete immutable traits with no levels or degrees of which to speak.[174] Therefore, a court may easily determine whether a plaintiff has created an inference of discrimination simply based on whether the plaintiff's replacement was within the protected class.[175] The district court also stated that the Supreme Court focused on whether the prima facie element had any probative value in the discrimination determination.[176] Because class membership was not probative in the ADEA context but was probative in the Title VII context, the *O'Connor* holding was not relevant in a Title VII case.[177]

In *Pivirotto v. Innovative Systems, Inc.*, the United States Court of Appeals for the Third Circuit disagreed.[178] The court held that a female plaintiff alleging sex discrimination need not show that a man replaced her.[179] The court based its holding partly on the Supreme Court's reasoning in *O'Connor*.[180] While acknowledging that the fact that a man replaced a female employee may have more probative value than the requirement in an age discrimination context, the court asserted that the Supreme Court's reasoning was equally applicable in the gender discrimination context.[181] Just as the fact that someone within the protected class replaced the plaintiff in an age discrimination suit was irrelevant to the prima facie case as long as the plaintiff was discharged on the basis of age, the fact that someone within the protected class replaced a Title VII plaintiff was also irrelevant if the employer discriminated against her on the basis of her membership in the class.[182] Finally, the court pointed out that the main thrust of the Supreme Court's reasoning in *O'Connor*—that the proper focus in determining whether the plaintiff has made out a prima facie case for discrimination was determining whether she has created an inference of discrimination—was equally applicable in the Title VII context.[183]

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[174] *See id.*
[175] *See Simens*, 960 F. Supp. at 9.
[176] *See id.*
[177] *See id.*
[178] *See* 191 F.3d at 354–55.
[179] *See id.* at 354.
[180] *See id.* at 354–55.
[181] *See id.* at 355.
[182] *See id.*
[183] *See Pivirotto*, 191 F.3d at 355.

IV. Analysis: The Identity of Plaintiff's Replacement Is Not a Valid Consideration at Any Point in the Evidentiary Framework

The primary focus of the disagreements among the federal circuit courts of appeals regarding the identity of a discharged Title VII plaintiff's replacement has been its role in the prima facie case.[184] A minority of the federal circuit courts of appeals require that the plaintiff show replacement by someone outside the plaintiff's protected class to establish a prima facie case for discriminatory discharge.[185] Other federal circuit courts of appeals do not strictly require the showing but consider replacement identity in the prima facie case or in the third step of the evidentiary framework.[186] Many federal circuit courts of appeals have held that the replacement requirement is not an appropriate consideration in the Title VII plaintiff's prima facie case.[187]

Currently, a majority of the federal circuit courts of appeals agree that the replacement requirement has no place in the plaintiff's prima facie case.[188] Some of these courts have stated that the identity of the plaintiff's replacement may be a factor in the ultimate inquiry of discriminatory intent.[189] Many of the courts' reasons for eliminating the replacement requirement in the prima facie case, however, additionally support the argument that the replacement requirement also should not be a consideration in the third step of the evidentiary framework, where the plaintiff must show that the employer's stated reason is merely a pretext for its discriminatory motive.[190]

A. *Replacement Identity's Lack of Probative Value Is More Relevant in Plaintiff's Ultimate Burden*

Although the controversy surrounding the consideration of replacement identity centers on its role in the prima facie case, it is not until the third step of the evidentiary framework that courts test its probative value, or the lack thereof.[191] Although many federal circuit

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[184] *See supra* notes 32–155 and accompanying text.
[185] *See supra* notes 36–51 and accompanying text.
[186] *See supra* notes 52–105 and accompanying text.
[187] *See supra* notes 106–155 and accompanying text.
[188] *See supra* notes 106–155 and accompanying text.
[189] *See, e.g.*, Nieto v. L&H Packing Co., 108 F.3d 621, 624 n.7 (5th Cir. 1997).
[190] *See supra* notes 106–155 and accompanying text.
[191] *See* Chin & Golinsky, *supra* note 27, at 660.

courts of appeals decisions properly interpret the elements of a prima facie case or the functioning of the burden-shifting framework, the ultimate issue in an employment discrimination case is the same: whether the plaintiff has proven that it is more likely than not that the discharge was motivated at least in part by an impermissible reason.[192]

Precisely because a Title VII plaintiff often does not have direct evidence of an employer's discriminatory motive, the United States Supreme Court emphasized that a prima facie burden is not intended to be onerous.[193] Most plaintiffs are able to meet the four elements of the *McDonnell Douglas Corp. v. Green* prima facie case and as a result, the Title VII prima facie case "has evolved into something of a formality. In fact, many courts simply presume that the plaintiff has made out a prima facie case."[194] In addition, as long as the employer offers a legitimate, nondiscriminatory reason for the discharge, it meets its burden in the second step of the evidentiary framework.[195] Thus, the defendant's burden also appears to be a mere formality that few, if any, defendants are unable to meet.[196]

As a result, substantive determinations of Title VII violations occur not during the plaintiff's prima facie case or the defendant's articulation of a legitimate reason for its actions, but rather when the court is deciding whether the plaintiff has met the ultimate burden of persuasion.[197] For this reason, courts may not weigh the probative value of replacement identity until the third step of the evidentiary framework.[198] Thus, the misleading effects of considering the identity of the plaintiff's replacement has the greatest force during the ultimate inquiry phase and should therefore be eliminated from consideration from the entire evidentiary framework, rather than merely in the prima facie case.[199]

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[192] *See id.*

[193] *See* Jones v. W. Geophysical Co. of Am., 669 F.2d 280, 284 (5th Cir. 1982) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

[194] *See* Chin & Golinsky, *supra* note 27, at 668.

[195] *See id.* at 665.

[196] *See id.*

[197] *See id.* at 671.

[198] *See id.*

[199] *See* Chin & Golinsky, *supra* note 27, at 671.

B. *Reasons for Excluding Replacement Identity from Prima Facie Case Support Exclusion of Consideration from Plaintiff's Entire Case*

A summary of the reasons that the federal circuit courts of appeals have presented in eliminating the replacement requirement as an element of the prima facie case reveals that the requirement would be equally misleading in the ultimate determination of whether the employer had discriminatory intent when discharging the plaintiff.[200] First, the replacement requirement is inappropriate and at odds with the policies underlying Title VII.[201] Title VII protects persons, not classes of persons, and therefore a requirement that the plaintiff show that she was replaced by a person outside of her protected class does not comport with Title VII's purpose, because it presumes that the employer has not discriminated against the plaintiff if it has subsequently hired another member of the plaintiff's protected class.[202]

Furthermore, the replacement requirement is often unworkable because of the difficulty of identifying the precise protected class of which the plaintiff is a member.[203] If the plaintiff's identity encompasses multiple categories of protection (such as a Hispanic woman) or a particular subcategory of a specific class (such as an Orthodox Jew or a mixed-race individual), determining the degree of narrowness or breadth in identifying the appropriate protected class becomes particularly challenging.[204]

Even if a court has determined the accurate and relevant protected class for the plaintiff, assuming that members of one protected class are fungible or interchangeable in the employment context is fraught with dangers, because each member of a protected class is a unique and complex individual.[205] As a result, the employer's decision to discharge the plaintiff may still be based on an improper discriminatory motive even if the employer hired someone in the plaintiff's protected class to replace the plaintiff.[206] For example, if the employer fires employees who do not fit its description of stereotypical

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[200] *See supra* notes 106–155 and accompanying text.

[201] *See* Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 355 (3d Cir. 1999); Cumpiano v. Banco Santander P.R., 902 F.2d 148, 156 (1st Cir. 1990); Meiri v. Dacon, 759 F.2d 989, 995–96 (2d Cir. 1985).

[202] *See* Connecticut v. Teal, 457 U.S. 440, 453–54 (1982); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1536 (11th Cir. 1984).

[203] *See Meiri*, 759 F.2d at 996.

[204] *See id.*

[205] *See* Perry v. Woodward, 199 F.3d 1126, 1137 (10th Cir. 1999); *Pivirotto*, 191 F.3d at 354.

[206] *See Perry*, 199 F.3d at 1137; *Pivirotto*, 191 F.3d at 354.

minorities or gender roles and replaces them with members of the same protected class who do, the employer has nevertheless violated Title VII.[207] For this reason, examining an employer's track record of hiring and discharging, as well as statistics of employee characteristics over time, is more appropriate in disparate impact cases, where the plaintiff seeks to establish a pattern of discrimination by the employer.[208] In contrast, the inquiry in discriminatory treatment cases is whether the employer has discriminated against the plaintiff as an individual, rather than against members of the plaintiff's protected class generally.[209]

Additional possible employer motives demonstrate why considering the identity of the plaintiff's replacement may be misleading in determining discriminatory intent.[210] If the employer replaced the plaintiff after the plaintiff filed a Title VII complaint, the employer may have chosen to hire a person in the plaintiff's protected class to disguise its previous act of discrimination.[211] Alternatively, the employer may hire an employee, discharge the employee before the employee's employment benefits have vested or before the employee is eligible for a promotion, and subsequently hire a replacement within the employee's protected class in order to prevent minority employees from achieving management level.[212] In this circumstance, the employer discriminated against the plaintiff on an impermissible basis, but considering the identity of the plaintiff's replacement would weaken or negate the plaintiff's attempt to show discriminatory intent.[213]

In addition, consideration of replacement identity has the potential to be a red herring in Title VII cases when the employer imposes a higher standard for members of the plaintiff's protected class that it does not apply to its employees who do not belong to the class.[214] Thus, the employer may discharge members of the protected class who do not meet this higher standard and hire replacement employ-

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[207] *See Perry*, 199 F.3d at 1137; *Pivirotto*, 191 F.3d at 354.

[208] *See Cumpiano*, 902 F.2d at 156. *But see* Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986).

[209] *See Cumpiano*, 902 F.2d at 156.

[210] *See Perry*, 199 F.3d at 1137; Brown v. McLean, 159 F.3d 898, 905–06 (4th Cir. 1998); *Howard*, 726 F.2d at 1535.

[211] *See Brown*, 159 F.3d at 905–06; *Howard*, 726 F.2d at 1535.

[212] *See Perry*, 199 F.3d at 1137.

[213] *See id.*

[214] *See Pivirotto*, 191 F.3d at 353; Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996).

ees of the same protected class who do.[215] Also, if significant time has passed between the plaintiff's discharge and the employer's replacement of the plaintiff, the utility of considering replacement identity as an indication of the presence or absence of discriminatory intent proves to be even more remote because the employer may have replaced supervisors or managers who have the power to terminate.[216]

Finally, the United States Supreme Court's reasoning in 1996 in *O'Connor v. Consolidated Coin Caterers Corp.* not only applies to Title VII cases but also serves to support the elimination of replacement identity as a consideration in the third step of the evidentiary framework of Title VII cases.[217] The Court found that whether someone outside the class of people age forty or over replaced the ADEA plaintiff lacks probative value in an age discrimination case.[218] Similarly, in the Title VII context, the fact that the employer replaced the plaintiff with someone within the plaintiff's protected class is irrelevant as long as the employer discharged the plaintiff on the basis of the plaintiff's membership in the class.[219] Given the many circumstances in which an employer may discriminate in violation of Title VII when discharging an employee, despite the fact that it replaces the employee with someone in the same protected class, replacement identity lacks probative value not only in the prima facie case but also in the plaintiff's ultimate burden of persuasion.[220]

Furthermore, the argument that the Supreme Court's reasoning in *O'Connor* is not applicable in the Title VII context because of the difference in nature between age and Title VII's protected classes is flawed.[221] Although one's racial and gender traits are immutable over the course of one's life, whereas one's age is not, just as there are levels and degrees when it comes to age, there are comparable degrees in racial and gender characteristics.[222] For example, an employer who discharged an employee who is sixty years of age and replaced her with someone who is forty-five years of age may nevertheless have engaged in age discrimination because of the level of age disparity between the two employees.[223] Similarly, an employer who terminates

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[215] *See Pivirotto*, 191 F.3d at 353; *Carson*, 82 F.3d at 158.

[216] *See Brown*, 159 F.3d at 905–06; *Howard*, 726 F.2d at 1535.

[217] *See* 517 U.S. 308, 311–13 (1996); *Pivirotto*, 191 F.3d at 355.

[218] *See O'Connor*, 517 U.S. at 312.

[219] *See Pivirotto*, 191 F.3d at 355.

[220] *See id.*

[221] *See id.*

[222] *See id.*

[223] *See O'Connor*, 517 U.S. at 313.

the employment of a black employee whom the employer perceives as insufficiently subservient and replaces him with another black person whom the employer perceives as someone who "knows his place" as a black individual may also have engaged in race discrimination, despite the fact that both employees are black.[224]

C. *Distinctions Based on Protected Class Are Artificial and Irrelevant*

By allowing consideration of the identity of the plaintiff's replacement in a discriminatory discharge case, courts place artificial boundaries between Title VII protected classes that lead to inaccurate and unjust rulings.[225] In contrast to disparate impact cases, in the disparate treatment framework, a protected class formulation is inappropriate and irrelevant because the focus is on whether the employer unlawfully discriminated against the plaintiff based on the plaintiff's membership in a protected class, rather than whether the employer discriminated against a class of persons.[226]

Due to the complexity of employer motivations and perceptions of identity, a rigid categorization of the protected class in the Title VII disparate treatment context is impractical.[227] An employer may prefer to employ an employee from another country who does not speak with an accent to one who does, or it may discriminate on the basis of the shade of skin color within the same racial category.[228] Because of the multiple overlapping characteristics within classifications, any consideration of the protected class to which the plaintiff's replacement belongs in determining discriminatory treatment, whether in the prima facie case, or in the plaintiff's ultimate burden of persuasion, perpetuates racial and gender stereotypes and further muddies the already murky waters of employment discrimination.[229]

Conclusion

The identity of the plaintiff's replacement in a discriminatory discharge suit should not be a consideration at any point in the Title VII evidentiary framework. The underlying policy of Title VII is to

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[224] *See Perry*, 199 F.3d at 1137.

[225] *See* e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 Conn. L. Rev. 441, 442–43 (1998).

[226] *See id.* at 449.

[227] *See id.* at 478.

[228] *See id.* at 478–79.

[229] *See id.*

protect individuals, not classes of individuals, from employment discrimination. Furthermore, whether an employer hired a person within the plaintiff's protected class to replace the plaintiff is not an accurate indicator of the presence or absence of discriminatory intent. In addition, the difficulty of identifying the relevant protected class further supports the contention that replacement identity lacks probative value in a Title VII case. Therefore, consideration of the plaintiff's replacement in a discriminatory discharge suit has no legitimate place in either the plaintiff's prima facie case or the plaintiff's ultimate burden of persuasion.

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