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NOTES

THE FIRST PRONG'S EFFECT ON THE DOCKET: HOW THE SECOND CIRCUIT SHOULD MODIFY THE *MCDONNELL DOUGLAS* FRAMEWORK IN TITLE VII REVERSE DISCRIMINATION CLAIMS

I. INTRODUCTION

Mark was hired by a state corrections department as a correctional officer in 1985.¹ Eight years later, he was promoted to sergeant.² After another eight years, he was promoted to lieutenant.³ Sixteen years later, a full twenty years after he was hired, Mark became Watch Commander, one of the highest-ranking positions during his 3-11 p.m. shift.⁴ That same year, he was unceremoniously terminated after being involved in an altercation with a prisoner.⁵ Three other corrections officers involved in the altercation—all of a different race than Mark—eventually returned to work.⁶ All four had received a Notice of Discipline recommending termination, but only Mark was terminated.⁷ A subsequent arbitration denied his grievance, and found him guilty of insubordination, filing a false report, and making false statements under oath.⁸ Mark filed state and federal employment discrimination claims, alleging he was

1. Adamczyk v. N.Y. State Dep't of Corr. Servs., No. 07-CV-523S, 2011 WL 917980, at *1 (W.D.N.Y. Mar. 14, 2011), *aff'd*, 474 F. App'x 23 (2d Cir. 2012).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at *2.

6. *Id.* at *3.

7. *Id.* at *2-3.

8. *Id.* at *2. The other three COs also were found to have filed false reports and made false statements under oath. *Id.*

terminated because of his race.⁹ Mark is also white.¹⁰ Is Mark a member of a protected class under Title VII of the Civil Rights Act of 1964 despite his status as a “majority” plaintiff?¹¹ The answer depends not on the Act itself, but on the jurisdiction in which Mark’s case will be tried.

The above facts illustrate the fact pattern in a recent federal district court case wherein the plaintiff alleged reverse discrimination in an adverse employment action.¹² The term “reverse discrimination” became a part of the cultural landscape in 1974 shortly after the Supreme Court’s decision in *DeFunis v. Odegaard*.¹³ Columnist James J. Kilpatrick, who wrote about the case concerning a claim of racial bias in law school admissions, said that the “more familiar name for this abnormality is ‘reverse discrimination.’ The short and ugly word is racism.”¹⁴ Throughout the 1970s and 1980s, various publications and politicians used the term, which eventually lost its quotation marks and became an accepted term on its own.¹⁵ Academic commentators have given the term several explanations, including “‘discrimination against members of the white majority’ . . . ‘[p]referential hiring practices’ . . . ‘the removal of that benefit which American society has for so long bestowed without questions, upon its privileged classes’ [and] ‘[p]rejudice or bias exercised against a person or class for purpose of correcting a pattern of discrimination against another person or class’”¹⁶

One commentator has suggested that reverse discrimination is a “covert political term which should be removed from the writings of any serious academician or lay-person[,]” arguing that it is not an expression neutral in tone with a commonly accepted meaning.¹⁷ Congress intended Title VII to apply to both white and non-white men and women,¹⁸ and

9. *Id.* at *1.

10. *See id.*

11. *See id.* at *5.

12. *See id.* at *1, *5.

13. 416 U.S. 312 (1974); Philip L. Fetzer, ‘Reverse Discrimination’: *The Political Use of Language*, 17 T. MARSHALL L. REV. 293, 297-98 (1992).

14. *See* Fetzer, *supra* note 13, at 298.

15. *Id.* Fetzer cites a 1976 issue of *U.S. News & World Report* commenting on “‘a practice known as reverse discrimination’” without defining exactly what it meant, and then-Republican presidential nominee Ronald Reagan commenting during his first run for presidency that same year that “‘[i]f you happen to belong to an ethnic group not recognized by the Federal Government as entitled to special treatment you are a victim of reverse discrimination.’” *Id.*

16. *Id.* at 298-99 (footnotes omitted).

17. *Id.* at 294.

18. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (citing 110 CONG.

the U.S. Supreme Court soon after interpreted the terms of Title VII as prohibiting racial discrimination against white persons upon the same standards as non-white persons.¹⁹ However, circuit courts are sharply divided on whether a majority plaintiff alleging reverse discrimination in adverse employment actions must satisfy his or her Title VII protected class status by the same standard as minority plaintiffs, or whether a majority plaintiff must provide additional "background circumstances."²⁰

Whether the term is reflective of political ideologies or policy preferences will not be addressed here. Rather, this Note will approach the term in a strictly jurisprudential manner, through the lens of the first prong of the burden-shifting analysis cemented by the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*.²¹ Specifically, this Note serves to determine which standard the Second Circuit should expressly adopt when modifying the first prong of the *McDonnell Douglas* framework in reverse discrimination claims.²² Where most federal circuits have adopted either a "background circumstances,"²³ a modification of "background circumstances,"²⁴ or a "sufficient evidence" standard,²⁵ the Second Circuit has consistently avoided the issue and remained silent.²⁶

Part II discusses a brief history of Title VII of the Civil Rights Act of 1964 and the original intent of the Act as primarily demonstrated through legislative history and early Supreme Court decisions, as well as early Supreme Court cases that interpreted Title VII as applying to members of all races, along with the *prima facie* elements of a Title VII employment discrimination claim established by *McDonnell Douglas*.

Part III explains the modification of the first element of the *McDonnell Douglas* *prima facie* case,²⁷ and will discuss the decision by

REC. 2578 (1964) (remarks of Rep. Celler)).

19. See *McDonald*, 427 U.S. at 278-80. See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."); EEOC Decision No. 74-31, 7 Fair Empl. Prac. Cas. (BNA) 1326 (1973), 1973 WL 3907 (recognizing that all individuals must have equal notice of existing job opportunities).

20. Compare *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999), with *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

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

22. See *infra* Part VI.

23. See *Parker*, 652 F.2d at 1017.

24. See *Notari v. Denver Water Dep't*, 971 F.2d 585, 590 (10th Cir. 1992).

25. See *Iadimarco*, 190 F.3d at 161.

26. See *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 80 n.5 (2d Cir. 2009).

27. "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority . . ." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

the D.C. Circuit Court of Appeals in *Parker v. Baltimore & Ohio R.R. Co.*²⁸ to impose upon a majority plaintiff the additional burden of proving “background circumstances,” as well as circuits that have strictly followed suit, circuits that have modified the “background circumstances” standard, and the Third Circuit’s rejection of the *Parker* standard in *Iadimarco v. Runyon*.²⁹

Part IV closely examines the Second Circuit in terms of the guidance it has provided, as well as several cases from this circuit’s district courts and how they have adapted this area of jurisprudence and interpreted the first prong of the *McDonnell Douglas* framework. Part V analyzes which standard the Second Circuit should expressly adopt: *Parker*’s “background circumstances,” a modified approach introduced in the Tenth Circuit by *Notari v. Denver Water Department*,³⁰ or reject “background circumstances” entirely and follow the *Iadimarco* “sufficient evidence” approach.³¹ Part VI weighs each argument and concludes that the Second Circuit should adopt the *Iadimarco* “sufficient evidence” framework.

II. PROTECTIONS, LEGISLATIVE HISTORY AND THE SUPREME COURT’S INTERPRETATION OF TITLE VII

A. Title VII Protections

Title VII of the Civil Rights Act of 1964 protects employees from discriminatory employment practices, specifically providing, in pertinent part, that “[it] shall be an unlawful employment practice . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”³² Congress passed Title VII to prevent employment discrimination against historically disfavored minorities.³³

Legislators were concerned about the pervasive obstacles that African Americans faced historically, and the resulting harm of stagnant

28. 652 F.2d 1012 (D.C. Cir. 1981).

29. 190 F.3d at 160.

30. 971 F.2d 585, 590 (10th Cir. 1992).

31. *Iadimarco*, 190 F.3d at 163.

32. 42 U.S.C. § 2000e-2(a) (2006).

33. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

and dismal employment prospects.³⁴ Senator Hubert Humphrey, who sponsored the Act in the Senate, stated that “[t]he crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them Title VII is designed to give Negroes . . . a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America.”³⁵ Other supporters, such as Representative William McCulloch, stressed the need to remove barriers in employment for African Americans.³⁶ Congressional debates on Title VII demonstrate that Congress was primarily concerned with the number of African Americans in low-skill jobs and “the manner in which racial discrimination helped to perpetuate [their] low status in employment.”³⁷

The Supreme Court stated unambiguously that “[t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”³⁸ Further, the objective of Title VII “was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”³⁹ However, the Court has also explained that:

[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.⁴⁰

Finally, the Court has held that there are broad, overriding societal and personal interests, “shared by employer, employee, and consumer . . . [in] efficient and trustworthy workmanship assured

34. See 110 CONG. REC. 1512 (1964) (statement of Rep. Madden).

35. 110 CONG. REC. 6548 (1964).

36. See Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 61 (1999).

37. *Id.*

38. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

39. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

40. *Id.* at 430-31 (emphasis added).

through fair and racially neutral employment and personnel decisions.”⁴¹ “In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”⁴²

B. Legislative History

The scope of Title VII is not limited to one class of individuals, despite its primary purpose of helping minorities.⁴³ While debating the bill in the House of Representatives, Democratic Representative Manny Celler declared: “The legislation before you seeks . . . to honor the constitutional guarantees of equality under the law It bestows no preference on any one group; what it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people”⁴⁴ In congressional debates, supporters of Title VII stressed its inclusiveness and expressly provided that it was meant to protect a broad range of individuals, regardless of race, including Caucasians.⁴⁵ Representative Celler made it clear that Title VII was intended to “cover white men and white women and all Americans.”⁴⁶ Other legislators stated that Title VII created an “obligation not to discriminate against whites.”⁴⁷

If, for example, the International Longshoremen’s Association . . . which is predominantly white, permitted no Negro members, they would come under this act. This situation is exactly the same if the colored International Longshoremen’s organization . . . discriminated against a white person who is qualified for membership. Both are clear examples of discrimination. It works both ways.⁴⁸

Some commentators have gone further to argue that, despite the bill’s purpose and focus on African Americans, it is unlikely that Title VII would have been enacted if it only protected minorities from discrimination.⁴⁹ Proponents of this view argue that the legislative

41. *McDonnell Douglas Corp.*, 411 U.S. at 801.

42. *Id.*

43. See Ryan M. Peck, *Title VII Is Color Blind: The Law of Reverse Discrimination*, 75 J. KAN. B. ASS’N, no. 6, June 2006 at 20, 21.

44. *Id.* at 21.

45. 110 CONG. REC. 2578 (1964) (statement of Rep. Celler).

46. *Id.*

47. 110 CONG. REC. 7218 (1964) (memorandum of Sen. Clark).

48. 110 CONG. REC. 2552 (statement of Rep. Celler).

49. See Peck, *supra* note 43, at 21. “While there was strong support for Title VII, it likely would not have been enacted if it had not been clear that Title VII prohibits all discrimination,

history demonstrates an effort by legislators to stress the inclusiveness of Title VII protections in order to gain political support.⁵⁰ Senator Humphrey's proclamation may raise such an inference.

What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.⁵¹

Finally, the language of the Act itself suggests that Congress intended Title VII to protect all individuals, regardless of race.⁵² According to the Act's plain language, any person, whether white or black, can be a plaintiff in a Title VII case.⁵³ If Congress had meant to prohibit discrimination only against minorities or some other socially disfavored group, it could have used narrower phrasing instead of consistently and deliberately using the phrase "any individual."⁵⁴

In *McDonald v. Santa Fe Trail Transp. Co.*,⁵⁵ the Supreme Court ended any debate when it unequivocally held that a white plaintiff is protected by Title VII and, therefore, is entitled to bring a claim to enforce those protections.⁵⁶ The Court held that the terms of Title VII "prohibit[ing] the discharge of any individual because of such individual's race . . . are not limited to discrimination against members of any particular race."⁵⁷ The Court pointed to the Equal Employment

including reverse discrimination." *Id.*

50. *Id.* "To assuage the concerns of some of the conservative members of Congress, other members emphasized Title VII's broad prohibitions against all discrimination." *Id.*

51. 110 CONG. REC. 13,088 (1964).

52. See Peck, *supra* note 43, at 21. Title VII provides in pertinent part:

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

Id. (alteration in original) (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a) (2006)).

53. See Onwuachi-Willig, *supra* note 36, at 59.

54. Peck, *supra* note 43, at 21.

55. 427 U.S. 273 (1976).

56. *Id.* at 280.

57. *Id.* at 278-79 (citations omitted) (internal quotation marks omitted). The *McDonald* opinion further noted that the *Griggs* Court was not confronted with racial discrimination against whites but nevertheless described the Act as proscribing discriminatory preference for any racial

Opportunity Commission's consistent interpretation of Title VII "to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites," and agreed "that to proceed otherwise would 'constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians.'"⁵⁸ The Court held that the EEOC's conclusion "is in accord with uncontradicted legislative history to the effect that Title VII was intended" to protect Caucasians, and all Americans, from discriminatory employment practices.⁵⁹ The Court therefore held "Title VII prohibits racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes and [the employee who was not terminated was] white."⁶⁰

C. McDonnell Douglas Corp. v. Green and the McDonnell Douglas Framework

A plaintiff may rely upon either direct or indirect evidence to establish a prima facie case of disparate treatment under Title VII.⁶¹ However, "[t]he Supreme Court has recognized that an employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."⁶² A Title VII action will survive if there is sufficient indirect evidence to satisfy the standard the Supreme Court set out in *McDonnell Douglas Corp. v. Green*.⁶³

Under the *McDonnell Douglas* framework, a plaintiff establishes a prima facie case by proving:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to

group, whether it be minority or majority. *Id.* at 279.

58. *Id.* at 279-80 (quoting EEOC Decision No. 74-31, 7 Fair. Empl. Prac. Cas. (BNA) 1326 (1973), 1973 WL 3907, at *2).

59. *McDonald*, 427 U.S. at 280.

60. *Id.*

61. See, e.g., *Notari v. Denver Water Dep't*, 971 F.2d 585, 590 (10th Cir. 1992).

62. *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999).

63. See *Notari*, 971 F.2d at 590.

seek applicants from persons of complainant's qualifications.⁶⁴

If the plaintiff has sufficient evidence to establish these four elements, the Court will draw an inference of discrimination.⁶⁵ The burden then shifts to the employer who must "articulate some legitimate, nondiscriminatory reason for the employee's rejection."⁶⁶ If the employer can satisfy this burden, the burden shifts back to the plaintiff to persuade the court that the employer's nondiscriminatory reason is pretext for discrimination.⁶⁷

In *McDonnell Douglas*, the plaintiff, a black man and long-time civil rights activist, filed a formal complaint with the EEOC claiming that the defendant-employer violated the Civil Rights Act of 1964 when the defendant refused to rehire him.⁶⁸ The suit arose after the defendant discharged the plaintiff in the course of a general reduction in work force.⁶⁹ Following his dismissal, the plaintiff "protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated."⁷⁰ Accompanied by like-minded activists, the plaintiff orchestrated a "stall-in" whereby they purposefully stalled their cars on the main roads leading to the defendant's plant in an effort to block access to it during the morning shift change.⁷¹ Later, a "lock-in" was organized and a chain and padlock were secured on the front door of a building to prevent those inside, some of whom were defendant's employees, from leaving.⁷² Three weeks after the "lock-in," the defendant-employer publicly advertised that they were looking for mechanics with experience akin to the plaintiff's, and he re-applied for a position.⁷³ The defendant denied plaintiff's application based on his participation in the protests.⁷⁴

The plaintiff filed suit shortly after his application was denied, initially claiming violations of sections 703(a)(1) and 704(a) of the Civil

64. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

65. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

66. *McDonnell Douglas Corp.*, 411 U.S. at 802.

67. See *id.* at 804 (Plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason for respondent's rejection was in fact pretext.").

68. See *id.* at 794, 796.

69. See *id.* at 794. At *McDonnell Douglas Corp.*, an aerospace and aircraft manufacturer that employed over thirty thousand people, plaintiff worked as a lab technician and mechanic from 1956 until 1964. *Id.*

70. *Id.*

71. See *id.*

72. See *id.* at 795. "Though [plaintiff] apparently knew beforehand of the 'lock-in,' the full extent of his involvement remains uncertain." *Id.*

73. See *id.* at 796.

74. *Id.*

Rights Act.⁷⁵ The district court dismissed the claim of racial discrimination, but the Eighth Circuit reversed dismissal of the plaintiff's claim under section 703(a)(1), holding that the plaintiff was entitled to demonstrate that defendant's reasons for refusing to hire him were mere pretext.⁷⁶ The Supreme Court subsequently granted certiorari "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination"⁷⁷ Writing for a unanimous Court, Justice Powell explained that the case raised "significant questions as to the proper order and nature of proof in actions under Title VII"⁷⁸ Citing *Griggs*, the Court reinforced the proposition that Title VII was meant to protect minorities from racially discriminatory employment practices.⁷⁹ Noting inconsistency in the lower courts,⁸⁰ the Court resolved the problem by establishing a burden-shifting framework allowing a plaintiff to establish an inference of discrimination without direct evidence.⁸¹

Commentators argue that the formulation of the prima facie case in *McDonnell Douglas* reflects the legislative objectives of addressing a particular pattern of discrimination against African Americans, as well as the Civil Rights Act's broader purpose of protecting all individuals from discrimination.⁸² To properly apply the *McDonnell Douglas* framework, courts should recognize the purpose of Title VII and the reasoning that led Justice Powell and the other Justices to create it.⁸³ In *Furnco Constr. Corp. v. Waters*,⁸⁴ the Court explained:

75. *Id.* Section 703(a)(1) of the Civil Rights Act of 1964 provides: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (2006). Section 704(a), in pertinent part, provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter" 42 U.S.C. § 2000e-3(a) (2006).

76. *See McDonnell Douglas Corp.*, 411 U.S. at 797-98.

77. *Id.* at 798.

78. *Id.* at 793-94.

79. *Id.* at 800.

80. "The two opinions of the Court of Appeals and the several opinions of the three the judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case." *Id.* at 801.

81. *See id.* at 801-02.

82. *See* 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, 450-51 (1998).

83. *See* Onwuachi-Willig, *supra* note 36, at 64.

84. 438 U.S. 567 (1978).

A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.⁸⁵

The *McDonnell Douglas* framework "was 'never intended to be rigid, mechanized, or ritualistic.'"⁸⁶ Instead, it was established to provide fact finders with a sensible and orderly way to determine the existence of discrimination in light of common experience.⁸⁷ The use of a common sense approach, regardless of its effectiveness, is one reason why judicial modification is necessary in claims of employment discrimination brought by non-minority plaintiffs.

D. "Reverse" Discrimination

In *Griggs v. Duke Power Co.*,⁸⁸ the Supreme Court touched on the possibility of a reverse discrimination claim.⁸⁹ While *Griggs* did not involve a reverse discrimination claim, the Court discussed the scope of Title VII.⁹⁰ The Court officially recognized reverse discrimination in *McDonald*, which involved the termination of two white plaintiffs after they were caught stealing cargo from one of the defendant's shipments.⁹¹ The employees brought suit, alleging they were discriminated against because a black employee who committed the same offense was disciplined rather than discharged.⁹² Following the language of *Griggs*,

85. *Id.* at 577 (emphasis in original) (citation omitted).

86. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco*, 438 U.S. at 577).

87. *Furnco*, 438 U.S. at 577.

88. 401 U.S. 424 (1971).

89. *Id.* at 431 ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").

90. *See id.* at 430-31. The Court found that an employer was prohibited by Title VII from requiring a high school education or passing of a standardized general intelligence test as condition of transfer or promotion due to disparate impact on African American employees. *See id.*

91. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 276, 279-80 (1976) (holding Title VII is violated unless employment criteria are applied alike to all races).

92. *See id.* at 276.

the Court ultimately determined that “Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [the disciplined employee] white.”⁹³

The Court then turned to whether the white plaintiffs were entitled to establish their claim under the *McDonnell Douglas* framework.⁹⁴ Writing for the Court, Justice Marshall answered in the affirmative, finding the facts “indistinguishable” from those in *McDonnell Douglas*.⁹⁵ The Court explained that the *McDonnell Douglas* framework was applicable despite the fact that the plaintiffs could not meet the first prong of the prima facie case,⁹⁶ noting that “‘specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations.’”⁹⁷ Interestingly, the Court held that the first prong “of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII’s prohibition on racial discrimination.”⁹⁸ Ultimately, *McDonald* firmly established two key principals: (1) Title VII protects whites from racial discrimination in employment; and (2) white plaintiffs may use the *McDonnell Douglas* framework to enforce those rights.⁹⁹

III. MODIFYING THE “MEMBER OF A PROTECTED CLASS” PRONG

McDonald gave little guidance on how the first prong of the prima facie case should be changed in cases of reverse discrimination.¹⁰⁰ If the *McDonnell Douglas* framework were applied rigidly, reverse discrimination claims would not exist because the first prong would

93. *Id.* at 280.

94. *See id.* at 281.

95. *See id.* at 282-83 (“Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white . . . While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be ‘applied, alike to members of all races,’ and Title VII is violated if, as petitioners alleged, it was not.”).

96. The first prong of the prima facie case requires that the plaintiff belong to a minority group. *Id.* at 279 n.6.

97. *Id.* (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802 n.13).

98. *McDonald*, 427 U.S. at 279 n.6.

99. *See id.* at 279-80, 282-83.

100. *See supra* note 97 and accompanying text.

automatically disqualify majority plaintiffs.¹⁰¹ Such a result would be contrary to the scope of Title VII, as well as the language of the Act itself.

Circuit courts have recognized this dilemma and have responded by modifying the first prong.¹⁰² However, “courts have struggled in attempting to apply the *McDonnell Douglas* burden-shifting framework to Title VII suits by [w]hite plaintiffs, and no universally accepted statement of the appropriate standard has emerged.”¹⁰³ Generally speaking, circuit courts apply one of the following three standards: (a) the “background circumstances” standard,¹⁰⁴ (b) a modified “background circumstances” standard,¹⁰⁵ or (c) the “sufficient evidence” standard.¹⁰⁶ The following subsections will introduce each of these standards and explain them in greater detail, including any substantive differences within each general category.

A. Parker, Murray, and the “Background Circumstances” Standard

In *Parker*, the D.C. Circuit established a new standard under the *McDonnell Douglas* framework for white plaintiffs alleging reverse discrimination.¹⁰⁷ The court explained that modification was justified for several reasons. First, the court stated that the *McDonnell Douglas* framework was “not an arbitrary lightening of the plaintiff’s burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination.”¹⁰⁸ The court then noted that the *McDonnell Douglas* framework was frequently modified in a variety of discrimination claims in employment.¹⁰⁹ Modification was required in *Parker* because the plaintiff alleged that his employer was giving illegal preference to black and female coworkers.¹¹⁰ The court explained:

101. See *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 454 (7th Cir. 1999).

102. See *id.* at 455.

103. *Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999).

104. See *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (1981); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).

105. See *Notari v. Denver Water Dep’t*, 971 F.2d 585, 589-90 (10th Cir. 1992); *Mills*, 171 F.3d at 457.

106. See *Iadimarco*, 190 F.3d at 161.

107. See *Parker*, 652 F.2d at 1017.

108. *Id.*

109. See *id.* at 1017-18.

110. See *id.* at 1014.

Membership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can it be stated as a general rule that the “light of common experience” would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society.¹¹¹

The court then drew on its own precedent in *Daye v. Harris*,¹¹² where it found that a majority plaintiff could utilize the *McDonnell Douglas* criteria for proving a prima facie case without being required to provide direct evidence of racially motivated favoritism.¹¹³ Proof of such circumstances serves as the equivalent of the first standard expounded in *McDonnell Douglas*: membership in a racial minority.¹¹⁴

Later, in *Harding v. Gray*,¹¹⁵ the D.C. Circuit attempted to clarify two general categories of evidence that demonstrate “background circumstances,” concluding that either “evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites” or “evidence indicating that there is something ‘fishy’ about the facts of the case at hand that raises an inference of discrimination” would suffice.¹¹⁶ The court explained that this approach was not meant to foreclose reverse discrimination claims or to be an additional hurdle to white plaintiffs, but rather to serve as a substitute for a minority plaintiff’s burden under the first prong.¹¹⁷

Evidence of the first category can be demonstrated by “political pressure to promote a particular minority because of his race, pressure to promote minorities in general, and proposed affirmative action plans.”¹¹⁸ Such evidence may be sufficient “where an employer was in the process of drafting or adopting an affirmative action plan . . . in combination with other factors, to the creation of sufficient ‘background

111. *Id.* at 1017.

112. 655 F.2d 258 (D.C. Cir. 1981).

113. *See Parker*, 652 F.2d at 1017-18.

114. *Id.* at 1018. The court referred to *Daye* to illustrate background circumstances sufficient to establish a prima facie case of reverse discrimination in a case where the majority of defendant’s employees were black and they received a large proportion of promotions. *Id.* at 1017.

115. 9 F.3d 150 (D.C. Cir. 1993).

116. *Id.* at 153.

117. *Id.* at 154.

118. *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 851 (D.C. Cir. 2006).

circumstances.”¹¹⁹ Of the second category enumerated in *Harding*, the court found in *Lanphear v. Prokop*¹²⁰ that evidence that a majority plaintiff was given “little or no consideration” for a promotion, and that a supervisor did not fully review qualifications for a minority promotee, was sufficient to establish background circumstances.¹²¹ In *Bishopp v. District of Columbia*,¹²² evidence that a minority applicant was promoted in an “unprecedented fashion” over four majority applicants who were clearly more qualified was sufficient to establish background circumstances.¹²³

In explaining the relative weight of evidence from either category in *Mastro v. Potomac Electric Power Co.*,¹²⁴ the court gave the plaintiff the choice of establishing background circumstances by putting forth evidence from either of the two general categories.¹²⁵ In addition, evidence of these circumstances “may arise from either the employer’s general background or the background of the case at hand.”¹²⁶ In *Harding*, the court held that “if a more qualified white applicant is denied promotion in favor of a minority applicant with lesser qualifications, we think that in itself raises an inference that the defendant is ‘that unusual employer who discriminates against the majority.’”¹²⁷

The Sixth Circuit adopted a similar approach to the D.C. Circuit following its decision in *Murray v. Thistledown Racing Club, Inc.*¹²⁸ In *Murray*, the circuit court agreed with the lower court’s use of *Parker* in approving the use of background circumstances in reverse discrimination claims.¹²⁹ The court reasoned that the *McDonnell Douglas* framework stems from congressional efforts “to address [the] nation’s history of discrimination against racial minorities, a legacy of racism so entrenched that we presume acts, otherwise unexplained, embody its effect.”¹³⁰ Furthermore, the court reasoned that the purpose of Title VII justifies the presumption of discrimination implicit in the *McDonnell Douglas*

119. *Id.* at 851 n.4 (citing *Bishopp v. D.C.*, 788 F.2d 781, 787 (D.C. Cir. 1986)).

120. 703 F.2d 1311 (D.C. Cir. 1983).

121. *Id.* at 1315.

122. *Bishopp*, 788 F.2d at 781.

123. *Id.* at 786.

124. *Mastro*, 477 F.3d at 843.

125. *Id.* at 852 (finding “evidence from both is not necessary.”).

126. *Id.* at 852.

127. *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (quoting *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (1981)).

128. 770 F.2d 63 (6th Cir. 1985).

129. *Id.* at 67 (internal quotation marks omitted).

130. *Id.*

framework.¹³¹ In a case of reverse discrimination, “[a]s with the minority plaintiff, the majority plaintiff who asserts a claim of racial discrimination . . . does so within the historical context of the Act.”¹³² Further, “reverse discrimination claims require application of a *McDonnell Douglas* standard modified to reflect this context as well as the factual situation of the claim.”¹³³ Thus, in the court’s view, the reverse discrimination plaintiff must demonstrate that, despite his majority status, he was the victim of intentional discrimination.¹³⁴

Since *Murray*, the Sixth Circuit has developed a two-part test of its own to determine background circumstances under the modified first prong of the *McDonnell Douglas* framework.¹³⁵ The current test provides:

[A] prima facie case of “reverse discrimination” is established upon a showing [1] that “background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority” . . . and upon a showing [2] that the employer treated differently employees who were similarly situated but not members of the protected class.¹³⁶

To demonstrate that employees are similarly situated, the plaintiff is required to show that “the relevant aspects of his employment situation are nearly identical to those of the . . . employees who he alleges were treated more favorably.”¹³⁷ A determination of “similarly situated” can rest on “differences in job title, responsibilities, experience, and work record.”¹³⁸

In *Pierce v. Commonwealth Life Insurance Co.*,¹³⁹ the plaintiff claimed reverse discrimination after he was demoted subsequent to committing an employment violation, whereas a female employee who committed the same violation was not similarly disciplined.¹⁴⁰ Because

131. See *id.* “[T]he primary purpose of Title VII is ‘to assure equality of employment opportunities and to eliminate those discriminating practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.’” *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

132. *Murray*, 770 F.2d at 67.

133. *Id.* (internal quotation marks omitted).

134. *Id.* (citing *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983)).

135. See *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994).

136. *Id.* (citations omitted).

137. *Id.* at 802 (internal quotation marks omitted).

138. *Leadbetter v. Gilley*, 385 F.3d 683, 691 (6th Cir. 2004).

139. *Pierce*, 40 F.3d at 796.

140. See *id.* at 802.

of the plaintiff's supervisory status, he was not considered "similarly situated" to the female employee, and therefore failed to satisfy the background circumstances requirement.¹⁴¹ The "similarly situated" requirement seems to create an additional hurdle for non-minority plaintiffs, going beyond even what is required under *Parker* and its progeny. In a telling admission, the court itself raised concerns about the fairness of its own standard.¹⁴²

B. Notari and the Modification of Background Circumstances

The Tenth and Seventh Circuits use a modified formulation of the "background circumstances" standard that provides an alternative means of establishing a *prima facie* case of reverse discrimination. Under *Notari*, a white plaintiff can still establish a *prima facie* case with evidence of background circumstances, but unlike *Parker*, a lack of such evidence is not necessarily fatal.¹⁴³ The Tenth Circuit determined that when a plaintiff cannot prove background circumstances but does present sufficient evidence to raise a reasonable inference of discrimination, he should be entitled to proceed beyond the *prima facie* stage.¹⁴⁴ However, a majority plaintiff still must do more than just show he was being treated differently than a similarly situated minority.¹⁴⁵ The majority plaintiff must produce sufficient evidence to support the reasonable inference that *but for* the plaintiff's majority status, the challenged decision would not have occurred.¹⁴⁶

In *Notari*, a white male plaintiff brought an action against his employer after an alleged discriminatory promotion of a female employee.¹⁴⁷ The suit arose after he had applied for a position as safety and security coordinator for the Denver Water Works.¹⁴⁸ During the application process, the plaintiff and other candidates were interviewed

141. See *id.* at 802-03.

142. See *id.* at 801 n.7. "The first prong of this test has been criticized by some courts as impermissibly imposing a 'heightened standard' upon reverse discrimination plaintiffs." *Id.* (citing *Ulrich v. Exxon Co.*, 824 F. Supp. 677, 683-84 (S.D. Tex. 1993)). "We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts. *Pierce*, 40 F.3d at 801 n.7.

143. *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992).

144. See *id.* at 590.

145. See *id.*

146. See *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1150 (10th Cir. 2008).

147. *Notari*, 971 F.2d at 587.

148. *Id.* at 586.

and required to take oral examinations.¹⁴⁹ After all the interviews were finished, the hiring committee ranked him as the most qualified candidate, and his name was submitted to the Director of Personnel (a woman) who then rejected the committee's selection.¹⁵⁰ After deciding that the position's focus should be shifted from "safety" to "security," the Director of Personnel conducted a reevaluation and selected a woman whom the hiring committee deemed less qualified than the plaintiff.¹⁵¹ Despite these undisputed facts, the district court found that plaintiff did not produce sufficient evidence of background circumstances to support an inference of reverse discrimination and thus could not state a *prima facie* case.¹⁵²

The Tenth Circuit reversed, setting forth an alternative to the background circumstances test.¹⁵³ The court framed the issue as follows:

[W]hether a reverse discrimination plaintiff's failure to allege background circumstances necessarily compels a conclusion that he has failed to state a *prima facie* case of intentional discrimination . . . in other words, whether a disparate treatment plaintiff's failure to demonstrate entitlement to the *McDonnell Douglas* presumption forecloses his opportunity to prove that he was a victim of intentional discrimination. We hold that it does not.¹⁵⁴

The court reasoned that the *McDonnell Douglas* presumption allows a plaintiff, absent direct evidence, to rely on strong indirect evidence to prove that his employer discriminated against him.¹⁵⁵ For minorities, a "lack of direct evidence is not fatal," as the four-prong test will usually allow him to proceed.¹⁵⁶ However, "[a]bsent unusual circumstances, his white counterpart will not be so fortunate."¹⁵⁷ Unlike his minority counterpart, a white plaintiff who can provide strong indirect evidence to support his claim, but lacks direct evidence of a racially discriminatory motive, cannot raise the presumption of discrimination.¹⁵⁸ "[Such a] result is untenable and inconsistent with the

149. *Id.*

150. *Id.* at 586-87.

151. *See id.* at 587.

152. *Id.* at 588.

153. *See id.* at 589.

154. *Id.*

155. *See id.* at 590.

156. *See id.* at 589.

157. *Id.* at 589-90.

158. *See id.* at 590 ("Under the modified *McDonnell Douglas* standard for reverse discrimination . . . he states a *prima facie* case only if he can show background circumstances that

goals of Title VII.”¹⁵⁹

The court explained that any employee who puts forth sufficient evidence that he was intentionally discriminated against should be able to proceed beyond the prima facie case stage.¹⁶⁰ The court adopted the Fourth Circuit's standard in *Holmes v. Bevilacqua*,¹⁶¹ which allows a plaintiff to establish a prima facie case “by direct evidence of discrimination or by indirect evidence whose cumulative probative force, apart from the presumption's operation, would suffice under the controlling standard to support as a reasonable probability the inference that but for the plaintiff's race he would have been promoted.”¹⁶² Thus, to satisfy the first prong of the *McDonnell Douglas* framework, a white plaintiff can provide direct evidence of background circumstances, or if he is unable, he may provide sufficient evidence to support a reasonable probability that *but for* the plaintiff's race, the adverse employment action would not have taken place.¹⁶³ The court cautioned application of this alternative however, emphasizing that a non-minority plaintiff must present more evidence than his minority counterpart, as he is not entitled to the same presumption implicit in the *McDonnell Douglas* prima facie case.¹⁶⁴

The Seventh Circuit adopted the *Notari* approach in *Mills v. Health Care Service Corporation*.¹⁶⁵ Prior to *Mills*, the court applied a test similar to *Parker*, requiring a showing of “background circumstances sufficient to demonstrate that the particular employer has reason or inclination to discriminate invidiously against whites or evidence that there is something fishy about the facts at hand.”¹⁶⁶ In *Mills*, the plaintiff provided evidence that from 1988 to 1995, almost all

demonstrate that his employer is one of those unusual employer[s] who discriminate[s] against the majority.”).

159. *Id.*

160. *See id.*

161. 794 F.2d 142 (4th Cir. 1986).

162. *See id.* at 146. *Bevilacqua* did not involve a claim of reverse discrimination. *Id.* at 143.

163. *Notari*, 971 F.2d at 590.

164. *See id.* (“In other words, it is not enough, under this alternative formulation, for a plaintiff merely to allege that he was qualified and that someone with different characteristics was the beneficiary of the challenged employment decision. Instead, the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.”). *See also* Reynolds v. Sch. Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1534-35 (10th Cir. 1995) (finding plaintiff met burden with evidence that she was the only white employee in the department and Hispanic supervisors made almost all of the employment decisions of which plaintiff complains).

165. 171 F.3d 450 (7th Cir. 1999).

166. *Ineichen v. Ameritech*, 410 F.3d 956, 959 (7th Cir. 2005) (internal quotation marks omitted).

promotions made by the defendant-employer went to women, and females dominated the supervisory positions at the relevant office at the time the challenged hiring decision was made.¹⁶⁷ Relying on *Notari*, the court held that these facts were sufficient to satisfy the first prong of the *McDonnell Douglas* framework.¹⁶⁸

The court, agreeing with the presumption that it is the unusual employer who discriminates against the majority, also believed that majority plaintiffs should have to provide additional evidence to preserve the “screening out benefits” served by the *prima facie* analysis.¹⁶⁹ Thus, the court held that in reverse discrimination claims, “a plaintiff . . . must show at least one of the background circumstances . . . other courts have alluded to.”¹⁷⁰ However, where a plaintiff is not able to show background circumstances “but has established a logical reason to believe that the [employer’s] decision rests on a legally forbidden ground, such as his race or gender,” he may satisfy his burden under the *prima facie* case.¹⁷¹ Other courts relying on *Mills* have allowed majority plaintiffs to satisfy their burden under the modified first prong in a variety of ways.¹⁷²

C. *Iadimarco v. Runyon* and the “Sufficient Evidence” Standard

The Third Circuit’s pronouncement of a “sufficient evidence” standard in *Iadimarco v. Runyon*¹⁷³ expressly rejected all forms of “background circumstances,” deciding that a majority plaintiff’s burden at the *prima facie* stage of a Title VII claim should not differ from that of

167. *Mills*, 171 F.3d at 457.

168. *See id.* at 456-57.

169. *Id.* at 456-57 (citing *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134 (7th Cir. 1985)).

170. *Mills*, 171 F.3d at 457.

171. *Id.* (alteration in original) (internal quotation marks omitted).

172. *See DeWeese v. DaimlerChrysler Corp.*, 120 F. Supp. 2d 735, 748-49 (S.D. Ind. 2000) (noting that courts have relied on *Mills* to apply a lower burden in reverse discrimination claims); *Rayl v. Fort Wayne Cmty. Schs.*, 87 F. Supp. 2d 870, 883-84 (N.D. Ind. 2000) (finding that plaintiff met his burden with evidence that: (a) the employer expressed interest in hiring minority applicants; (b) the employer had incentives to do so from the federal government; and, (c) that only two of fifty-three employees in the relevant position were white males); *Burton v. Sw. Bell Mobile Sys., Inc.*, 74 F. Supp. 2d 841, 847 (C.D. Ill. 1999) (stating that background circumstances existed where the plaintiff was told by a supervisor that despite having difficulties with black employees, he could not fire them because they were protected minorities); *Corral v. Chicago Faucet Co.*, No. 98-C-5812, 2000 WL 628981, at *3 (N.D. Ill. Mar. 9, 2000) (holding that background circumstances existed where the male plaintiff had been discharged for misconduct but produced evidence that a female employee was only disciplined for the same conduct).

173. 190 F.3d 151 (3d Cir. 1999).

a minority plaintiff.¹⁷⁴ Prior to the Third Circuit's decision, the "background circumstances" standard was losing traction. At least one writer pronounced that the Eleventh Circuit's decisions in *Wilson v. Bailey*¹⁷⁵ and *Shealy v. City of Albany*¹⁷⁶ dealt the *Parker* standard the greatest blow.¹⁷⁷ In *Wilson*, two white deputy sheriffs in Jefferson County, Alabama, were both certified twice as candidates for promotion, but were never promoted.¹⁷⁸ During the two certification processes, the sheriff interviewed eight minority or women candidates, promoting six, and interviewed eleven white males of whom five were promoted.¹⁷⁹ Without discussion, the court wrote that the test for reverse discrimination suits merely requires that plaintiff "belongs to a class" in addition to the three other *McDonnell Douglas* prima facie requirements.¹⁸⁰

Five years later in *Shealy*, the court articulated the same standard in a case involving five white firefighters who sued when, out of a pool of six applicants, the only black applicant was promoted to the position of battalion chief.¹⁸¹ Notably absent from either case is a discussion of "background circumstances." In its silence, the Eleventh Circuit chose the traditional *McDonnell Douglas* framework over the *Parker* standard, essentially assuming as a formality that whites and males are protected classes under Title VII.¹⁸² The Eleventh Circuit has strengthened its standard in recent years with decisions in *Bass v. Board of County Commissioners*¹⁸³ and *Smith v. Lockheed-Martin Corp.*,¹⁸⁴ echoing the Supreme Court's reasoning in *McDonald* in holding that "[d]iscrimination is discrimination no matter what the race . . . of the victim."¹⁸⁵ It cannot be said, however, that the Eleventh Circuit adopted

174. See *id.* at 163.

175. 934 F.2d 301 (11th Cir. 1991).

176. 89 F.3d 804 (11th Cir. 1996).

177. See Maria A. Citeroni, Note, *Iadimarco v. Runyon and Reverse Discrimination: Gaining Majority Support for Majority Plaintiffs*, 48 CLEV. ST. L. REV. 579, 598-99 (2000). Citeroni claims that the Second Circuit "wholly reject[s] the *Parker* court's modification of the *McDonnell Douglas* standard." *Id.* at 597-98. While the Second Circuit seemingly has not applied the *Parker* standard, it has not explicitly rejected it either. See *infra* Part IV.

178. *Wilson*, 934 F.2d at 303.

179. *Id.*

180. *Id.* at 304. The *Iadimarco* court found *Wilson* problematic in that that court never defined the "class" to which plaintiffs belonged and essentially eliminated the first prong in the *McDonnell Douglas* analysis *sub silentio*. *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3d Cir. 1999).

181. *Shealy*, 89 F.3d at 805.

182. See *id.*

183. 256 F.3d 1095 (11th Cir. 2001).

184. 644 F.3d 1321 (11th Cir. 2011).

185. *Bass*, 256 F.3d at 1103; *Smith*, 644 F.3d at 1325 n.15.

the reasoning in *Iadimarco*, as neither case so much as mentions *Iadimarco* or “sufficient evidence.”

The court in *Iadimarco* recognized the difficulty in applying the *McDonnell Douglas* framework to white plaintiffs, and announced that “no universally accepted statement of the appropriate standard” had emerged.¹⁸⁶ The court remarked that a white plaintiff obviously cannot satisfy the first prong of the test (membership in a minority group) in the same way a black plaintiff can.¹⁸⁷ After giving a brief account of *Parker*’s “background circumstances” modification, and quoting *Harding*’s clarification,¹⁸⁸ the court noted several jurisdictions that have concluded that the “background circumstances” substitution places a more onerous burden on a white plaintiff than on any other protected group.¹⁸⁹

Iadimarco ultimately rejected *Parker*, *Harding*, and their progeny on several grounds. The court stated that the *McDonnell Douglas* framework merely provided an allocation of burdens and order of presentation of proof for a Title VII claim, the central focus being on “whether the employer is treating some people less favorably than others because of their race”¹⁹⁰ All that should be required to establish a prima facie case is for the plaintiff to provide sufficient evidence to allow a fact finder to conclude that the employer is treating him or her less favorably because of their race.¹⁹¹ The court acknowledged that the *McDonnell Douglas* framework was never meant to be rigid, but requiring a majority plaintiff to state a prima facie case in terms of “background circumstances” is still problematic.¹⁹²

Many courts that have tried to apply the *Parker* standard, and those that have rejected “background circumstances” have found that it imposes a heightened burden on the plaintiff at the outset of his case.¹⁹³ This heightened burden forces the plaintiff to present proof at the prima facie stage that is ordinarily required only after the employer-defendant has sustained their burden by proffering a legitimate, non-discriminatory

186. *Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999).

187. *Id.*

188. *Id.* at 158-59.

189. *Id.* at 159 (citing *Eastridge v. R.I. College*, 996 F. Supp. 161, 161 (D.R.I. 1998)). The court also discusses the Southern District of New York case *Cully v. Milliman & Robertson, Inc.*, 20 F. Supp. 2d 636 (S.D.N.Y. 1998). See *infra* Part IV.B.3.

190. *Iadimarco*, 190 F.3d at 160 (quoting *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

191. *Iadimarco*, 190 F.3d at 161.

192. *Id.*

193. See *id.*

reason for the adverse employment action.¹⁹⁴ The *Parker* modification therefore undermines the purpose of the burden-shifting analysis: to provide a vehicle for plaintiffs to bring discrimination claims that would otherwise be difficult to prove.¹⁹⁵ Moreover, the *McDonnell Douglas* framework was not only intended to root out the most common nondiscriminatory reasons for adverse employment decisions, but also to place the burden of production on the party with the easiest access to the adverse decision—the employer.¹⁹⁶ “Background circumstances” does not allow for this.

In addition to thwarting the purpose of the *McDonnell Douglas* framework, the *Iadimarco* court deemed the concept of background circumstances “irremediably vague and ill-defined.”¹⁹⁷ Further, the circuits that have grappled with the concept have further modified it to render the test unnecessary.¹⁹⁸ The *Iadimarco* court went even further to criticize the *Parker* standard’s ambiguity, stating courts that have employed the standard have yet to come up with a clear definition of “background circumstances,” i.e., one that is “neither under nor over inclusive, and possible to satisfy.”¹⁹⁹

Finally, the court claimed the *Parker* standard leads to jury confusion.²⁰⁰ The court explained that ordinarily evidence of “background circumstances” is introduced at the pretext stage after the burden shifts to the employer, but under *Parker*, courts also use such evidence to satisfy the first prong at the prima facie stage.²⁰¹ The use of duplicative evidence can confuse jurors, creating an additional hardship for non-minority plaintiffs.²⁰² In sum, the court’s complete retreat from the *Parker* standard was a declaration that a plaintiff bringing a Title VII reverse discrimination suit under the *McDonnell Douglas* framework should be able to establish a prima facie case “by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff ‘less favorably

194. *See id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* The court used *Notari* as an example of such a problematic decision. In refining its “background circumstances” modification, the Tenth Circuit essentially removed the need to present evidence of background circumstances, and a white plaintiff would only ever need to “present sufficient evidence to support the reasonable probability of discrimination.” *Id.* at 162.

199. *Id.* at 162-63.

200. *Id.* at 163.

201. *See id.*

202. *See id.*

than others because of [his] race”²⁰³

IV. THE SECOND CIRCUIT AND A SURVEY OF DISTRICT COURT DECISIONS

A. Second Circuit “Guidance”

The Second Circuit has been less than helpful in guiding lower courts on how to apply one standard over the other in reverse discrimination cases under the *McDonnell Douglas* framework. At least one district court has suggested that *McGuinness v. Lincoln Hall*²⁰⁴ is “instructive, if not determinative” on the issue.²⁰⁵ However, prior to *McGuinness* and up until *Aulicino v. New York City Department of Homeless Services*²⁰⁶ (and the more recent *Carroll v. City of Mount Vernon*),²⁰⁷ the Second Circuit had not explicitly adopted a *Parker*, *Iadimarco*, or other standard, and had consistently evaded the issue.

The assertion that *McGuinness* is “instructive, if not determinative” grossly overstates that case’s influence on deciding which standard applies to the first prong. *McGuinness* merely asserts that the burden of establishing a prima facie case of employment discrimination is minimal and not onerous.²⁰⁸ Indeed, there is virtually no discussion of the plaintiff’s satisfaction of the first prong other than the assertion that her uncontested status as a white woman was part of her “minimal” burden.²⁰⁹ Absent from the analysis is any discussion of “background circumstances” or an alternative standard.

Unlike *McGuinness*, *Aulicino* at least addresses the struggle in the circuit courts between the *Parker* and *Iadimarco* standards, but the court limits this discussion to a footnote.²¹⁰ Since the defendants did not argue that the plaintiff must proffer evidence of “background circumstances,” the court did not see fit to submit a holding on the matter.²¹¹ To muddy the waters further, the court declared in the same footnote that “in any event . . . there is sufficient evidence from which a rational jury could

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

204. 263 F.3d 49 (2d Cir. 2001).

205. *Tappe v. Alliance Capital Mgmt. L.P.*, 177 F. Supp. 2d 176, 182 (S.D.N.Y. 2001).

206. 580 F.3d 73 (2d Cir. 2009).

207. 453 F. App’x 99 (2d Cir. 2011).

208. *McGuinness*, 263 F.3d at 53 (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

209. *McGuinness*, 263 F.3d at 53.

210. *See Aulicino*, 580 F.3d at 80 n.5.

211. *See id.*

conclude that both [defendants] harbored discriminatory animus against white persons, facts that constitute 'background circumstances' reflecting that the defendant is that unusual employer who discriminates against the majority."²¹² While this does not necessarily reflect an endorsement of the "background circumstances" standard, it does not represent an outright rejection either. Without adequate guidance, the district courts have been split on whether to subject a majority plaintiff to "background circumstances." While certain trends have emerged from nearly twenty years of reverse discrimination cases, many of the decisions discussed *infra* are inconsistent.

B. District Court Decisions and Analysis

1. *Olenick* and the Adoption of *Parker*

Second Circuit district courts have squarely addressed which standard should apply to the *McDonnell Douglas* framework several times since 1995. In *Olenick v. N.Y. Telephone/A NYNEX Co.*,²¹³ a pro se plaintiff applied for a job at New York Telephone.²¹⁴ As part of the application process, she underwent a "Customer Contact Evaluation."²¹⁵ Plaintiff claimed she was discriminated against on account of race and color when, among other things, defendant-employer did not take her application.²¹⁶ The court determined that the *McDonnell Douglas* framework applied,²¹⁷ but because plaintiff did not belong to a racial minority, her claims were subject "to a slightly altered analysis."²¹⁸

Citing *Parker*, *Notari*, and *Murray*, the court reasoned that a plaintiff could prove their prima facie case when background circumstances support the suspicion that the defendant was an employer who typically discriminated against the majority.²¹⁹ The court did not rely on any New York Southern District, Second Circuit, or U.S. Supreme Court precedent, failing to mention *McDonald's* holding that Title VII "proscribe[s] racial discrimination in private employment against whites on the same terms as . . . nonwhites"²²⁰ The court

212. *Id.* (internal quotation marks omitted).

213. 881 F. Supp. 113 (S.D.N.Y. 1995).

214. *Id.* at 114.

215. *Id.*

216. *See id.*

217. Plaintiff could not present direct evidence of discrimination. *Id.*

218. *Id.*

219. *See id.*

220. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279-80 (1976).

granted defendant's motion for summary judgment because plaintiff presented no evidence that defendant was the "unusual employer who discriminates against the majority."²²¹

The Southern District's holding clearly established the adoption of a heightened pleading standard of racial discrimination for white plaintiffs, a standard that a member of a racial minority would satisfy automatically by virtue of his or her race. *Olenick* is one of the first and last decisions in the Southern District (and Second Circuit courts generally) to adopt the *Parker* heightened standard of pleading.

2. A Split in the District Courts: *Cunliffe* and *Umansky*

The Connecticut District Court decision three years after *Olenick* marked the beginning of a shift among Second Circuit district courts. In *Cunliffe v. Sikorsky Aircraft Corp.*,²²² plaintiff was terminated following an investigation into allegations of sexual harassment.²²³ The plaintiff claimed that an African American employee was accused and suspended following two separate allegations of sexual harassment, and was only terminated after a third accusation.²²⁴

Defendant argued that since plaintiff was Caucasian, he must also show "background circumstances" as applied in *Olenick*.²²⁵ The court, however, rejected this argument, declining to place an extra burden on the plaintiff at the prima facie stage.²²⁶ The court was unwilling "to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group."²²⁷

Four months after *Cunliffe* refused to apply "background circumstances," the Southern District upheld the same standard. In *Umansky v. Masterpiece International Ltd.*,²²⁸ plaintiff, a white female, alleged discrimination and demanded more than two million dollars in damages from defendant-employer.²²⁹ The court made the curious observation that as a woman, plaintiff was a member of a protected

221. *Olenick*, 881 F. Supp. at 114-15 (internal quotation marks omitted).

222. 9 F. Supp. 2d 125 (D. Conn. 1998).

223. *Id.* at 127. Plaintiff filed a grievance that was submitted to an arbiter, who concluded plaintiff was terminated for just cause. *Id.* at 127-28.

224. *Id.* at 128.

225. *See id.* at 130 n.3.

226. *Id.*

227. *Id.* (internal quotation marks omitted) (citing *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

228. No. 96 Civ. 2367(AGS), 1998 WL 433779 (S.D.N.Y. July 31, 1998).

229. *Id.* at *1. Plaintiff alleged race, gender, and disability discrimination. *Id.*

class, but was not similarly protected as a Caucasian.²³⁰ Working under this presumption, the court applied the *Parker* “background circumstances” standard²³¹ but failed to actually analyze any background circumstances that led to their conclusion. The court simultaneously acknowledged their use of a heightened standard,²³² and recognized that establishing a prima facie case of disparate treatment is not onerous for a plaintiff.²³³ Concerning plaintiff’s protected class status and the standard applied, the court did little to advance its case for using “background circumstances” over a different standard.

3. Rejecting *Olenick* and “Background Circumstances:” *Cully*

*Cully v. Milliman & Robertson, Inc.*²³⁴ served as the watershed case in the Southern District, breaking from the court’s decision in *Olenick*. Although it did not espouse a clear standard, absent guidance from the Second Circuit, it did support treating cases of traditional and reverse discrimination with the same set of criteria. Plaintiff, a white female, was hired as a secretary by the defendant.²³⁵ She was the only white secretary assigned to a common work area with four other secretaries.²³⁶ Plaintiff claimed that soon after she started, the four other secretaries began to harass her based on her race, making derogatory comments, sabotaging her work, making veiled threats, and being generally hostile.²³⁷ After she was moved to a semi-private cubicle, the harassment continued.²³⁸ In addition, she alleged that her one black supervisor tolerated the harassment and became “abusive” and “hypercritical” in dealing with plaintiff.²³⁹ Despite having no pre-termination records of criticism and receiving compliments from one of the managers, plaintiff was terminated during a meeting in which only her black supervisor criticized her performance.²⁴⁰ After plaintiff was terminated, she filed a discriminatory discharge claim based on New

230. *Id.* at *3 n.3.

231. *See id.*

232. *Id.*

233. *See id.* at *3 (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1973)).

234. 20 F. Supp. 2d 636 (S.D.N.Y. 1998).

235. *Id.* at 638.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

York State and City law.²⁴¹ The court applied the *McDonnell Douglas* framework to the claims, explaining that it applies equally to federal, state, and municipal discrimination claims alike.²⁴²

Three short years after *Olenick*, the court in *Cully* disagreed with the assertion that a different legal standard should apply to claims of race discrimination against a white plaintiff,²⁴³ suggesting that in some circumstances it was willing to apply the protections of Title VII in a colorblind manner.²⁴⁴ The court further bolstered its decision by observing “the glaring silence of the Second Circuit,” noting that in the absence of binding authority to the contrary, “*McDonald* means what it says: a Title VII case is a Title VII case on the same terms for plaintiffs of all races.”²⁴⁵

The court also recognized the shifting demographic in the United States and New York, where it is becoming more common for white persons to be in a position as minorities in the workplace:

[I]n a majority-nonwhite office in a majority-nonwhite city in an increasingly diverse country, it is not clear that whites are a majority that we should doubt face racial discrimination. Discrimination against nonwhites undoubtedly is the greater problem in the region and the country; but in any particular social pocket, the tables may turn, leaving it unclear which discrimination direction is the “reverse.”²⁴⁶

The court explained that the burden to establish a *prima facie* case is low because all it does is force the defendant to offer an explanation, and allegations may still fail after the *prima facie* showing.²⁴⁷ Furthermore, the *McDonnell Douglas* framework is outdated because all races are protected classes, and only prongs two and four would ever be in dispute in a discriminatory discharge case.²⁴⁸ The court’s criticism of the burden-shifting framework ultimately called for its abandonment, asserting that all discrimination cases would “progress more sensibly without the much criticized yo-yo rule about the shifting burden of

241. *See id.*

242. *Id.* at 640.

243. *Id.*

244. *See* O’Melveny & Myers, *Court Allows Reverse Discrimination Claim by White Secretary*, 5 N.Y. EMP. L. LETTER, no. 12, Dec. 1998, at 2.

245. *Cully*, 20 F. Supp. 2d at 641 (internal quotation marks omitted).

246. *Id.*

247. *See id.*

248. *See id.* Prongs two and four are “satisfactory of job duties and circumstances giving rise to an inference of discrimination.” *Id.*

persuasion” and the confusing definition of a *prima facie* case.²⁴⁹

Three Southern District cases decided in 2000 and 2001 signaled a complete retreat from *Olenick* and “background circumstances” without fully adopting *Cully*’s reasoning behind abandoning the *McDonnell Douglas* framework. In *Berkowitz v. County of Orange*,²⁵⁰ the court determined that plaintiff Berkowitz was not a member of a protected class under Title VII because he was a white male.²⁵¹ Berkowitz urged the court to adopt the framework established by *Parker*, *Olenick*, and *Umansky*, which would have required a showing that defendant was the unusual employer who discriminates against the majority.²⁵² The court instead chose to apply the framework established by *McDonald*, *Cunliffe*, and *Ticali v. Roman Catholic Diocese of Brooklyn*,²⁵³ announcing that without binding authority from the Second Circuit, “the Court will assume that white persons, as a class, are protected from discrimination against that class.”²⁵⁴

In *DiLegge v. Gleason*,²⁵⁵ the white male firefighter plaintiff was denied twice for promotion in the Fire Department of the City of Mount Vernon, New York.²⁵⁶ He had worked at the fire department since 1986, and was the second-ranked candidate on a civil service eligible list for one of two open lieutenant positions in 1999.²⁵⁷ The first- and third-ranked candidates were promoted, one a Caucasian, the other African American.²⁵⁸ On a motion for summary judgment, the defendants argued that the court should have followed the heightened standard articulated in *Olenick*.²⁵⁹ The court declined to do so, instead articulating that courts confronted with summary judgment motions face an ordinary standard of proof in civil litigation with few exceptions (this case not being one of them).²⁶⁰ Absent clear direction from the Second Circuit or the Supreme Court to the contrary, the court found no reason to adopt such a standard: “The Court rejects as unfounded the concept articulated in *Olenick* . . . and a considerable number of unreported cases

249. *Id.* (internal quotation marks omitted).

250. 120 F. Supp. 2d 386 (S.D.N.Y. 2000).

251. *Id.* at 397.

252. *Id.*

253. 41 F. Supp. 2d 249 (E.D.N.Y. 1999).

254. *Berkowitz*, 120 F. Supp. 2d at 397.

255. 131 F. Supp. 2d 520 (S.D.N.Y. 2001).

256. *See id.* at 521.

257. *Id.*

258. *Id.*

259. *Id.* at 522-23.

260. *Id.* at 523.

which follow the logic of *Olenick* . . . declining to approve a heightened pleading standard in civil rights cases against a municipality.”²⁶¹

In *Tappe v. Alliance Capital Management, L.P.*,²⁶² a white male plaintiff was fired from Alliance Capital on the day it was to pay bonus compensation to its employees.²⁶³ His normal compensation was via base salary and bonuses, the latter of which was substantially more.²⁶⁴ The explanation given to plaintiff as to why he did not receive a bonus was that he “did not fit with the profile of the High Yield Group and its strategy going forward.”²⁶⁵ The four other portfolio managers in plaintiff’s group included three women (one of whom was black), and one white male.²⁶⁶ The court held that the plaintiff was a member of a protected group and did not need to allege “background circumstances” to satisfy the first prong of the *McDonnell Douglas* framework.²⁶⁷ The court acknowledged the split among the federal circuit courts, as well as the variance in the Southern District,²⁶⁸ and chose to follow *McDonald*, highlighting the fact that the Supreme Court held Title VII to prohibit a discriminatory preference against *any* racial group, minority or majority.²⁶⁹ The court’s analysis went further, and held that the Supreme Court has “steadfastly held male plaintiffs to the same standard as female plaintiffs—no more or less.”²⁷⁰

The *Tappe* court placed a special emphasis on the Fourteenth Amendment’s Equal Protection Clause, inferring that enforcement of a heightened burden standard such as “background circumstances” may violate the clause.

No one doubts that the “background circumstances” test, if adopted, would place a higher burden on *Tappe* than a “traditional” plaintiff—after all, if *Tappe* was black, for example, he would not be required to allege any background circumstances. Such differential treatment, if adopted, would raise a serious question because treating plaintiffs differently because of their race or sex triggers heightened

261. *Id.* (citations omitted). The court added that “[w]hether or not the analysis of *Olenick* is followed, a [C]aucasian plaintiff may not holler discrimination and survive a summary judgment motion simply because the political leadership of the city resides with a minority.” *Id.*

262. 177 F. Supp. 2d 176 (S.D.N.Y. 2001).

263. *Id.* at 179.

264. *See id.*

265. *Id.* (internal quotation marks omitted).

266. *Id.*

267. *See id.* at 181-83.

268. *Id.* at 181.

269. *Id.*

270. *Id.* at 182.

constitutional scrutiny.²⁷¹

In its discussion of the Equal Protection Clause, the court concluded that where an alternative interpretation of a statute is “fairly possible” in light of an otherwise acceptable construction that raises serious constitutional problems, courts construe the statute to avoid such problems.²⁷² Interpreting Title VII to mean that all plaintiffs, regardless of race, have the same pleading burden is more than “fairly possible” and in fact “flows from Title VII’s plain language as well as the precedent of the Supreme Court and this Circuit.”²⁷³ Accordingly, the court found that plaintiff had satisfied the first prong,²⁷⁴ therefore upholding the *Cully* line of reasoning.

4. New York’s Eastern and Western Districts

Six months after *Cully* was decided in the Southern District, New York’s Eastern District decided to sidestep the modified *McDonnell Douglas* framework. In *Ticali v. Roman Catholic Diocese of Brooklyn*,²⁷⁵ the plaintiff, a white female elementary school teacher, sued her parochial school employer for, *inter alia*, discrimination based on race, claiming that the school planned to fire white lay teachers and replace them with Hispanic nuns from Argentina.²⁷⁶ The court held that she was not a member of a protected class in a Title VII race discrimination claim, therefore necessitating the use of a “reverse discrimination” framework.²⁷⁷

Instead of following the “background circumstances” standard espoused by *Parker* and *Olenick*, or the standard applied by *Cully* and its progeny, the court chose to follow the Supreme Court’s advice in *U.S. Postal Service Board of Governors v. Aikens*,²⁷⁸ switching the focus to whether an inference may be drawn from the demonstrated facts that the employer treated plaintiff less favorably because of his race.²⁷⁹ This “simplified approach to weighing and evaluating evidence of

271. *Id.*

272. *Id.* at 183.

273. *Id.*

274. *See id.*

275. 41 F. Supp. 2d 249 (E.D.N.Y. 1999).

276. *Id.* at 251.

277. *Id.* at 260.

278. 460 U.S. 711 (1983).

279. *Ticali*, 41 F. Supp. 2d at 261.

discrimination”²⁸⁰ abandoned the *McDonnell Douglas* framework and focused on the actual evidence presented. Under this approach, a court is charged with evaluating plaintiff’s direct or indirect proof, then evaluating defendant’s proof that it did not discriminate, and finally, analyzing the evidence as a whole.²⁸¹ The court’s inquiry focused on “whether the plaintiff has proven that it is more likely than not that the employer’s decision was motivated at least in part by an impermissible or discriminatory reason.”²⁸² The *Ticali* framework maintained the assumption that persons of all races are members of a protected class,²⁸³ but focused on the actual evidence, direct or indirect, of a potentially discriminatory act.

The anomalous holding in *Ticali* has been all but abandoned in the Eastern District as is evident by the standard applied in *Stepheny v. Brooklyn Hebrew School for Special Children*.²⁸⁴ Plaintiff, a white woman, was terminated from her job along with her husband, a black male, for their involvement in an extramarital affair.²⁸⁵ The plaintiff claimed she was terminated because she was white.²⁸⁶ Without much discussion, the court adopted an approach similar to *Cully*, following the reasoning in *McDonald* that “Title VII prohibits racial discrimination against whites on the same terms as racial discrimination against non-whites.”²⁸⁷ The court noted that *Olenick*, in adopting the “background circumstances” standard, “did not cite to or attempt to distinguish” *McDonald*, and therefore found no reason to adopt *Olenick*’s line of reasoning.²⁸⁸ Within the constraints of the *McDonnell Douglas* framework (which the court re-established as the standard for analyzing a *prima facie* case of reverse discrimination),²⁸⁹ the court found that “the standard of proof for a plaintiff to establish a *prima facie* case of reverse employment discrimination is the same in all cases.”²⁹⁰

As of this writing, New York’s Western District has had the last word among Second Circuit district courts over which standard to apply

280. See Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 661 (1998).

281. *Id.* at 673.

282. *Id.*

283. See *Cully*, 20 F. Supp. 2d at 641.

284. 356 F. Supp. 2d 248 (E.D.N.Y. 2005).

285. See *id.* at 254-57.

286. *Id.* at 258.

287. *Id.* at 259 n.9 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976)).

288. See *id.*

289. *Id.* at 258.

290. *Id.* at 259 n.9 (emphasis in original).

to the *McDonnell Douglas* framework. In *Allaire v. HSBC Bank USA*,²⁹¹ plaintiff, a white male, worked for defendant for ten years.²⁹² While overseeing the Commercial Finance Department in Dallas, he discovered discrepancies in required loan documents.²⁹³ After reporting this to his supervisor, he agreed to conduct a more thorough self-audit of the department.²⁹⁴ After being transferred back to the Buffalo office, defendant's Audit Department reviewed the Dallas office and downgraded plaintiff's performance rating.²⁹⁵ Shortly thereafter, he was terminated and replaced by a black female who had been employed by defendant for three years before plaintiff was hired.²⁹⁶

Defendant argued that plaintiff would need to show "background circumstances" because he was not a member of a protected class for purposes of Title VII claims.²⁹⁷ The court acknowledged that the Second Circuit had not specifically resolved the issue, but has "declined to apply such a heightened burden in a recent case involving a white plaintiff's employment discrimination claim."²⁹⁸ After noting that the Supreme Court has also rejected a heightened standard of proof for majority plaintiffs, the court declined to apply the pleading standard proposed by defendant, holding that plaintiff had satisfied the first prong of the *McDonnell Douglas* framework.²⁹⁹

In 2011, the same district court weighed in on reverse discrimination in *Adamczyk v. N.Y. State Department of Correctional Services*.³⁰⁰ Acknowledging *McDonald, Parker, Tappe, Iadimarco*, and the absence of an express adoption by the Second Circuit of any test, the court determined that it was not inclined to apply a higher standard of proof in reverse discrimination suits.³⁰¹ The court explained that "[a] plaintiff's burden to establish a *prima facie* case is supposed to be a minimal one."³⁰²

291. No. 00-CV-0084E(SC), 2003 WL 23350119 (W.D.N.Y. Oct. 27, 2003), *aff'd*, 109 F. App'x 477 (2d Cir. 2004).

292. *Id.* at *1.

293. *Id.*

294. *Id.*

295. *See id.*

296. *Id.* at *2.

297. *Id.* at *3.

298. *Id.* (citing to *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001)).

299. *See id.* at *3-4.

300. No. 07-CV-523S, 2011 WL 917980 (W.D.N.Y. Mar. 14, 2011), *aff'd*, 474 F. App'x 23 (2d Cir. 2012).

301. *Adamczyk*, 2011 WL 917980, at *5.

302. *Id.* (emphasis in original).

V. SOLUTIONS FOR THE SECOND CIRCUIT

Determining how to modify the *McDonnell Douglas* standard in reverse discrimination claims essentially boils down to three alternatives: (a) the *Parker* standard of providing “background circumstances” at the pleading stage; (b) the modified “background circumstances” standard applied in *Notari*; (c) or the *Iadimarco* “sufficient evidence” standard, which does not subject a majority plaintiff to a heightened burden. Despite the absence of guidance from the Second Circuit, one principle has emerged from the district courts: the *Parker* standard is no longer controlling.³⁰³ What is unclear is whether the Second Circuit is best served by reverting to the *Parker* standard or whether it should adopt the more loosely-defined standards of proof in either *Notari* or *Iadimarco*.

A. *Parker* and “Background Circumstances”

Two pervasive arguments support *Parker*. First, proponents of the “background circumstances” requirement argue that application of a heightened burden for majority plaintiffs is consistent with the spirit of Title VII.³⁰⁴ The Civil Rights Act was meant to aid the plight of African Americans.³⁰⁵ It is well established that Title VII was intended to break down barriers in employment for minorities, particularly for African Americans.³⁰⁶ Thus, application of the same test to all racial groups may contradict the legislative intent.³⁰⁷ Simply put, “Title VII was not enacted merely to enforce like treatment of all individuals but was instead enacted primarily as a means of improving the economic status of Blacks and other minorities.”³⁰⁸ Proponents of *Parker* conclude that a heightened burden on non-minorities is consistent with the Act’s purpose.³⁰⁹ It follows that removing the heightened burden on majority plaintiffs must require a judicial determination that Title VII has achieved its purpose of removing barriers in employment for minorities, and that such additional protection is no longer needed.³¹⁰ This dubious

303. See *id.*

304. See Onwuachi-Willig, *supra* note 36, at 84.

305. See 110 CONG. REC. 1511 (1964) (statement of Rep. Madden).

306. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). See also 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey).

307. See Onwuachi-Willig, *supra* note 36, at 84.

308. *Id.*

309. See *id.*

310. See *id.* (“[Removing a heightened burden] would also send an implicit message to

conclusion falls outside permissible judicial determinations, but also ignores that the *McDonnell Douglas* framework “was premised not on the fact that minorities are discriminated against in modern society, but rather on the fact that they were traditionally disfavored,” compared to the majority, and therefore, “the issue of which groups in today’s society experience unfavorable treatment is irrelevant.”³¹¹

Another argument supporting *Parker* is that the *McDonnell Douglas* framework demonstrates judicial enforcement of the legislative purpose of Title VII. The framework provides that “when a qualified, presumptively disadvantaged person has been the object of an adverse employment decision regarding an available position, the individual has established a presumption of discrimination.”³¹² It is argued that the sole purpose of the *McDonnell Douglas* test is to determine whether discrimination against a plaintiff be inferred from the circumstances.³¹³ The validity of the presumption of discrimination depends on the plaintiff’s membership in a historically disadvantaged group.³¹⁴

The rationale of affording minorities this presumption is simple: Congress recognized that minorities faced discriminatory practices in employment that whites did not.³¹⁵ Such practices placed them at a disadvantage historically, and Title VII was passed to help them overcome these barriers.³¹⁶ While Title VII does protect both minority and majority plaintiffs, “[t]he historical facts of discrimination mean that a presumption of discrimination coincides with certain identities and not others,” and membership in a class that has historically faced discrimination “establishes a presumption of unlawful discrimination for those individuals who possess identities likely to subject them to prohibited forms of discrimination”³¹⁷ Thus, *Parker*’s reliance on “background circumstances” is logical because without membership in a historically disadvantaged group, an inference of discrimination often defies common sense and affords additional protections not warranted

Whites . . . that discrimination against Blacks and other minorities is no longer a problem.”)

311. Brenda D. DiLuigi, Note, *The Notari Alternative: A Better Approach to the Square-Peg-Round-Hole Problem Found in Reverse Discrimination Cases*, 64 BROOK. L. REV. 353, 371 (1998) (internal quotation marks omitted).

312. Cunningham, *supra* note 82, at 452.

313. See Onwuachi-Willig, *supra* note 36, at 64.

314. See Cunningham, *supra* note 82, at 452 (“[A]lthough individuals with privileged identities are protected under the statute, a privileged individual may not rely on his identity to establish an inference of discrimination.”).

315. See *id.*

316. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

317. See Cunningham, *supra* note 82, at 453-54 (footnote omitted).

by historical practice or statutory intent.³¹⁸ The *Parker* approach preserves reliance on the *McDonnell Douglas* framework because, without additional facts that demonstrate the requisite background circumstances, any inference of discrimination is unfounded and does not justify the presumption of discrimination.

Despite sound arguments in favor of adopting the *Parker* approach, it would make the least sense in the Second Circuit considering that approach has been widely rejected among the district courts, either explicitly or by implication. Several problems with the *Parker* standard have already been highlighted—including its heightened pleading requirements and amorphous definition—but the principle of *stare decisis* has only been discussed by implication and may in fact foreclose the Second Circuit from applying the *Parker* standard.³¹⁹ In its broadest form, *stare decisis* is “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”³²⁰ The Supreme Court has ruled that this principle is one of policy, not a “mechanical formula of adherence to the latest decision,”³²¹ and is given special force in cases of statutory interpretation due to the legislature’s involvement and freedom to alter the Court’s decision.³²² The Second Circuit should explicitly disregard *Parker* in the interest of precedent.³²³

In the interest of uniformity and creating an unbroken, consistent body of law, the Second Circuit should apply a test that does not modify the first prong of the *McDonnell Douglas* framework in such a way as to impose more than a “minimal” burden on a majority plaintiff.³²⁴ Second Circuit cases have explicitly and continuously allowed a majority plaintiff to satisfy the first prong without having to prove “background circumstances.”³²⁵ Imposing the *Parker* standard would not only break

318. See *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (1981).

319. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 911-12 (2010) (identifying the factors relevant in deciding whether or not to adhere to *stare decisis*, including “the antiquity of the precedent, the reliance interests at stake, and . . . whether the decision was well reasoned.”).

320. *Hohn v. United States*, 524 U.S. 236, 251 (1998) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

321. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

322. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

323. *United States v. Santiago*, 268 F.3d 151, 154 (2d Cir. 2001) (“We are bound by [precedent] unless it has been called into question by an intervening Supreme Court decision or by one of this Court sitting *in banc*.”).

324. See *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001).

325. See *id.* See also *Aulicino v. N.Y.C. Dep’t of Homeless Servs.*, 580 F.3d 73, 80 n.5 (discussing “background circumstances” but failing to adopt it); *Carroll v. City of Mount Vernon*,

from most recent district court decisions, but also would create a different set of circumstances for a majority plaintiff that has thus far not proven to be unworkable or antiquated.³²⁶

However, *stare decisis* may not control because the Second Circuit has not articulated sound and clear reasoning for its silence and implicit rejection of *Parker*. Since any decision is at the court's discretion, the Second Circuit may be persuaded by a defendant challenging the first prong standard.³²⁷ It is not implausible that the Second Circuit would adopt *Parker* in light of a well-reasoned challenge that the "minimal" burden of a majority plaintiff includes proving a set of background circumstances.³²⁸ At a minimum, the Second Circuit likely will continue to apply a burden-shifting scheme that does not differentiate between majority and minority plaintiffs.

A common criticism of *Parker* is that it results in making it more difficult for non-minority plaintiffs to bring a claim.³²⁹ The Sixth Circuit questioned whether "the background circumstances prong, only required of reverse discrimination plaintiffs, may impermissibly impose a heightened pleading standard on majority victims of discrimination."³³⁰ Opponents of *Parker* argue that, because plaintiffs in Title VII claims often must rely solely on indirect evidence of discrimination, requiring additional facts to present a *prima facie* case contradicts the Supreme Court's reasoning for the *McDonnell Douglas* framework.³³¹ Under *Parker*, a minority plaintiff may rely on indirect evidence of discrimination, whereas a white plaintiff, lacking direct evidence of background circumstances, may not.³³² Non-minorities may become discouraged from asserting their rights, a result that is inequitable and contrary to the objectives underlying Title VII.³³³ Moreover, the test ignores the fact that, even if an employer has never discriminated against

453 F. App'x 99 (2011) (no discussion of "background circumstances"); *Vallone v. Lori's Natural Foods Ctr., Inc.*, No. 98-9388, 1999 WL 1012668, at *1 (2d Cir. Oct. 12, 1999) ("This Court has applied the same burden-shifting to claims of 'regular' discrimination-i.e., where the plaintiff is a member of a historically disfavored group-as well as to claims of reverse discrimination-i.e., where the plaintiff is not a member of a historically disfavored group.").

326. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 911-12 (2010).

327. 20 AM. JUR. 2D *Courts* § 131 (2005).

328. *Iadimarco* essentially abrogated lower court decisions within the Third Circuit, reversing a course of jurisprudence that employed the *Parker* standard. Citeroni, *supra* note 177, at 599.

329. See *Iadimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999).

330. *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002) (internal quotation marks omitted).

331. See DiLuigi, *supra* note 311, at 372.

332. See *id.*

333. *Id.*

non-minorities, he may have discriminated against the plaintiff under the alleged circumstances.³³⁴ Thus, a non-minority plaintiff may not survive the prima facie stage with strong indirect evidence of discrimination unless there is direct evidence of the employer's history of reverse discrimination.

Parker's background circumstances test has also been criticized for being ill-defined and vague.³³⁵ While the test requires proof that the defendant discriminates against the majority, "if a racial 'minority' constitutes a racial 'majority' in a particular locality, the 'traditionally disfavored' presumption should not be applicable."³³⁶ It follows that a rigid application requiring a minority to be a member of a "traditionally disfavored group" may be "an inequitable assumption about modern society."³³⁷ Whether or not this premise is correct, opponents make it clear that "[t]he absence of coherent substantive content is sufficient reason to consider a different approach."³³⁸

B. The Notari Modification

The approach set forth in *Notari* presents an interesting compromise between *Parker* and *Iadimarco*. Essentially, *Notari* provides that a plaintiff may establish a prima facie case either by background circumstances sufficient to raise an inference of reverse discrimination, or by offering indirect evidence "sufficient to support a reasonable probability" that, but for the plaintiff's race, the challenged employment action would not have occurred.³³⁹ While direct evidence of background circumstances may not be required, the plaintiff is still not entitled to the presumption of discrimination implicit in the *McDonnell Douglas* framework.³⁴⁰

Proponents of this standard argue it "provides a reasonable alternative to the reverse discrimination plaintiff who lacks sufficient

334. Timothy K. Giordano, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure That Separate Is Equal*, 49 EMORY L.J. 993, 1020 (2000).

335. Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1080 (2004) (noting that the background circumstances test "is more a label than a test" and is comprised of many different approaches).

336. Citeroni, *supra* note 177, at 596.

337. *Id.* at 596-97.

338. Sullivan, *supra* note 335, at 1080.

339. *Notari v. Denver Water Dep't*, 971 F.2d 585, 590 (10th Cir. 1992).

340. *Id.*

evidence to establish a prima facie case under the *Parker* approach.”³⁴¹ Like *Parker*, it requires a heightened burden in reverse discrimination cases, thus preserving Title VII’s primary objective and the justification for the presumption of discrimination established in the *McDonnell Douglas* framework.³⁴² Unlike *Parker*, it allows a non-minority plaintiff to state a prima facie case based solely on indirect evidence of discrimination.³⁴³ Therefore, “the availability of an alternative means of proof serves to rectify some of the infirmities created by the imposition of an elevated standard.”³⁴⁴ This alternative recognizes the rationale behind the modification *Parker* imposes while establishing an equitable scheme that allows plaintiffs to prove reverse discrimination.³⁴⁵ “By easing the burden on reverse discrimination plaintiffs and allowing for the use of indirect evidence, the *Notari* alternative is consistent with the spirit of Title VII and remains true to its purpose of enforcing the provisions embodied in the statute.”³⁴⁶

Commentators have criticized *Notari* for imposing a heightened standard on non-minority plaintiffs.³⁴⁷ Opponents argue that the alternative approach has not placed non-minority plaintiffs in a better situation than those subject to the *Parker* test.³⁴⁸ It follows that *Notari* is deficient for the same reasons as *Parker*.

[I]t is not clear how the “but for” test is any easier to meet than the *Parker* standard, especially in light of the fact that one of the most successful ways of making such a “but for” showing undoubtedly would be through proving a fact akin to the *Parker* requirement that the defendant regularly discriminates against the majority.³⁴⁹

As a result, “[i]t seems likely that the plaintiff must prove

341. DiLuigi, *supra* note 311, at 375.

342. *See id.* at 375-76.

343. *See id.* at 376.

344. *Id.* at 376.

345. *See id.*

346. *Id.*

347. *See* Scott Black, McDonnell Douglas’ *Prima Facie Case and the Non-Minority Plaintiff: Is Modification Required?*, 1994 ANN. SURV. AM. L. 309, 348-49 (1995).

348. *See* Citeroni, *supra* note 177, at 601. “[I]t would be a daunting task to convince a majority plaintiff that he is placed in a better position under the *Notari* standard when he must twice attempt to adduce evidence[] at the prima facie stage of litigation” where his minority counterpart would not. *Id.*

349. Black, *supra* note 347, at 349 (“Even more puzzling is the court’s statement that ‘a given employer may discriminate against an individual white worker even when no evidence demonstrates that the employer generally favors workers who belong to historically disadvantaged groups.’”). *See also* Citeroni, *supra* note 177, at 602.

something like background circumstances, even under this alternative formulation.”³⁵⁰ Thus, under *Notari* the plaintiff will still face obstacles not applicable to minority plaintiffs, and, like *Parker*, these obstacles are very difficult to overcome in cases where the plaintiff can only provide indirect evidence to support his claim.³⁵¹

C. *Iadimarco* and the “Sufficient Evidence” Standard

Iadimarco effectively guarantees that a majority plaintiff’s claim of reverse discrimination will not be foreclosed at the prima facie stage if he is unable to prove any “background circumstances.” One commentator has suggested that maintaining a uniform standard for all plaintiffs will encourage employers to be more “conscious of the legitimacy of their actions” so as to avoid opening the floodgates for suits from majority plaintiffs.³⁵² Regardless of its impact on future Title VII suits, *Iadimarco* sidestepped the “intractable problem of what constitutes background circumstances and avoids the intellectually disingenuous approach of courts that have continued to use the label” while departing from the intent of the *Parker* court.³⁵³

Iadimarco alters the method of proof in the traditional *McDonnell Douglas* framework in favor of a more “holistic assessment” of evidence in a Title VII claim.³⁵⁴ In taking this holistic approach, *Iadimarco* eschews reliance on predictions of human behavior on which *McDonnell Douglas* and *Parker* rely—that “cross-racial discrimination is more common than intra-racial discrimination.”³⁵⁵ The *Iadimarco* standard, however, maintains a true burden-shifting configuration, and a judge will still have to decide whether there is sufficient evidence to find discrimination after the employer has presented a nondiscriminatory reason for an adverse employment action, even when a white employee sues a white employer.³⁵⁶ In certain areas of New York, it is becoming more common for a white person to be in the minority, prompting courts in those jurisdictions to utilize a *Iadimarco*-style modification of the first prong.³⁵⁷ These results suggest that a “sufficient evidence” approach

350. Sullivan, *supra* note 335, at 1071.

351. Black, *supra* note 347, at 349.

352. Citeroni, *supra* note 177, at 600.

353. Sullivan, *supra* note 335, at 1118-19.

354. *Id.* at 1129.

355. *Id.* at 1129-30.

356. *Id.* at 1130.

357. See *Cully v. Milliman & Robertson, Inc.*, 20 F. Supp. 2d 636, 641 (S.D.N.Y. 1998).

serves the same purpose for white plaintiffs as a traditional approach would for minority plaintiffs in predominantly white areas. Even in cases where a white plaintiff lives and/or works in a predominantly minority-populated area, the *Iadimarco* standard is not likely to automatically confer an inference of discrimination.³⁵⁸

Despite leveling the playing field for all plaintiffs in Title VII employment discrimination claims, eliminating the requirement of a formal proof structure may create an impediment to reverse discrimination suits.³⁵⁹ One commentator singled out *Tappe* as a prime example of how modifying the *McDonnell Douglas* framework with a “sufficient evidence” approach would fly in the face of the original intent of Title VII and the *McDonnell Douglas* framework, and would further cripple efforts to diversify the workplace because of the looming threat of liability after every adverse employment decision.³⁶⁰

Title VII was clearly intended to secure full civil rights for African Americans, not to secure rights for white citizens.³⁶¹ Several statements from House debates at the time of the Civil Rights Act of 1964 echo this purpose: opponents of the bill conceded that it was intended to improve the lives of African Americans,³⁶² and proponents argue the legislation was required to address the “moral outrage” regarding discrimination against them.³⁶³ Nowhere in the debates in either the House or the Senate was it apparent that whites were in need of protection from discrimination in employment or otherwise.³⁶⁴ The Senate debates were more contentious, but they ultimately agreed that Title VII was primarily intended to benefit African Americans, and that discrimination against whites in the employment sphere was non-existent.³⁶⁵

If one accepts the presumption that Title VII protects members of all races equally, then *Iadimarco*'s reasoning undermines not only the legislative intent of the Act, but also the *McDonnell Douglas* framework, essentially reducing it to one prong.³⁶⁶ By refusing to apply

358. See, e.g., *DiLegge v. Gleason*, 131 F. Supp. 2d 520, 523 (S.D.N.Y. 2001) (“[A] caucasian plaintiff may not holler discrimination . . . simply because the political leadership of the city resides with a minority.”).

359. See Sullivan, *supra* note 335, at 1119.

360. Michael J. Fellows, Note, *Civil Rights — Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 421-24 (2004).

361. See 110 CONG. REC. 1512 (1964) (statement of Rep. Madden arguing for the enactment of “The Civil Rights Act of 1963”).

362. 110 CONG. REC. 1515 (1964) (statement of Rep. Colmer).

363. 110 CONG. REC. 1521 (1964) (comments of Rep. Celler).

364. Fellows, *supra* note 360, at 401.

365. *Id.* at 402.

366. *Id.* at 420 (applying the reasoning in *Tappe*, which is similar to *Iadimarco* in that it does

“background circumstances” and only requiring “sufficient evidence” of discrimination based on a protected trait, as in *Iadimarco*,³⁶⁷ district courts have failed to satisfy the essential function of the *McDonnell Douglas* test itself, “which is to ‘raise[] an inference of discrimination because [of employment actions that], if otherwise unexplained, are *more likely than not* based on consideration of impermissible factors.’”³⁶⁸ *Iadimarco* would fail to eliminate other reasonable explanations for the termination of a white employee, and it would not make sense to require an employer to explain the decision to dismiss a white employee based on non-prohibited criteria.³⁶⁹ Instead, based on the history of Title VII and the purpose behind the *McDonnell Douglas* test, the burden should fall on the white employee to prove that his firing was the result of invidious discrimination.³⁷⁰

The Second Circuit’s adoption of *Iadimarco* could also stifle legitimate employment decisions to diversify and correct the historical imbalance for which Title VII was enacted. Michael J. Fellows succinctly explains this catch-22:

As workplaces become more diverse, whenever *any* worker is fired perhaps he will have a claim under Title VII. All he need show is that someone of a different race did not perform as well, this despite the fact that ‘there is rarely a single, best qualified person for a job.’ Employers who attempt to bring diversity into the workplace will be subject to lawsuits under the very statute designed to bring diversity into the workplace. . . . Title VII, an anti-discrimination statute, may thus become a statute used to harass employers and constrict their legitimate business decisions.³⁷¹

Thus, applying a “sufficient evidence” standard has the potential not only to undermine Title VII, but would make nearly every legitimate employment decision subject to a Title VII lawsuit. While no empirical evidence exists to suggest that reverse discrimination claims would spike if the Second Circuit adopts the “sufficient evidence” standard, Fellows

not apply the “background circumstances” standard and treats the white plaintiff as any other plaintiff alleging Title VII race discrimination).

367. *Iadimarco v. Runyon*, 190 F.3d 151, 161-62 (3d Cir. 1999).

368. Fellows, *supra* note 360, at 420 (alterations in original) (internal quotation marks omitted).

369. *Id.* at 421 (criticizing the reasoning of *Tappe* and Justice Rehnquist’s dissent in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), both of which support Title VII’s colorblind and neutral application).

370. Fellows, *supra* note 360, at 421.

371. *Id.* at 421-22 (emphasis in original) (footnotes omitted).

suggests that white applicants would always have a *prima facie* Title VII claim whenever an employer hires a less-qualified minority applicant.³⁷²

VI. CONCLUSION

The Second Circuit should explicitly adopt the *Iadimarco* approach in reverse discrimination claims where modification of the first prong of the *McDonnell Douglas* standard is appropriate. *Stare decisis* should not foreclose the Second Circuit from adopting the “background circumstances” standard because that court has yet to address the issue, and the relevant precedent is too inconsistent to distill any standard.³⁷³ However, a “background circumstances” standard would cut against the current trend in district courts that apply an approach similar to that of *Iadimarco*’s “sufficient evidence” standard.³⁷⁴ Given the heightened burden that is unavoidable under *Parker*, embracing “background circumstances” as the solution would be contrary to the Second Circuit’s own conclusion that the burden on a majority plaintiff should not be onerous.³⁷⁵

The *Notari* standard maintains the admirable elements of the “background circumstances” approach while providing a “but-for” totality of the evidence catchall in claims lacking direct evidence of background circumstances.³⁷⁶ Even though *Notari* suffers from the same amorphous consequences that plague the “background circumstances” standard, it is an admirable attempt to preserve the purpose of Title VII while recognizing the dilemma facing majority plaintiffs who may only be able to provide indirect evidence of discrimination.³⁷⁷ However, this approach still suffers most of the pitfalls of *Parker*, and can essentially be boiled down to the same standard, leading to the conclusion that *Notari* is a mere masquerade of *Parker*.

Iadimarco is the sensible standard to adopt because it does not impose a heightened pleading standard, but rather treats every Title VII claimant alike regardless of race.³⁷⁸ The United States has not shaken its legacy of slavery and disparate treatment of minorities, as invidious discrimination and impermissible discriminatory motives still exist. It is

372. *Id.* at 422.

373. See discussion *supra* Part V.A-B.

374. See discussion *supra* Part IV.B.2-4.

375. See *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001).

376. See discussion *supra* Part III.B., V.B.

377. See *Notari v. Denver Water Dep’t*, 971 F.2d 585, 590 (10th Cir. 1992).

378. See *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999).

true that Title VII was meant to correct the historical imbalance against African Americans and other historically disfavored groups, and that the “background circumstances” modification was established with this same intent in mind.³⁷⁹ However, it is unclear whether this method is appropriate to interpret the meaning of Title VII in 2012. As racial minorities begin to outnumber the current majority, it will be difficult to justify the rationale behind *Parker* and *Notari*. Some of the district court cases discussed in this Note, particularly those in urban areas, have already recognized this issue.³⁸⁰

A majority plaintiff has a difficult time satisfying the prima facie requirements for reverse discrimination as it stands. Requiring additional evidence at the pleading stage only makes it more difficult. *Iadimarco* applies uniformly, regardless of one area’s racial demographic.³⁸¹ A white plaintiff will have the same pleading requirements and inferences drawn under a “sufficient evidence” standard as under the *McDonnell Douglas* framework.³⁸² Any backlash of litigation against employers attempting to diversify is speculative at best. Regardless of whether the district courts have adopted *Iadimarco*-like reasoning, or whether *stare decisis* controls, the Second Circuit should expressly adopt its “sufficient evidence” approach and interpret the Title VII prima facie burden consistent with the Supreme Court’s decision in *McDonald*: a Title VII claim is a Title VII claim for all plaintiffs, regardless of race.

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379. See *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

380. See discussion *supra* Part IV.B.3.

381. See *Iadimarco*, 190 F.3d at 161.

382. See *id.* at 163.

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