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HIJACKING OF TITLE VII EMPLOYMENT DISCRIMINATION PLAINTIFFS ON THE WAY TO THE JURY

Steven R. Semler*

I. INTRODUCTION

The object of Title VII, since its enactment in 1964, is to eradicate intentional invidious discrimination in employment on the basis of race, sex, national origin, or religion.¹ Yet, court decisions over the half century since Title VII's enactment have made the task of a Title VII disparate treatment plaintiff who lacks *direct* evidence of discrimination to get to the jury increasingly difficult by a brew of: (i) restrictive pleading, (ii) substantive law requirements and interpretations, and (iii) evidentiary devices—which collectively serve to *convert* the central *statutory* inquiry of intent to, instead, legal issues. The net effect is to shift focus away from jury determination of the fact of discriminatory motivation to, instead, artfully become transformed by the courts into mechanisms which can be manipulated by the employer for court determination upon dispositive motion. Employers artfully have turned use of these mechanisms into bullet-proof dispositive legal inquiries to

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1. See 42 U.S.C. § 2000e-2 (2012). Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part: “It shall be an unlawful employment practice for an employer— (1) . . . 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” Title VII of the Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a). The statutory standard for proving such intentional discrimination is found at 42 U.S.C. § 2000e-2(m): “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). It is well settled that the prohibition bans all intentional discrimination on the protected bases. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); 42 U.S.C. § 2000e-2. Indeed, employment practices which are discriminatory in impact though neutral in intent are prohibited as well: “Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

be determined by judges on motion in lieu of trial by jury. The net result effectively functions to keep the factual motivation issues from ever getting to the jury and instead to become determined on the basis of legal issues strategically crafted by the employer to assure the absence of a jury question and, correspondingly, the employer's success on dispositive motion. The courts facilitate this—perhaps as docket control devices—and employers take full advantage of such opportunity to attempt to structure the case to avoid having the claim decided by the vagaries of a jury—much less a potential “runaway jury.”

There are multiple tiers of such analytical frameworks and devices which operate cumulatively to achieve this conversion from fact issue to legal issue. First, the threshold of pleading adequacy required to survive motions to dismiss has been raised by the courts; thus potentially precluding the plaintiff from ever getting to discovery to support her claim, and disposing of the case *ab initio*. Second, the standards applicable to adjudicating summary judgment motions also have become more permissive. Third, the substantive law increasingly has been interpreted by the courts to *convert* the central *jury-determination fact* inquiry of discriminatory intent, to the wholly different *court-manufactured and court-determined legal* inquiry of whether a *pretext case exists*—whether plaintiff has mounted a jury-triable issue as to the legitimacy or falsity of the employer's asserted business reason for its challenged employment action—as to which the employer has no burden to prove but as to which the plaintiff has the burden to disprove. *Fourth*, facilitating this conversion from an issue of fact for the jury to dispositive legal issue for the court, is the increasing assortment of judicially created “evidentiary toolbox”² devices which serve to neutralize fact-evidence of discrimination or pretext (by deeming potentially key pieces of evidence of intent to be not genuine, material, or probative). This combination facilitates dismissal of the claim upon dispositive motion and, perhaps coincidentally, thereby allowing the courts to prune their dockets of employment discrimination cases.

Collectively, this brew of employer strategic selection of reason for its action as to which it has no burden of proof, upon which it can then force the plaintiff into a burden of disproving on the basis of evidence that the employer has set the trap of the plaintiff's inability to disprove, and to further marginalize evidence of discrimination by judicial

2. A term of my invention, referring to the grab bag of judicially created devices which can be used by employers to judicially neuter—individually or collectively—pieces of evidence from supporting a jury question of discriminatory intent. See discussion *infra* Part III.C.

creation of increasing court-crafted “legal tools” to neuter issues of fact for the jury. These “legal tools” all serve to hijack the plaintiff’s jury determination of discrimination to a different question of law to be determined by a judge on dispositive motion.

The cumulative effect of these mechanisms has been devastating to plaintiffs seeking to get their Title VII employment discrimination claims to juries, and correspondingly rewarding to employers skilled in aggressively exploiting—perhaps “out-lawyering” adversaries less skilled in navigating these tricky waters—by structuring strategic deployment of these mechanisms to prevent employment discrimination claims from reaching juries. More employment discrimination claims filed in federal courts are disposed of upon dispositive pretrial motion than any other type of claim,³ hence never reaching a jury. Of those that survive dispositive motions, most settle.⁴ Inviting aggressive utilization of these devices and doctrines is the key battleground for stopping such cases from having to be settled, much less from ever being exposed to the risk of jury determination.

The reasons for each are described below and then a potential solution to facilitate allowing the statutory inquiry to be reset to where Congress intended from the outset.

II. ROUND ONE: RAISING THRESHOLD FOR PLEADING UNDER FRCP RULE 8(A)(2) AND, CORRESPONDINGLY, FOR MTD’S UNDER RULE 12(B)(6)

The pleading requirements of complaints filed in the Federal Courts are defined in the Federal Rules of Civil Procedure (“FRCP”) Rule 8(a)(2), which merely requires the complaint to set forth “a short and plain statement of the claim showing that the pleader is entitled to relief”⁵ The Rule has not changed.⁶ Instead, the Supreme Court

3. See Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson 15 tbl. 10 (Aug. 13, 2008) (on file with author), *available at* <https://bulk.resource.org/courts.gov/fjc/sujulrs2.pdf> (showing that in a sample of cases where a party moves for summary judgment, 16% of employment discrimination cases were disposed of by a summary judgment granted in whole, while the average of all cases in the study was 6%). This, does not address the cases already filtered out earlier on motions to dismiss. See Part II.D, *infra*.

4. See Robert Nelson et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 187 fig. 1 (2010) (analyzing a study of employment discrimination cases that were settled in federal court from 1988-2003).

5. FED. R. CIV. P. 8(a)(2).

6. See *id.*

moved the Rule's goal posts.

A. The Goal Post

Thus, for many years, the lenient “no set of facts” standard of *Conley v. Gibson*⁷ applied: Rule 8 requiring nothing more than that “a complaint should not be dismissed for failure to state a claim *unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim* which would entitle him to relief.”⁸ Relying on Rule 8, the Court concluded that all ~~that~~ the Rule required was that defendant receive “fair notice of what the plaintiff’s claim is and the grounds upon which it rests,” thus allowing merely “notice pleading,” after which the details of the claim could be fleshed out by the “liberal opportunity for discovery,”⁹ noting the Federal Rules “reject the approach that pleading is a game of skill”¹⁰ *McCray v. Standard Oil Co. (Indiana)*,¹¹ sustained the complaint under Rule 8 with conclusory unspecified class allegations of discrimination by, *inter alia*, “[m]aintaining job classifications segregated on the basis of race, color and sex. . . .” The Court noted that *Conley* did not require more and, rather, that such notice served the purpose of allowing the defendant to take discovery to ascertain specifically what the plaintiff was suing about, stating¹²: “The pleadings are not designed to carry the burden of formulating the issues and advising the adverse party of the facts involved. Depositions and discovery procedures perform that function.”¹³

B. The Goal Post Moved

As noted, Rule 8(a)(2) was not changed, but its requirements as to the minimum required standards of pleading were effectively, substantively tightened by a pair of Supreme Court cases—first in 2007 by an antitrust case (*Bell Atlantic Corp. v. Twombly*)¹⁴ the holding of

7. *Conley v. Gibson*, 355 U.S. 41(1957). This case arose on an employment discrimination claim brought by African-American employees alleging their jobs were discriminatorily replaced by Caucasians. *Id.* at 42-43.

8. *Id.* at 45-46 (emphasis added).

9. *Id.* at 47.

10. *Id.* at 48.

11. *McCray v. Standard Oil Co. (Ind.)*, 76 F.R.D. 490 (N.D. Ill. 1977).

12. *Id.* at 496.

13. *Id.*

14. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

which was extended to civil rights claims in 2009 (*Ashcroft v. Iqbal*).¹⁵ The goal posts imposed by the Rule were moved further from the plaintiff.

In *Twombly*, the Supreme Court held an antitrust complaint was insufficient to state a claim under Rule 8(a)(2) and was required to be dismissed under Rule 12(b)(6). The Court concluded that the “formulaic recitation of the elements of a cause of action,”¹⁶ the legal “conclusion[s] couched as a factual allegation,”¹⁷ and the “naked assertion[s] devoid of ‘further factual enhancement,’”¹⁸ would not be sufficient pleadings under Rule 8(a)(2). Rather, the Court crafted a tenuous tightrope of a higher standard that more facts need to be alleged to be sufficient to withstand a motion to dismiss (“MTD”) a complaint must allege enough facts which make the appearance of a violation “*plausible on its face*.”¹⁹ The facts must allege something that is *more than a possibility* though *less than a “probability requirement* at the pleading stage; it simply calls for enough fact [in the complaint] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”²⁰ Under this gossamer formulation, mere *possibility* of a violation was deemed insufficient pleading: but *plausibility* of a violation being pled became the new required minimum.²¹ Pleading facts which are merely consistent with liability “stops short of the line between possibility and plausibility of ‘entitlement to relief’” under Rule 8(a)(2).²² The Court additionally stated in *Iqbal* that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”²³

While the Court claimed merely to be interpreting the existing requirements of Rule 8(a)(2), it does not require intensive analysis to appreciate that having to plead “plausible probability” of a violation imposes a far higher pleading bar than the *Conley* standard of failing to plead “no set of facts” that might support a violation.²⁴ Indeed, while *Conley* was based on minimizing the burden on the plaintiff to get to

15. See *Ashcroft v. Iqbal* 556 U.S. 662, 684 (2009).

16. *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

17. *Iqbal*, 556 U.S. at 678.

18. *Id.*

19. See *Twombly*, 550 U.S. at 570 (emphasis added).

20. *Id.* at 556 (emphasis added).

21. See *id.* at 556, 570.

22. *Id.* at 557 (quoting *DM Research, Inc. v. Coll of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)).

23. *Iqbal*, 556 U.S. at 663.

24. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

discovery to establish facts in support of her claim (“liberal opportunity for discovery” suffices to ferret out facts in support of a claim),²⁵ *Twombly* rested on precisely the reverse—a desire to protect defendants from the cost and imposition of expensive discovery (“antitrust discovery can be expensive”).²⁶ But ultimately, discussed in Round Two, the change was more due to an evolving pattern of creating multiple devices to prune and protect judicial dockets than out of concern with discovery burdens on litigants.²⁷

Twombly was extended two years later into the constitutional (rather than statutory) civil rights litigation realm by *Iqbal*, which held the complaint insufficient to pass the “plausible claim” pleading threshold imposed by *Twombly*.²⁸ *Iqbal* contended that he was detained by the government due to his national origin and related invidious characteristics.²⁹ The Court, sustaining dismissal of his claim, held that while it was factually *conceivable* under the factual allegations of the complaint, nonetheless, the complaint’s facts did not show that the discrimination allegations were *plausible*.³⁰ Returning to the *Twombly* theme of protecting defendants from discovery, the Court explained in *Iqbal* that “Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”³¹ But, keeping the now-required “plausibility” determination opaque, the court explained that this invites a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”³² While conclusions are insufficient, if added with facts assumed to be true as pled, the court is to determine if the insufficient line of possibility of violation is passed and if the required higher pleading standard of plausibility is met.³³ But legal conclusions pled as facts are not entitled to the presumption of truth under this formulation.³⁴ Applying these principles, the Court in *Iqbal* found that the facts of discriminatory intent alleged were conclusory and insufficient to nudge the complaint “across the line from conceivable to plausible.”³⁵ At bottom, a “plausible

25. See *id.* at 47–48.

26. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557–59 (2007).

27. See *infra* Parts III.B., III.C.

28. See *Iqbal*, 556 U.S. at 683.

29. *Id.* at 666, 668–69.

30. *Id.* at 680.

31. See *id.* at 678–79.

32. See *id.* at 679.

33. See *id.*

34. See *id.*

35. *Id.* at 680 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

complaint” must at least “plead[] factual content that allows the court to draw the reasonable inference” of the existence of a violation.³⁶

Suffice it to say the plausible pleading requirement has significantly tightened the judicial filter on allowing Title VII cases to go forward as a matter of law, as compared to the *Conley* “notice-pleading” standard.³⁷

C. Swierkiewicz

Enigmatically hanging tenuously between the loose pleading standard of *Conley*³⁸ and the heightened pleading standard of *Twombly* and *Iqbal*, is the Supreme Court’s holding in *Swierkiewicz v. Sorema*³⁹ - a Title VII case which relied on *Conley*⁴⁰ and was noted but not overruled in *Twombly*.⁴¹ The case held that the complaint was not required to plead a prima facie case under the rubric of *McDonnell Douglas* and that a “heightened pleading standard” was *not* applicable to Title VII cases—doing so without reaching whether its factual averments were *plausible* under the *Twombly/Iqbal* standard or reviewing how the plausible-pleading standard was *not* a “heightened pleading standard.”⁴² Much scholarly content has been devoted to whether *Swierkiewicz* can survive *Twombly* and *Iqbal*⁴³—stated otherwise, whether a complaint can meet the plausibility requirement

36. *Id.* at 678.

37. *See, e.g.,* *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 191 (4th Cir. 2010) (holding claim of race discrimination not plausibly pled because allegations were conclusory and did not frame an inference of discrimination); *See also* *Henry v. NYC Health & Hosp. Corp.*, No. 13 Civ. 6909, 2014 WL 957074, at *7 (S.D.N.Y. Mar. 10, 2014) (“Here, the Amended Complaint lacks any factual basis from which one could infer that any Caucasian employee similarly situated to Henry was subject to differential treatment.”); *Dudek v. Greektown Casino, LLC*, Civil Case Case No. 13-cv-12471, 2013 WL 6823282, at *3 (E.D. Mich. Dec. 24, 2013). *But see* *Ocholi v. SkyWest Airlines*, No. 11-C-0310, 2012 WL 3150310, at *1, *9-10 (E.D. Wis. July 31, 2012) (“Upholding plausibility, after disregarding conclusory statements, because the facts alleged “contains a straightforward claim and *presents a story that holds together* by identifying who discriminated against him, the type of discrimination, and when it took place.” (emphasis added)).

38. *See supra* Part II.A.

39. *See* *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); Charles A. Sullivan, *Plausibility Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1649 (2011); Arthur S. Leonard, *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 659, 660 (2012/2013).

40. *See* *Swierkiewicz*, 534 U.S. at 509, 512, 514.

41. *See* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007); Sullivan, *supra* note 39, at 1618.

42. *See* *Swierkiewicz*, 534 U.S. at 508, 510-15. *Swierkiewicz* did not use the *Iqbal* and *Twombly* standard because the cases were not decided until 2009 and 2007 respectively. *See* *Ashcroft v. Iqbal* 556 U.S. 662, 662 (2009); *Twombly*, 550 U.S. at 544.

43. *See* Sullivan, *supra* note 39, at 1618, 1620-22.

without pleading at least enough facts to plead at least the concededly light burden of stating a *prima facie* case.⁴⁴ Other than observing the issue as being potentially significant, it seems the status of the law on this point is that if an inference of a violation can be created by facts alleged irrespective of whether they fulfill all the elements of a *prima facie* case, then *Iqbal*'s requirements arguably are fulfilled. For, meshing the two doctrines, it is plausibility pleading, not *prima facie* case pleading, which is required—consistent with both *Iqbal* and *Swierkiewicz*.

D. Impact of *Twombly* and *Iqbal* on Employment Discrimination Litigation

Data collected as to the impact of *Twombly* and *Iqbal* on dismissal of employment discrimination suits is conflicting and therefore inconclusive. First, two studies gathered in one review showed an 11% and 34.1% increase in motion to dismiss success rates, respectively.⁴⁵ Whereas another showed more motions to dismiss being filed but not a higher dispositive dismissal rate.⁴⁶ While another showed essentially no increase in dismissals at the summary judgment stage from the tighter pleading standard.⁴⁷ The higher pleading keeps marginal cases from being brought in the first place, and causes well-pled meritorious cases being settled quickly. Thus muddling meaningful statistical analysis as to dismissal rates without comparing impact on the rate of bringing such cases and rendering summary judgment rate comparisons meaningless other than noting that only well pleaded cases are more likely to survive summary judgment if they survive motions to dismiss.

Finally, the Supreme Court observed, given the relatively undemanding nature of “notice pleading,” that the Court expected cases to be filtered from juries by motions for summary judgment and not by MTD’s.⁴⁸ But, “notice pleading” has now morphed into more

44. See *EEOC v. United Parcel Serv., Inc.*, No. 09-cv-5291, 2013 WL 140604, at *4-7 (N.D. Ill. Jan. 11 2013); *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190-91 (4th Cir. 2010).

45. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1163 (2012).

46. See Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After Iqbal* 7-13 (Federal Judicial Center, 2011).

47. See KEVIN P. MCGOWAN, *TWOMBLY AND IQBAL CAUSE SCANT CHANGE IN SUMMARY JUDGMENT RESULTS* 1 (2013), available at BNA.

48. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“Before the shift to ‘notice pleading’ accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and

demanding “plausibility pleading” as a result of *Twombly* & *Iqbal* which, inexorably, gives a far greater “filtering” role to MTD’s to screen cases from ever reaching discovery, much less reaching juries.⁴⁹ Therefore, it may be said that now MTD’s serve more strongly to abort a claim before expensive discovery, whereas the motion for summary judgment (“MSJ”) serves potentially to bar the defendant from the cost of a jury trial and the risk of a jury determination, or even the risk of a runaway jury.

III. ROUND TWO: MOTIONS FOR SUMMARY JUDGMENT AS CRITICAL ROUND IN EMPLOYERS’ BATTLE TO AVOID JURY DETERMINATION

As shown, *Twombly* and *Iqbal* serve to heighten the basis for MTD’s as the first round of artillery in attempting to dispose of employment discrimination law suits by motion *testing the factual adequacy of the face of the pleading* as a matter of law.⁵⁰ If Round I does not dispose of the suit, Round II is a motion for summary judgment (MSJ). The MSJ goes far deeper: it tests the adequacy of the pleading *in light of the discovery record and affidavits, as a question of law to be determined by a judge* as a gatekeeper to the jury (and guardian of the court’s docket), as to whether that record demonstrates existence of a genuine issue of material fact worthy of allowing the case to proceed to

prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of ‘notice pleading,’ *the motion to dismiss seldom fulfills this function any more*, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.”(emphasis added)).

49. See *Ashcroft v. Iqbal* 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

50. See *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544. Employers’ counsel may strategically elect to not file an MTD so as to not educate plaintiff as to the existence of a dispositive defect in the complaint which the plaintiff then can simply cure by filing a first amended complaint as a matter of right under FRCP Rule 15(a). See generally FED. R. CIV. P. 15(a). The strategy of not filing an MTD contemplates “locking in the error” until usually there is no remaining opportunity for plaintiff to amend the complaint—such as during the summary judgment phase—and virtually no opportunity to seek life support by seeking post MSJ additional discovery under the very limited strictures of Rule 56(d) of the FRCP. See generally FED. R. CIV. P. 56(d); *Murchison v. Astrue*, 466 F. App’x 225 (4th Cir. 2012); *Merchant v. Prince George’s Cnty. Md.*, 436 F. App’x 218 (4th Cir. 2011). While the plaintiff may attempt to seek life support via leave to take additional post-MSJ discovery under Rule 56(d), both the Rule and the cases are antagonistic to such attempts to seek a life line through use of Rule 56(d). See generally *Murchison*, 466 F. App’x 218; *Merchant*, 436 F. App’x 218.

the jury.⁵¹

The MSJ stage is the Holy Grail for both parties: defeat of an employer's MSJ frequently amounts to a "win" by the plaintiff because she could force a settlement with statutory attorneys' fee award against an employer not willing to risk a jury determination of liability.⁵² Conversely, for the employer, an MSJ not only shuts down the exposure and continuing high cost of litigation, but also strategically sends an important signal to employees waiting in the wings hoping for some quick settlement money, to not file their own copy-cat claims.⁵³

A. The Case Law Allows MSJ's to Transform the Jury Issue of Intent into a Legal Question for the Court, Hence Creating a Device to Keep the Case from the Jury

The foundation of summary judgment practice is FRCP Rule 56 as interpreted by the Supreme Court in the summary judgment *trilogy* of 1986 ("Trilogy").⁵⁴ At least two aspects of the *Trilogy* in combination have elevated summary judgment practice in employment discrimination litigation into a case-dispositive art form. First, as Justice Rehnquist unapologetically made clear to the lower courts, the MSJ device *should not be avoided* because of its harshness in shutting down access to a jury.⁵⁵ Rather, as he *mandated* to the lower courts: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of

51. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 572 (1986). MSJ entails a *de novo* review of the record for whether there is a genuine issue of material fact under properly applied substantive law. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166-67 (4th. Cir. 1988). And, "[a]s the non-movant, [plaintiff] is entitled to have the court view the facts most favorably to her claims." *Dunbar v. Md. Primary Care Physicians, LLC*, No. Civ. AMD-0402663, 2005 WL 1259631, at *1 (D. Md. May 27, 2005). In addition, when considering an MSJ, all justifiable inferences are to be drawn in the plaintiff's favor, "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co.*, 475 US at 587 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Also, the court is not to make credibility resolutions in deciding MSJ's. See *id.* Such inferences may be supported by circumstantial evidence; thus, circumstantial evidence is sufficient to defeat an MSJ by creating a pretext question for the jury. *Bowman v. Holopack Int'l Corp.*, C.A. No. 3:06-1648-CMC-BM, 2007 WL 4481130, at *13 -15 (D.S.C. Dec. 19, 2007).

52. See Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 698-99 (2012).

53. See *id.*

54. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita*, 475 U.S. 572 (1986).

55. See *Celotex*, 477 U.S. at 322.

every action.”⁵⁶ Second, the determination of whether there is a genuine issue of material fact requiring trial under Rule 56 is to determine in light of the substantive law of the cause of action pled: “the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit *under the governing law* will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”⁵⁷

This combination is potentially devastating to the employment discrimination plaintiff because the Supreme Court has turned the essential statutory task of plaintiff to show existence of enough evidence to establish a “pretext case”—namely, the falsity, or the reason to disbelieve, the employer’s assigned reason for its action—into one which the employer can strategize effective placement of the goal posts to effectively hog tie the plaintiff from being able to kick the ball to the jury.

Because summary judgment turns on the question of law of whether there is sufficient material fact dispute to get to a jury on an element of the cause of action,⁵⁸ it is necessary to summarize the basic elements of a typical Title VII case. As the courts have recognized, it is the rare case where the plaintiff has direct evidence of the decision maker deciding the challenged employment action on discriminatory grounds; for instance “I am firing you and hiring a man because we have too many women working on the assembly line.”⁵⁹ Such a rare case immediately creates a genuine issue of material fact as to motivation sufficient to create a jury question of intent irrespective of what the employer explains in defense.⁶⁰

Rather, in most cases, the evidence of discriminatory intent is circumstantial rather than direct, because the typical employment discrimination plaintiff does not have adequate access to evidence upon

56. *Id.* at 327 (quoting FED. R. CIV. P. 1).

57. *Anderson*, 477 U.S. at 248 (emphasis added).

58. FED. R. CIV. P. 56(d).

59. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (“[T]here will seldom be ‘eyewitness’ testimony to the employer’s mental processes.”); *Hruska v. Forest Pres. Dist. Of Cook Cnty., Ill.*, No. 10 C 7433, 2013 WL 1195699, at *5 (N.D. Ill. Mar. 21 2013) (“Hruska presents no direct evidence of that nature, which is not surprising given that, in this day and age, employers and managers rarely admit to having engaged in discrimination.”).

60. *See* *Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111, 121 (1985) (“[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.”). Cases presenting direct evidence of discrimination contemporaneously tied to the decision-maker bypass the burden shifting paradigm of *McDonnell Douglas* / *Burdine* and their progeny and go straight to the jury. *See* *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (en banc).

which to convert a merely *plausible claim* into a potentially jury-triable claim of discriminatory motivation based on genuine issue of material fact as to discriminatory intent.⁶¹ Therefore, the Supreme Court has created a construct of shifting burdens to enable the plaintiff an opportunity to mount an inference of discriminatory motivation (assuming a plausible claim is pled in the first place) sufficient to get to a jury.⁶²

The seminal case here is *McDonnell Douglas v. Green*.⁶³ There, recognizing the usual absence of plaintiffs' access to direct evidence of discrimination, the Supreme Court created the ability of plaintiff to create an evidentiary *inference* of discrimination by creating a *prima facie* case.⁶⁴ While the *prima facie* framework is flexible to the kind of case being pled, the mold is essentially a variation on this example: (i) I am woman who is qualified for promotion to supervisor; (ii) despite the opening, my application for the job, and superior qualifications, the employer hired a less qualified male; (iii) therefore, I have been discriminated on the basis of my sex.⁶⁵ Such *prima facie* case allegations create an evidentiary inference in favor of the plaintiff that the employer has discriminated against her at the summary judgment stage, if shown to be supported by sufficient evidence.⁶⁶ While it is the plaintiff's burden to prove a *prima facie* case, in order to gain the inference to force the employer to respond, that burden is concededly easy for plaintiff to fulfill.⁶⁷ That said, it is important to note that if the plaintiff nonetheless fails to supply evidence to fulfill an (meaning "any") element of the *prima facie* case, the analysis stops short at that point and the employer wins on summary judgment, due to plaintiff's failure to show existence of *any* evidence, much less a genuine dispute of material fact, in support of an essential element (the *prima facie* case) of the cause of action.⁶⁸ The Supreme Court stated:

In our view, the plain language of Rule 56(c) mandates the entry of

61. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973) (showing circumstantial evidence allowed for plaintiff to create a claim of discriminatory intent).

62. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

63. *McDonnell*, 411 U.S. 792.

64. *Id.* at 802.

65. See generally *id.* (establishing the requirements for a *prima facie* case of racial discrimination).

66. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("*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.>").

67. *Burdine*, 450 U.S. at 253 ("The burden of establishing a *prima facie* case of disparate treatment is not onerous.").

68. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.⁶⁹

Thus, for instance, if the employer can show, after plaintiff's opportunity for discovery, that, in the hypothetical *prima facie* case example above, the plaintiff has offered no evidence of the male's qualifications or no evidence of his qualifications being inferior to hers, then the plaintiff fails to mount a *prima facie* case, rendering summary judgment for the employer appropriate without more, due to failure of proof to mount a *prima facie* case—that being an essential element of the claim.⁷⁰

But, given the relative ease of mounting the *prima facie* case, most employment discrimination claims meet that burden (or perhaps should not be filed in the first place).⁷¹ The next (second) step of the analytical paradigm is for the employer to articulate a legitimate nondiscriminatory business reason for its action ("LNBR").⁷² For, example, in the hypothetical above, the employer may assert as a legitimate nondiscriminatory business reason that the male was selected because, notwithstanding that he had less production line experience than the plaintiff, the assembly lines frequently broke idling many employees and he had the skill which plaintiff lacked to quickly repair the problem and get everyone back to work, avoiding the employer's loss of expensive collective down time. It is important to note at this point that (i) the employer's *mere articulation* of a LNBR *neutralizes* the *prima facie* case, and that (ii) the employer's burden is merely one of articulating a LNBR – not a burden of proof as to the validity of the reason but is merely an insignificant burden of production—the "burden" of merely stating (*or, perhaps, coming up with*) a legitimate nondiscriminatory business reason—something other than discrimination—for the employer's action.⁷³

69. *Id.*

70. *See, e.g., Coleman v. ARC Auto.*, 255 F. App'x 948, 951 (6th Cir. 2007) (holding that the plaintiff failed to establish a *prima facie* case essential to her claim).

71. *See Burdine*, 450 U.S. at 253-54.

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

73. *See Sandra F. Sperino, Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 77 (2011). The mechanistic nature of this burden shifting process has been persuasively argued by

Assuming the plaintiff has met her relatively easy burden of proof of mounting a prima facie case and that the employer has met its even easier burden of *merely stating* some (any) LNBR for its action,⁷⁴ the pendulum swings back to the plaintiff for the “main event” in the typical employment discrimination case: whether the plaintiff can survive a summary judgment motion by carrying its burden of proof to mount a pretext case.⁷⁵ This is the third step of the analytical paradigm.⁷⁶ It serves to “frame the factual issue with sufficient clarity” (employer action taken, and its reason given for the action)⁷⁷ for plaintiff then to be able to focus on attempting to show existence of a factual issue to *discredit the reason asserted* (that the reason is false or not worthy of belief), and thereby get to the jury to allow it to infer that the real reason was discrimination.⁷⁸ This step requires the plaintiff to create a genuine issue of material fact that the employer’s LNBR is not legitimate—that it is false, inaccurate, not believable, or perhaps most significantly, is accompanied by evidence of the employer’s *mendacity*.⁷⁹ A genuine

Professor Sperino to overemphasize adherence to the formula rather than to hew the statute – this, for instance, by allowing the case to end on the failure to show the employer’s reason to be false when, indeed, the reason may be true but nonetheless still be a mask for “embedded discrimination”. See *id.* at 96.

74. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (illustrating the elements necessary for a plaintiff to meet the burden of a prima facie case and what burden the employer faces after that burden is met).

75. See *Burdine*, 450 U.S. at 253 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)). The burden of proof is always the plaintiff’s in employment discrimination cases; the employer’s burden of articulating a LNBR is merely a burden of *offering*—not proving—a reason (merely a burden of “articulation”—*not* a burden of proof—whereas the plaintiff bears the burden of proof of disbelief of the employer’s reasons). See *id.*

76. See *id.*

77. See *id.* at 255-56.

78. See *Wesley v. Arlington Cnty.*, 354 F. App’x 775, 781-83 (4th Cir. 2009) (holding that reasonable jury could find that the actions taken by the employer were pretext, based on his actions in reviewing the candidate’s promotion application); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852 -54 (4th Cir. 2001) (explaining the shifting reason given for employment decision, and late appearance of the reason in litigation suggesting the reason was a *post hoc* rationalization for employer action, which can support the pretext case) (citations omitted); *Murray v. Akima Corp.*, No. 4:07-CV-175-FL., 2009 WL 674395, at *6-7 (E.D.N.C. Mar. 12, 2009) (holding that a pretext case is mounted when there is conflicting evidence offered as to who made the challenged employment decision based on an interview, together with conflicting evidence as to whether the alleged decision maker even attended the employment interview) (citations omitted); *Webb v. Starbucks Corp.*, No. 1:07cv271, 2008 WL 4891106, at *7 (W.D.N.C. Nov. 12, 2008) (citing *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 248 (4th Cir. 2000) (illustrating that plaintiff met her burden by showing conflicting evidence that was relied upon by employer when making a decision regarding her employment: discharge for poor work was contradicted by good job evaluations)).

79. See *St. Mary’s Honor Ctr. V. Hicks*, 509 U.S. 502, 511 (1993) (“The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show

issue of material fact created by the plaintiff, through discovery or affidavit that the employer's asserted LNBR is false or not believable, permits (but does not require) the jury to infer that the employer's unworthy reason was a cover up for discriminatory reason being unmasked.⁸⁰

Thus, the crux of a Title VII case—assuming plaintiff's mounting a *prima facie* case and the employer's neutralizing it by articulating a LNBR, turns on whether the plaintiff can mount a “pretext case.” In other words, can the plaintiff mount a genuine issue of material fact as to the falsity or disbelief of the employer's LNBR, sufficient to survive the employer's MSJ and get the case to the jury?⁸¹ That is the “main event” in employment discrimination motions practice⁸²—with the plaintiff attempting to mount a genuine issue of material fact to get to the jury, and the employer attempting to maneuver around the discovery record land mines to attempt analytically to structure a factual pathway that avoids or legally neuters the claimed (or anticipated) genuine issue of material fact (by showing such to be not genuine⁸³ or not material/immaterial).

intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination . . .”).

80. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147-48 (2000) (illustrating disbelief of the employer's reason permits—but does not require—the jury to infer discrimination as the motivation for the employer's action).

81. See Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 4, 15 (2005).

82. *Id.* at 10 (“[T]he significance of *McDonnell Douglas-Burdine* lies in the Court's elevation of the issue of ‘pretext’ as the cornerstone of a plaintiff's case, and the instruction to lower courts that plaintiffs can prove discrimination indirectly by attacking the employer's explanation as untrue.”).

83. The concept of “genuine” issue for summary judgment purposes can be a bit misleading. It is perhaps better viewed as addressing the sufficiency of the evidence rather than its *bona fides*: “[A]ll that is required is that *sufficient evidence* supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.” *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968) (emphasis added). Thus, what is important is the concept of “sufficiency” in an MSJ contest effectively allows *the court to determine as a matter of law whether the quantum of factual evidence* disputed is enough to allow the fact determination to get to a jury. Stated otherwise, fact issues do not get to the jury if the court determines the quantum of disputed factual evidence to be insufficient. Effectively, therefore, the court makes a determination of the facts as a matter of law rather than as a matter of jury determination. Further, not only does the *court determine sufficiency of facts* under the rubric of “genuine” but *also* determines as a matter of law if the disputed facts are material to an element of the cause of action: “More important for present purposes, summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Lastly, under Rule 56, the movant must be entitled to “judgment as a matter of law”—meaning also that the movant's position must comport with the substantive law.

As to the viability of employers' use of MSJs to disarm the attempt at creating a genuine issue of material fact to survive the MSJ, it must be recalled that the issue of adequacy of a genuine issue of material fact is a question of law for the court.⁸⁴ It is in that fine niche that the court-made law thrice twists the inquiry against the plaintiff, in that: first, it effectively twists the inquiry on MSJ from statutory inquiry of proof of discrimination into plaintiff's burden of proving the falsity or disbelief of the LNBR as to which *explanation* the employer controls and can strategically deploy or refine (or withhold until MSJ) the evidence or its emphasis;⁸⁵ second, it deals away the presumption of summary judgment analysis that inferences are to be determined against the movant;⁸⁶ and third—central to this article—the courts have compounded this death spiral for plaintiff's by having created a slew of devices to neutralize pieces of evidence of discrimination into non-evidence—effectively turning evidence of discrimination for the jury into questions of law for the court to decide upon MSJ and thereby keep the case from ever getting to the jury (and to allow the court, as well, to prune its docket). These mechanisms are examined below.

B. *The Employer's Tactical Advantage in Getting to Summary Judgment*

MSJ's are high stakes devices expected—or deployed by ambush—

84. See FED. R. CIV. P. 56(a); *supra* note 51 and accompanying text.

85. Jeffrey A. Van Detta, "*Le Roi Est Mort; Vive Le Roi!*": An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed-Motives" Case, 52 DRAKE L. REV. 71, 100-01(2003).

This is an almost farcical feature of the McDonnell Douglas minuet; it never requires the defendant to truly "defend." Instead, it sets the case up for summary judgment by requiring the plaintiff to prove not only a *prima facie* case, but to effectively start over again by mounting evidence to attack an assertion—not a fact that will necessarily be proven at trial—that is the employer's mere articulation. Indeed, in order to grant summary judgment in favor of an employer, the court must effectively ignore the admonition to draw all inferences in the plaintiff's (nonmoving party's) favor. Yet trial might well demolish the defendant's articulation like a house of cards—as it did in the Costa case itself. By not requiring the defendant to prove the reason for its actions, the articulation feature is a major cop-out that allows the defendant, who already (at least in an organizational sense) possesses a monopoly over information about its action, to remain silently defiant about the details with the expectation that the plaintiff will not be able to survive summary judgment and put the defendant's articulated reason to the test at trial.

Id. at 101 (footnotes omitted).

86. See *id.* *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)) (applying the standard that "the evidence of the non-movant is to be believed, and all justifiable inferences are to drawn in his favor").

in most employment discrimination cases.⁸⁷ As a result, employers attempt to position the case from the outset to attempt both a prevention of a *prima facie* case and/or mount an LNBR for its challenged employment decision in such a manner as to prevent the plaintiff from establishing a “pretext case,” and therefore, attempting to weave a multi-tiered path to a successful MSJ by using several bases for the court to award summary judgment.⁸⁸

The employer has a huge tactical advantage here because it usually has access to facts that a plaintiff does not;⁸⁹ and by finding out through admissions in discovery what a plaintiff does *not* know, the employer can orchestrate the factual mosaic so as to make the employer’s legitimate business decision to be *undisputed* by positing it based on what plaintiff admits it does not know—and what the employer can then craft knowingly without opposition—thereby preventing a plaintiff from mounting a pretext case and assuring the employer’s success on its MSJ.⁹⁰

For example, assume hypothetically that a female sex discrimination plaintiff testified at deposition that her male supervisor, who had made repeated sexist comments in the workplace, notified her that she was being terminated from her assembly line worker position in a reduction in force (“RIF”), while a junior, less competent male on the same assembly line was not subjected to a RIF. Further, assume that: (i) the plaintiff also testified in a deposition that she was uncertain who made the RIF selection decision, but was certain it was gender based because the supervisor had just made yet another offensive sexist comment to her the day before the RIF; (ii) that the supervisor testified in deposition that the Human Resources Manager made the RIF selection decision speculating that it perhaps was due to plaintiff having a high tardiness rate affecting the entire assembly line, but he was uncertain of the basis for the HR Manager’s selection decision; and (iii) the Human

87. See JOAN M. GILBRIDE, N.Y. CNTY. LAWYER’S ASS’N, HOW TO HANDLE AN EMPLOYMENT DISCRIMINATION CASE: PRE-TRIAL MOTIONS AND TRIAL STRATEGIES FROM THE DEFENDANT’S PERSPECTIVE 1 (2013), available at <http://www.kbrlaw.com/gilbride3.pdf> (suggesting that summary judgment motions can be “a powerful tool in resolving employment discrimination cases before trial . . . [and] should be used frequently. . .”).

88. See Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days*, 57 N.Y.L. SCH. L. REV. 685, 705 (2012-13) (discussing “increasingly subtle discrimination” and the ability of employers to “avoid certain patterns of behavior to preclude claims of discrimination.”).

89. Kaminshine, *supra* note 81, at 9.

90. See Van Detta, *supra* note 85, at 104 (stating that after *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), the plaintiff must prove that all reasons suggested by the employer are “false and camouflage for discriminatory reasons”).

Resources Manager was not deposed by plaintiff. Assume the plaintiff thereby established a prima facie case that the senior, more competent female was RIF'd while the less competent male was not, hence the employer must establish the minimal burden of production (not proof) of articulating an LNBR for selecting the plaintiff for RIF. The admission that the plaintiff does not know who made the decision opens the field for the employer to identify an untainted decision-maker, such as the human resources manager, who states by affidavit⁹¹ (after the close of discovery⁹²) that she made the decision for RIF and did so on the basis of plaintiff's frequent tardiness which, was the worst on the assembly line, that the HR representative had no knowledge of the supervisor's sexist comments because plaintiff never complained to her about it, that she relied only on attendance records in the HR office, and that no one else was RIF'd. The employer moves for summary judgment on the basis of having articulated an LNBR for the termination—highest rate of tardiness—as to which there is no pretext case mounted. It is undisputed that the supervisor's sexist comments—conceding they were made—could not possibly have played a role in the RIF decision because it was made by the HR Manager who not only made no such comments but never even knew of the supervisor having made them. The employer has maneuvered the plaintiff into a legal summary judgment headlock. The law allowed it to position its summary judgment analysis into a pathway through the summary judgment record evidence to selectively assert a reason as to why it prevented plaintiff from creating a genuine issue of material fact as to pretext. Thus allowing the legitimate nondiscriminatory business reason of the employer to stand unchallenged and summary judgment granted, due to plaintiff's failure to create a genuine issue of material fact as to an essential element of its case. The sexist comments of the supervisor do not raise a pretext case

91. See FED. R. CIV. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

92. Many plaintiffs—at their peril and the employer's opportunity—fail to take full advantage of deposition opportunities due to their cost, and employers can minimize the value of interrogatories to plaintiff through muffled responses which really do not tie the employer down. See generally REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009, at 8, 11 (2010) (stating that survey takers found discovery to be too expensive and "abused in almost every case"). For instance, in the subject hypothetical, a plaintiff's interrogatory as to why she was selected for RIF might nonspecifically respond "due to job related problems affecting the entire assembly line"—answers which leave the employer wide berth to refine its consistent reason at the MSJ stage.

because comments by non-decision-makers are not material.⁹³ Worse, the plaintiff, who may have been sandbagged by the assertion of the “tardiness” reason, when she was expecting, but failed adequately to probe for a “seniority-based” reason. This is the potential end run upon evidence not adduced by the plaintiff during discovery. For example, if the supervisor suggested to the Human Resources Manager that the selection decision be based on tardiness rather than seniority – to “get” the woman whom he did not like having. Had that been uncovered, a pretext case potentially could have been established on the basis of the “cat’s paw” doctrine, which imputes the influence of the sexist supervisor to the asserted neutral decision-maker if there is evidence that the supervisor influenced the decision.⁹⁴

As a result of the aforementioned series of court decisions as to both summary judgment and substantive employment discrimination, this substantial tactical advantage permits the employer to select *what* to assert as the reason for its action—but not have to prove it—and *when* to assert it, such as *after* discovery at the MSJ stage based on potential gaps in the discovery record. Indeed, the employer may attempt to do so by positioning a pathway consistent with the summary judgment record, knowing that the plaintiff cannot have any evidence to controvert and will therefore be unable to mount a pretext case to reach the jury.⁹⁵ The employer may maneuver in such a way that makes it impossible for the plaintiff to carry its burden of disproving a reason which the employer has only the burden to assert—while creating minimized exposure to discovery—but not to prove. Allowing the employer to assert a reason based on gaps or admissions in the discovery record, which the employer need not prove but the plaintiff nonetheless must create a genuine issue of material fact to disprove, gives a huge tactical advantage to the employer.⁹⁶

93. See *Murry v. Jacobs Tech., Inc.*, No. 1:10-CV-771, 2012 WL 1145938, at *8 (M.D.N.C. Apr. 5, 2012) (citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286 (4th Cir. 2004)) (“Statements by employees who are not decision-makers do not bear on the contested employment decision; even statements by those making the decision to terminate an employee—but which are unrelated to the decisional process itself—do not satisfy a plaintiff’s burden of proving discrimination.”), *aff’d per curiam*, 568 Fed. App’x 265 (4th Cir. 2014).

94. See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190 (2011).

95. See *supra* text accompanying notes 89-90.

96. See *Van Detta*, *supra* note 85, at 85 (“[Justice] Powell’s changes [in tinkering with Title VII] have actually worked to the detriment of many plaintiffs . . .”).

[The pretext inquiry] forces the plaintiff to address a second, entirely different intent question—the question specifically addressed to discrediting whatever alibi the defendant happens to offer. . . . Shifting the “intent” inquiry into a pretext mode places control of the case entirely in the defendant’s hands with no corresponding burden of production or proof to detain it.

More fundamentally, the substantive law paradigm that evolved has upended the statute by turning the statutory inquiry of intentional discrimination (intentional sex discrimination in the above example) into a different inquiry by placing a burden on the plaintiff to disprove a reason strategically asserted by the employer.⁹⁷ In contrast the employer has no burden other than to merely assert a position on summary judgment after surveying the latitude that the summary judgment record allows in order to strategically box in the plaintiff.⁹⁸ Therefore the net effect is that the operative statutory *factual* discriminatory motivation question and its forum of jury determination has instead been converted into an entirely different question of *law* to be determined by the different forum of a judge; one who is prone to use or create legal devices to neuter potentially probative evidence in order to prune the court's docket.⁹⁹

Stated otherwise, by the employer utilizing the legal device of articulating any reason for its action as to which it has no burden of proof, the inquiry shifts to the plaintiff to show the falsity of that reason, effectively marginalizing or sidetracking altogether the statutory inquiry of discriminatory intent.¹⁰⁰ Compounding this substitution of the factual inquiry for a legal inquiry, the employer can manipulate discovery so as to put the plaintiff in the trick-box of admitting it does not know the business reason for the action it complains of, or does not know who made the decision.¹⁰¹ Such a move facilitates the employer's ability to strategically select from a potential menu of reasons, a bullet-proof reason for its action—one over which it knows the plaintiff cannot possibly create a genuine issue of material fact sufficient to get to a jury—and thereby allows the employer to prevent the case from ever reaching the jury.

In addition to this paradigm shift from a jury inquiry of discriminatory intent to, instead, having to disprove the employer's reasons in order to get to a jury, courts have effectively made the employee/plaintiff's burden even higher by further increasing the hurdle to overcome summary judgment through judicially created tools.¹⁰²

Id. at 102.

97. *See id.* at 90.

98. *See id.* at 90 (“[T]he employer must simply place its hand on its hip, chin in hand, inventory possible excuses for a discriminatory decision, and throw one out to see if it will stick.”).

99. *See supra* note 85 and accompanying text; *see also* Bennett, *supra* note 88, at 707-08.

100. *See* Van Detta, *supra* note 85, at 91 (“[Now] the plaintiff has the additional burden to prove not only that the defendant is a discriminator, but also a liar.”).

101. *See id.* at 91.

102. *See* Bennett, *supra* note 88, at 708-09.

Courts have created all manner of case-law devices to convert factual evidence of discriminatory intent as putative jury issues, into, issues of law for judges to dispose of in a manner that will keep them from ever getting to the jury in the first place.

This all reflects a self-protective calendar control bias of the courts rather than a fidelity to the statutorily mandated inquiry; indeed it may be a legitimate reaction to many lawsuits being filed like buying a lottery ticket or by plaintiffs' attorneys knowing that many employers would prefer to pay to settle a claim expeditiously rather than engage in a more expensive fight.¹⁰³ It remains that the baby may wind up being thrown out with the bathwater in efforts to achieve calendar control through the creation of judicial devices rather than through the congressionally mandated jury determination of claims of intentional discrimination. Indeed, in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court candidly admitted outright that restrictive interpretations of Title VII are appropriate as a docket control measure for judicial implementation.¹⁰⁴

C. Courts Have Created Evidence Neutering Devices to Facilitate the Granting of Summary Judgment Motions

Courts have increasingly created “evidence-neutering devices” which serve to convert potential jury-determination factual evidence of discrimination into court-determined legal issues which, in turn, are used to dispose of the case on summary judgment to keep it from ever reaching a jury.¹⁰⁵ Some of these evidence-neutering devices are discussed below. The first three are required by Rule 56¹⁰⁶ and the rest

103. See *id.* at 701.

104. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct 2517, 2531-2532 (2013) (establishing higher pleading requirements for showing causation in retaliation claims).

The proper interpretation and implementation of § 2000e-3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.

In addition, lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment.

Id. (citations omitted).

105. See Bennett, *supra* note 88, at 708-09.

106. FED. R. CIV. P. 56(a), (c)(4).

are purely judge-made devices which neuter potential evidence to become not genuine, not material, or incompetent as to evidentiary value under Rule 56.¹⁰⁷

1. “Genuine”

As noted above, the courts will not allow a factual dispute to get to a jury unless it is “genuine”—meaning there is sufficient evidence of the fact being disputed.¹⁰⁸

2. “Material”

As also noted above, the courts will not allow a genuine factual dispute to reach the jury unless the dispute is “material”—meaning the fact is potentially outcome-determinative under the substantive law of the cause of action at issue.¹⁰⁹

3. Affidavits on Personal Knowledge

Rule 56(c)(4) allows any party to support or resist MSJ by supplying affidavits.¹¹⁰ In the case of the plaintiff, this is usually used to show existence of controverted evidence in order to demonstrate a prima facie case, impeach the employer’s legitimate nondiscriminatory business reason, or show the existence of direct evidence of

107. See discussion *infra* Part III.C.4-C.18.

108. See, e.g., FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986) (“[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. . . . If the evidence is merely colorable, or is not significantly probative summary judgment may be granted.”); see also, e.g., *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 176 (4th Cir. 1988).

On the record, it is arguable that any “dispute” as to what was said on this critical occasion was not a “genuine” one, for an apparent dispute is not “genuine” within contemplation of the summary judgment rule unless the non-movant’s version is supported by sufficient evidence to permit a reasonable jury to find the fact in his favor. *Stone*, 855 F.2d at 175 (citing *Anderson*, 477 U.S. at 248-52).

109. See, e.g., FED. R. CIV. P. 56(a); *Anderson*, 477 U.S. at 248.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. . . . [W]hile the materiality determination rests on the substantive law, it is the substantive law’s identification of which facts are critical and which facts are irrelevant that governs.

Anderson, 477 at 248 (citation omitted).

110. See FED. R. CIV. P. 56(c)(4).

discrimination.¹¹¹ However, the Rule requires any such evidence to be based on “personal knowledge” and that the evidence therein be “competent”.¹¹² Therefore, a plaintiff’s affidavit proffered for purposes of attempting to create a genuine issue of material fact to get to the jury will be disregarded by the court, as a matter of law, if purporting direct evidence of discrimination which is not based on the plaintiff’s own personal knowledge.¹¹³

4. Conclusory Evidence

To survive an MSJ, the plaintiff must demonstrate that there are genuine, *specific* material facts controverted; mere conclusions of law couched as facts do not meet that requirement.¹¹⁴

5. Conjecture Evidence

As a variant of the “no conclusory statement” principle, a plaintiff cannot overcome an otherwise proper MSJ by asserting conjecture or speculation as “fact.”¹¹⁵

6. “Stray Remarks”

Many cases present potential direct evidence of discriminatory animus which could frame an issue of intentional discrimination for jury determination. However, this potential fact dispute may be neutered by

111. See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)).

112. FED. R. CIV. P. 56(c)(4).

113. See *Orange v. Fielding*, 517 F. Supp. 2d 776, 783 (D.S.C. 2007) (“[I]n the absence of an affirmative showing of personal knowledge of specific facts, a court cannot consider such an affidavit in making its summary judgment determination.” (quoting *Guseh v. N.C. Cent. Univ.*, 423 F. Supp. 2d 550, 555 (M.D.N.C. 2005), *aff’d per curiam*, 206 Fed. App’x 255 (2006))).

114. See *Carney v. Am. Univ.*, 960 F. Supp. 436, 439 (D.D.C. 1997), *rev’d on other grounds*, 151 F.3d 1090 (D.C. Cir. 1998).

[R]ule 56 places a burden on the nonmoving party “to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” The nonmovant cannot survive a motion for summary judgment by relying on “metaphysical doubt as to the material facts.” In addition, neither the nonmovant’s conjecture and surmise nor mere “conclusory allegations of discrimination, without more” are sufficient to defeat a motion for summary judgment.

Id. (citations omitted).

115. See *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996) (“[The plaintiff’s] own naked opinion, without more, is not enough to establish a *prima facie* cause of [] discrimination.” (second alteration in original) (internal quotation marks omitted)).

the court, as a matter of law, as being a “stray remark”—effectively applying the Rule 56 “genuine” requirement to neuter the evidence as being quantitatively insufficient as a matter of law to merit submission of the intent issue to a jury.¹¹⁶ Especially when the case is in the posture of a pretext case, the strength of the employer’s LNBR can be deemed unimpeached by potentially inculpatory evidence which is recast as merely a the “stray remark.”¹¹⁷ This can divert the statutory inquiry of intent determination from the jury to the court.¹¹⁸ However, whether a claimed stray remark will be discounted as a matter of law, or be deemed to raise a jury issue of intentional discrimination, entails a fact-intensive analysis for the court, usually turning on such variables as whether the remark was made by the decision-maker, tied to the decision, and temporally related to the decision.¹¹⁹

7. “Isolated Event”

Closely related to the stray remark doctrine, is the “isolated event” doctrine, which is somewhat analogous to the tort concept that “every dog gets one free bite!”¹²⁰ The isolated event doctrine neuters, as a matter of law, evidence of discrimination from being worthy of getting to a jury by effectively giving the employer or supervisor a free pass due to exuberance or asserted context or rationalization of a statement or act otherwise suggestive of discriminatory intent.¹²¹ Indeed, sometimes in

116. See *Bunk v. Gen. Servs. Admin.*, 408 F. Supp. 2d 153, 158 (W.D.N.Y. 2006) (finding that comments allegedly made by hiring personnel do not “constitute sufficient evidence of discriminatory intent and are merely ‘stray remarks’”). However, “[s]tray remarks, even if they occurred as plaintiff claims, are not enough to satisfy the plaintiff’s burden of proving pretext. Stray remarks alone do not create an issue of material fact to defeat summary judgment.” *Id.* But see *Shapiro v. N.Y.C. Dep’t of Educ.*, 561 F. Supp. 2d 413, 424 (S.D.N.Y. 2008) (explaining that although “it is true that the stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination, we have held that when other indicia of discrimination are properly presented, the remarks can no longer be deemed stray and the jury has a right to conclude that they bear a more ominous significance” (quoting *Abdu-Brisson v. Delta Air Lines*, 239 F.3d 456, 468)), *aff’d sub nom. Cruz v. N.Y.C. Dep’t of Educ.*, 376 Fed. App’x 82 (2d Cir. 2010).

117. See *Bunk*, 408 F. Supp. 2d at 159 (ruling that “even if the instances upon which plaintiff relies could be construed as some evidence of pretext . . . summary judgment is [still] warranted”).

118. See, e.g., *id.* at 159-60.

119. See *Silver v. N. Shore Univ. Hosp.*, 490 F. Supp. 2d 354, 363 (S.D.N.Y. 2007).

120. *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506, 510 (Idaho 1990) (“Reduced to its essence, the ‘prior similar incidents’ requirement translates into the familiar but fallacious saying in negligence law that every dog gets one free bite before its owner can be held to be negligent for failing to control the dog.”).

121. *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999) (“To survive summary judgment on the basis of direct and indirect evidence, [the plaintiff] must produce evidence that clearly indicates a discriminatory attitude at the workplace and must illustrate a nexus between that negative attitude and the employment action.”).

the same case, multiple events, which might be deemed by a jury as indicative of a pattern demonstrating pretext, are treated separately and dismissed as isolated events not worthy of jury submission—thus keeping the case from the jury on the basis of the court neutering evidence as a matter of law.¹²²

8. “Comparator” Evidence

Under the *prima facie* case rubric of *McDonnell Douglas*, the plaintiff must show, for instance, that she was treated differently than a similarly situated male (“the comparator”).¹²³ If the court determines as a matter of law that the required comparator is not on all fours with the plaintiff, the court may deem failure of a *prima facie* case and, on that basis alone, grant summary judgment to the employer.¹²⁴ Some courts employ strict comparator guidelines,¹²⁵ while others are less strict.¹²⁶ In any event, the point is that it is the court determining a fact issue as a matter of law: whether the comparator issue is close enough to the plaintiff to allow the plaintiff’s case to advance to the jury, or whether the case should be dismissed on MSJ for failure to show a valid comparator—once the judge has deemed it an essential element of the cause of action.

9. Not a “Super-Personnel Agency”

On MSJ in employment discrimination cases, the courts frequently are required, in determining existence of a pretext case, to determine whether there is sufficient evidence of “pretext” for a jury determination that the employer’s asserted business reason is false or should not be

122. See, e.g., *Carter v. Luminant Power Servs. Co.*, No. 3:10-CV-1486-L., 2011 WL 6090700, at *29-31 (N.D. Tex. Dec. 6, 2011) (holding that six incidents of derogatory racial comments over eighteen months, including the display of a noose, were isolated comments not raising a jury issue of discrimination, after parsing the context of such evidence), *aff’d*, 714 F.3d 268 (5th Cir. 2013).

123. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *supra* Part III.B.

124. See *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992).

125. See, e.g., *Spence v. BHTT Entm’t, Inc.*, No. 8:12-CV-694-T-33MAP, 2013 WL 3714016, at *6-8 (M.D. Fla. July 15, 2013) (“A comparator must be nearly identical to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer.” (quoting *Dickinson v. Springhill Hosps., Inc.*, 187 F. App’x 937, 939 (11th Cir. 2006) (internal quotation marks omitted))).

126. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 598-600 (11th Cir. 1994) (“The absence of an establishment requirement permits the plaintiff to make a Title VII *prima facie* case on a showing that she is female and her job was substantially similar to higher paying jobs occupied by males.”) (citing *Miranda v. B & B Cash Grocery Stores, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992)).

believed.¹²⁷ Plaintiffs may attempt to show that the business reason is so dumb or unreasonable as to be inherently unworthy of belief—as to be pretextual; stated otherwise, a cover-up for discrimination.¹²⁸ A court may choose to dodge that issue by claiming that it does not sit as a “super-personnel agency” that permits jury determinations of the wisdom of an employer’s purported business decisions.¹²⁹ Thus, here again, by court-made doctrine, the court may decide as a matter of law that a pretext case is insufficient to advance to the jury by claiming it does not sit to decide the wisdom of the employer’s business decision, despite the potential implausibility of the decision.

10. Not “Code of Civility”

Employers may be very demeaning to women or other minorities by disrespectful treatment, which may constitute circumstantial evidence of discriminatory intent.¹³⁰ Yet, by recasting the potential factual inference into a legal issue—that the statute does not serve to impose a “code of civility”—the court can choose to neutralize, as a matter of law, the potential jury inference and dispose of the case on that basis on MSJ.¹³¹

127. See Van Detta, *supra* note 85, at 102.

128. See *id.* at 103.

129. Client ID: Jarvis v. Enter. Fleet Servs. & Leasing Co., No. DKC 07-3385, 2010 WL 1068146, at *17 (D. Md. Mar. 17, 2010), *aff’d per curiam*, 408 Fed. App’x 668 (4th Cir. 2011).

This court’s task is not to sit, in this context, as a super personnel agency. It is not enough for Plaintiff to allege pretext based on her own view of the truth; in order to rebut Defendant’s non-discriminatory reason, Plaintiff’s task is to proffer evidence showing that Defendant’s stated reason was not the real reason for its actions. Plaintiff has proffered no such evidence and Defendant’s motion for summary judgment will therefore be granted.

Id. (quoting Khoury v. Meserve, 268 F. Supp. 2d 600, 615 (D. Md. 2003), *aff’d per curiam*, 85 Fed. App’x 960 (4th Cir. 2004)).

130. See Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (“In these circumstances, Griffith must produce sufficient circumstantial evidence of illegal discrimination under the *McDonnell Douglas* paradigm—by presenting a *prima facie* case of intentional discrimination plus sufficient evidence that one or more of the City’s proffered nondiscriminatory reasons is a pretext for unlawful discrimination.”).

131. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (holding that allowing same sex harassment to be subject to Title VII’s protections does not thereby “transform Title VII into a general civility code for the American workplace”); see also *Griffith*, 387 F.3d at 736 (requiring a plaintiff lacking evidence that “clearly points” to intentional discrimination to create an inference of the discrimination that will justify review by a jury).

11. Not the “Decision-Maker”

The law recognizes the logic of inferring discriminatory purpose of an employment action from the fact that the person who decided the employment action also made discriminatory comments.¹³² Conversely, it follows that discriminatory comments made by non-decision-makers are less probative of discriminatory purpose as to the challenged employment decision. This principle allows room for inventiveness on MSJ by—depending on what gaps and admissions of “I don’t know who made the decision” on the summary judgment record—the employer may attempt to manipulate the record to characterize (or recharacterize) the decision as having been made by someone other than the discriminatory speaker. Thereby, on MSJ, the employer would attempt to neutralize as a matter of law the otherwise jury triable issue arising from the discriminatory decision having been made by the discriminatory speaker.¹³³

12. Inference of *Absence* of Discrimination

Also presented as a matter of logic, if the person who hired the minority group member plaintiff also made the decision to terminate the same person, that decision-maker earns an inference of *nondiscriminatory* intent; if the decision-maker hired the minority irrespective of that status, it suggests that decision-maker would not terminate *because of* that very status.¹³⁴ Thus, on MSJ, the employer may attempt to neutralize as a matter of law an inference of discriminatory purpose by showing that the decision-maker made the decision to hire the plaintiff and therefore could not be inferred to be

132. See *Murray v. Jacobs Tech., Inc.*, No. 1:10-CV-771, 2012 WL 1145938, at*8 (M.D.N.C. Apr. 5, 2012) (citing *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999)), *aff’d per curiam*, 568 Fed. App’x 265 (4th Cir. 2014).

133. See *id.* at *9 (stating that AT&T provided evidence sufficient to show that the discriminatory speaker played no part in the decision to terminate the plaintiff).

134. *Proud v. Stone*, 945 F.2d 796, 797-98 (4th Cir. 1991).

One is quickly drawn to the realization that “claims that employer animus exists in termination but not in hiring seem irrational.” From the standpoint of the putative discriminator, “it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.” Therefore, in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.

Id. at 797 (citation omitted).

discriminatory by terminating the same employee.

13. “Equal Opportunity Jerk”

The plaintiff alleges harassment on the basis of sex due to the supervisor calling her disparaging names. The employer responds on MSJ that no such inference is permitted because the employer presents evidence that the supervisor calls male employees equally disparaging names. Stated otherwise, the comments are indicative of the supervisor being a *jerk* but not a *discriminatory* one; only the latter is proscribed by Title VII, not the former.¹³⁵

14. “No *Scienter*”

The employer who is accused of targeting minority group members may contend that it was impossible for such to have been the intent because the employer had no reason to know the plaintiff’s minority group status.¹³⁶ Thus, the defense on MSJ is that, as a matter of law, there could be no action taken on the basis of minority status when minority status is not known to the decision-maker.¹³⁷

15. “Intervening Event”

The supervisor broods out loud that “there are too many women working here.” A week later, a woman is fired. She contends that the discharge was due to her sex, as demonstrated by the supervisor’s contemporaneous comments. At the MSJ stage, however—after the close of discovery—the employer moves for MSJ supported by an affidavit from the company president contending that the employee was fired by the company president due to reports, confirmed by investigation, of the employee having just threatened the life of a

135. See, e.g., *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000).

There may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, sexual harassment would not be based on sex because men and women are accorded like treatment. . . . and the plaintiff would have no remedy under Title VII.

Id. (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

136. See, e.g., *Holmes v. Potter*, 384 F.3d 356, 362 (7th Cir. 2004).

137. See, e.g., *id.* (“Usually an employer’s lack of knowledge about a protected category rings a death knell for discrimination claims. ‘[T]here is no indication that [the employer] even knew about the [protected activity] when [an adverse action took place].’” (alteration in original) (citation omitted) (quoting *Clark Cnty. Sch. Dist. V. Breedon*, 532 U.S. 268, 273 (2001))).

company executive. The affidavit further states that the company president made the discharge decision on the basis of the alleged threat, without any knowledge of the supervisor's sexist comments made a few days earlier. The employer moves for summary judgment contending it had no knowledge of the supervisor's sexist comments in deciding the discharge and that it made the discharge decision on the basis of removing exposure created by the alleged threat. By showing that the employer relied on the threat as an intervening factor, the employer breaks the inference of discriminatory causation created by the supervisor's sexist comments. The employer, as a matter of law, neutered the inference and removed any basis for jury determination of discriminatory motivation by showing its action was based on the nondiscriminatory intervening event.¹³⁸

16. Good Faith, but Incorrect, Belief of Decision-Maker; Decision-Maker's Perception Controls

Referring to the hypothetical in the previous paragraph where the employer terminates female on the basis of the investigation confirming a threat had been made by the employee on the life of the company executive—assume the female denies having made *any* threat. Does the plaintiff's denial of having made any threat create a genuine issue of material fact, serving to defeat the employer's MSJ? No, because it is the employer's *good faith belief* of the threat having been made that counts; even if the employee did not make the threat, it is the employer's good faith belief that the threat was made, as confirmed by its investigation, that is sufficient as a matter of law to defeat the jury issue of discriminatory purpose.¹³⁹

138. See *Joseph v. Marco Polo Network, Inc.*, No. 09 Civ. 1597, 2010 U.S. Dist. LEXIS 119713, at *54-56 (S.D.N.Y. Nov. 10, 2010) ("Evidence of significant misconduct by a plaintiff that fully justifies the adverse employment action and that occurs after the employee's protected activity extinguishes the probative force that might arise from the proximity in time between the protected activity and the adverse employment action." (citing *Gubitosi v. Kapica*, 154 F.3d 30, 33 (2d Cir. 1998))).

139. See *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 217-18 (4th Cir. 2007).

Here, the uncontested evidence established that DeCesaris (the decision maker) honestly believed that Holland deserved to be discharged for threatening Peck, regardless of whether Holland did in fact issue the threats. Thus, Holland's evidence failed to address whether DeCesaris did not honestly believe that the threats were made, and ultimately, "[i]t is the perception of the decisionmaker which is relevant."

Id. "In assessing pretext, a court's focus must be on the perception of the decision maker, that is, whether the employer believed its stated reason to be credible." *Id.* (quoting *Azimi v. Jordan's Meats, Inc.* 456 F.3d 228, 246 (1st Cir. 2006)).

17. Inconsistency as a Mere “Charitable Act” Rather Than Pretext

Ordinarily, inconsistencies in the employer’s reasons for its challenged action give rise to a classic jury-triable issue of pretext because “[t]he factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.”¹⁴⁰ But, suppose the employer’s inconsistency was due to an attempt to lessen the financial impact of the termination—on the employee, such as in the hypothetical in the prior paragraph, by reporting to the unemployment compensation agency that the employee was laid off for lack of work. In this scenario, the employer reported this reason so the employee would still qualify for unemployment compensation benefits, notwithstanding the employer’s termination due to belief of a threat having been made. Do these conflicting reasons give rise to a pretext claim for the jury? No, because the beneficent acts, unaccompanied by proof that they were a cover up for a discriminatory purpose, do not give rise to a jury question of pretext arising from the employer giving conflicting reasons for a termination decision.¹⁴¹

18. Additional Consistent Reasons for Employer Action Are *Not* “Shifting Reasons”

Shifting reasons for the employer’s challenged action ordinarily will give rise to a jury-triable question of pretext.¹⁴² However, does the employer’s “piling on” of *subsequently added*, additional reasons for its employment action, itself create a pretext issue by the piling on of such additional reasons? No, it is *inconsistent* reasons that give rise to a pretext case for a jury, whereas adding consistent reasons into the summary judgment stage does not automatically create a pretext case and, indeed, may help fortify the employer’s MSJ based on an LNBR for its action as to which the plaintiff cannot demonstrate pretext.¹⁴³

140. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511; *see* *Castro v. Devry Univ., Inc.*, 941 F. Supp. 2d 965, 990 (N.D. Ill. 2013).

141. *See* *Holland*, 487 F.3d at 216-17 (“Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation’s validity . . .” (quoting *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006))).

142. *See* *Castro*, 941 F.2d at 990 (acknowledging that “shifting reasons may indicate pretext”).

143. *See, e.g.,* *Castro*, 941 F. Supp. 2d at 989 (“While shifting reasons may indicate pretext, the facts do not support the claim of such a shift or pretext here.”).

IV. WHAT TO DO?

As shown above, the combination of summary judgment principles and the substantive law framework for interpreting Title VII's burden shifting frameworks, has developed a self-feeding system that serves to detour the statutory inquiry and jettison from the judicial system cases in which evidence suggests a jury triable issue of discrimination. This article suggests one lesser administrative correction and two other options for judicial reform. The administrative solution strives to attempt to achieve greater resolution at the level of the Equal Employment Opportunity Commission (EEOC) in a manner required by Congress, but ignored by the EEOC. The others attempt to either return to adjudication by confronting the statutory issue straight-on or, instead, to reform the judicially created frameworks which currently usurp statutory purpose.

A. Administrative Reform: Abuse of Automatic Issuance of Right to Sue Letters upon Request

Title VII *requires* conciliation or other similar actions by the EEOC, when the Agency finds "reasonable cause" for a violation.¹⁴⁴ The purpose of that *congressional command* is precisely to avoid litigation in the federal courts and to promote *amicable* (non-judicial) resolution of the dispute.¹⁴⁵ Title VII attempts to accomplish this by

The fact that Hurt stressed Brooks' poor performance in a subsequent email to HR Director Maher, whereas dishonesty was at the forefront of DA Berry's mind when she testified at her deposition years later, does not demonstrate "shifting" reasons for the termination. To raise a suspicion of pretext, Brooks must present evidence of a "significant discrepancy" in the reasons offered by DeVry for her discharge. Concerns about dishonesty versus performance are not sufficiently inconsistent to show pretext.

Id. (citation omitted).

144. See 42 U.S.C. § 2000e-5(b) ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.") (emphasis added)).

145. See *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d. 1256, 1260 (11th Cir. 2003) ("The duty to conciliate is at the heart of Title VII. It clearly reflects a strong congressional desire for out-of-court settlements of Title VII violations. It is a condition precedent to the Commission's power to sue." (citations omitted)); *EEOC v. Sherwood Med. Indus., Inc.*, 452 F. Supp. 678, 683 (M.D. Fla. 1978).

The mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong Congressional desire for out-of-court settlement of Title VII violations. The legislative history of the 1972 amendments confirms that Congress viewed judicial relief as a recourse of last resort, sought only after a settlement has been attempted and failed. Conciliation is clearly the heart of the Title VII administrative process.

allowing EEOC investigation and by withholding (for at least 300 days in *deferral* states) charging parties' access to the courts, conditioning court access upon EEOC's controlling issuance of "right-to-sue letters" until the agency has investigated the charge and released itself from *further* conciliation efforts—only then allowing the case to be brought in court.¹⁴⁶

To be sure, the courts usually will not inject themselves in assessing the *adequacy* of the agency's conciliation efforts—that being a matter of agency discretion.¹⁴⁷ The adequacy of the agency's conciliation—assuming it engaged in the effort *at all*—arguably is not a task of the courts.¹⁴⁸

As an entirely different matter, flatly contrary to the express language of the statute, the EEOC has arrogated unto itself the power to issue right-to-sue letters without even investigating the charge, *much less* attempting conciliation on a meritorious charge in order to attempt to avoid judicial litigation.¹⁴⁹ It may do so merely upon the request of a charging party, pursuant to a regulation the agency promulgated.¹⁵⁰ Through such regulation, the EEOC has self-authorized itself to issue a form-letter in response to a request from charging parties; essentially, this permits the EEOC to automatically drop any investigation (much less perform conciliation of a charge found to have cause) and to instantly issue right-to-sue letters, a power the Agency reflexively

Sherwood Med., 452 F. Supp. At 683 (footnote omitted) (citations omitted).

146. See 42 U.S.C. § 2000e-5(f)(1).

If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) [300 days in *deferral* states] of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved *and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved.*

Id. (emphasis added). Thus, note that plaintiff may file in court either when the agency finds no cause and then issues a right-to-sue letter, or after cause is found and it declares that conciliation has failed. See *id.*

147. *EEOC v. Mach Mining, L.L.C.*, 738 F.3d 171, 183 (7th Cir. 2013) (refusing to assess the adequacy of EEOC's conciliation efforts), *cert. granted*, 134 S. Ct. 2872 (2014). But see *Asplundh*, 340 F.3d at 1261 (dismissing action due to EEOC's perfunctory stab at conciliation not being in compliance with statute).

148. See *Mach Mining*, 738 F.3d at 183; cf. *Sherwood*, 452 F. Supp. at 684 ("If the Commission is to seek relief in federal court it must be prepared to show that it has satisfied the jurisdictional prerequisites—including submitting the matters to conciliation This is a matter of subject matter jurisdiction, *not of Commission discretion.*" (emphasis added)).

149. See 29 C.F.R. § 1601.28(a)(2) (2013).

150. See *id.*

asserts in response to requests, asserting that it will not have time to investigate.¹⁵¹

This is impermissible reformation of statute by regulation.¹⁵² It results in encouraging litigation contrary to administrative procedures that are statutorily mandated by Congress precisely to avoid such cases winding up in the federal courts.¹⁵³ Ironically, by thus avoiding the non-litigated resolution intended by Congress, the agency is facilitating an end run around the statute and allowing plaintiffs into court to face the potential traps of MTD and MSJ.¹⁵⁴ In short, the EEOC is part of the problem in allowing so many cases to wind up in court on MSJ when they should be—as Congress commanded—resolved outside of court by the agency.¹⁵⁵

151. See *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1346-47 (D.C. Cir. 1999) (noting that the EEOC unlawfully sent a right-to-sue letter to the plaintiff before the 180 day statutory waiting period had expired).

152. See, e.g., *id.* at 1347. There is a conflict in the circuits concerning the validity of this EEOC regulation. Compare *id.*, with *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001) (“We therefore uphold EEOC’s reading, one that has been at least implicitly accepted by Congress for over 23 years.”), and *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) (upholding the validity of the regulation).

153. See *Martini*, 178 F.3d at 1347. Indeed, the only practical difference between a race discrimination in employment case brought under Title VII and one brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981, (aside from the longer statute of limitations for the latter statute), is the factor of EEOC investigation and conciliation. Compare 42 U.S.C. § 2000e-5 (2012) (empowering the EEOC to “prevent any person from engaging in any unlawful employment practice”), with 42 U.S.C. § 1983 (2012) (authorizing a private right of action for any civil rights violation). Absent that, one wonders what was accomplished by enactment of a statute that adds nothing—after having thus been neutered by the agency as to race discrimination in employment cases. Note further, that “race” within the meaning of Section 1981 may also include suits for *alienage* (ancestry, not national origin). See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

154. Arguably, an EEOC finding of “no cause” may give the charging party sufficient repose to feel that she had her “fair day in court” with the matter adjudicated by a neutral, and thus obviate litigation in the federal courts. See generally 29 C.F.R. 1601.19(a) (2014). Conversely, an Agency finding of “cause” may serve the salutatory purpose of a conciliated resolution which would obviate court litigation, which is precisely what congress intended. See 29 C.F.R. § 1601.24(a) (2014). But, by allowing plaintiff’s counsel to assert an Agency regulation to punt the case to federal court instead of allowing an agency attempt at resolution, the plaintiff (more precisely, plaintiff’s attorney) is may be positioning herself for an award of attorneys’ fees. See 42 U.S.C. § 2000e-5(k) (2012) (permitting court to allow the prevailing party to recover attorney fees). Thus, the pursuit of a court award of attorneys’ fees may incentivize taking the case away from the Agency and pushing it into court—thus creating cross purposes between the rationales for congressional mandate for Agency resolution to avoid litigation versus congressional award of attorneys’ fees for successfully bringing a Title VII suit.

155. By allowing the bypass around the agency intervention, the agency has effectively abrogated any real difference in race-based claims between Title VII and the pre-existing Civil Rights Act of 1866. The latter allows both a longer statute of limitations, no burden of EEOC-charge filing, and similar awards of attorneys fees and punitive damages. See J. CUNYON GORDON, CHI. LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, TITLE VII AND SECTION 1981, at 45-46, 53-56 (2012).

B. Judicial “Framework” Reform: Towards a Less-Stacked Deck

Beyond EEOC practices, however, the far larger issue is the judicial channeling of cases into analytical frameworks that divert the statutory inquiry of intent into, instead, shifting sands and slippery slopes for plaintiffs, which can be manipulated by employers to refocus—or perhaps more accurately—mis-focus the statutory inquiry from proving intent to the employee having to prove, instead, pretext.¹⁵⁶ This exposure is accentuated by the courts adopting myriad devices to convert issues of intent on MSJ into issues of law decided by judges rather than fact issues for juries.¹⁵⁷ This article suggests that the *McDonnell Douglas/Burdine* progeny need to be reexamined by refocusing on the intent question as framed by the statute rather than the version re-cast by the judicial frameworks and adopting a fairer standard that hews the statute. This article proposes two options: return to the statute or modify the framework.

1. Reform Option One: Return to the Statute: Straight-up Jury Question of Intent

Returning to basics, the intent standard of Title VII for disparate treatment cases is seemingly straightforward: “[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”¹⁵⁸ If the plaintiff pleads a plausible claim, she can advance to discovery.¹⁵⁹ Discovery either produces the existence of a genuine issue of material fact sufficient to survive summary judgment, as determined by the court, or it does not.¹⁶⁰ The issue becomes simply one of applying the statute in light of established pleading and summary judgment principles. In such an inquiry, the plaintiff can, but is not required to, adduce evidence that overlaps the *McDonnell Douglas* prima facie case elements, as well as *Burdine*-type evidence of pretext.¹⁶¹ Upon MSJ, the court determines the sufficiency of a genuine issue of material fact as to the statutory inquiry of whether a

156. See *supra* note 98 and accompanying text.

157. See *supra* note 98 and accompanying text.

158. 42 U.S.C. § 2000e-2(m) (2012).

159. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also *FED. R. CIV. P. 12(b)(6)* (2012).

160. See *FED. R. CIV. P. 56(a)* (2012).

161. See Gordon, *supra* note 155, at 10-11.

protected characteristic was a motivating factor for the challenged decision.¹⁶² The difference, as here proposed, is that Title VII directly, rather than pretext problematically, becomes the straightforward framework for the application of the summary judgment standard.¹⁶³ And, to the anticipated contention that this revision is too unfiltered, this article presents two responses: (i) statutes are customarily applied in light of their words rather than in light of frameworks adopted as statutory surrogates;¹⁶⁴ and (ii) the statutory word “motivating” is a filter, requiring plaintiff to prove to the satisfaction of the judge that the protected characteristic was not merely “a factor” but, indeed, rose to the status of potentially being “a motivating” one, in order to survive MSJ.

2. Reform Option Two: Reform the Framework to Place the Burden on the Employer to Prove its Business Reasons In the Face of an Adequately Mounted Plaintiff’s Claim

The rub with the current status of Title VII law is that the case law formulation of proof detours from the statutory inquiry of intent and requires the plaintiff to overcome *three* burdens of proof—each with its own set of dispositive barriers, plus an array of evidence-neutering devices.¹⁶⁵ Title VII, however, presents only one: intent to discriminate, which should be allowed to be established by an inference—that is potentially dispositive *for plaintiff* if not neutralized *by the employer*.¹⁶⁶

First, the plaintiff now must plead a plausible claim—or risk being thrown out of court if the judge concludes that the case is not plausible; previously, mere “notice pleading” was the requirement.¹⁶⁷ The difference is not insignificant: the change invites a judicial scrutiny of the adequacy of the pleading at a *higher level*, not previously required, thus ratcheting up the standard used to determine if the plaintiff will be allowed access to discovery. Discovery would give the plaintiff a chance to solidify the claim and test the evidence in support of the

162. See Gordon, *supra* note 155, at 6.

163. See Gordon, *supra* note 155, at 6, 10-11.

164. See YULE KIM, CONG. RESEARCH SERV. 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008).

165. See *supra* text accompanying notes 64-80

166. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 527-28 (1993) (Souter, J., dissenting) (“Under *McDonnell Douglas* and *Burdine*, however, proof of a *prima facie* case not only raises an inference of discrimination; in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff.”).

167. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

employer's explanation.¹⁶⁸ Second, the plaintiff must mount a prima facie case or risk being thrown out of court on MSJ without regard to the employer's business reason for the challenged action.¹⁶⁹ And third, once the employer *merely articulates* (and supplements) *any* business reason it chooses to assert for its challenged action, as to which the employer bears no burden of proof, the plaintiff then acquires yet another the off-target burden—to prove the falsity or reasons to disbelieve the reasons asserted by the employer.¹⁷⁰ And, in doing so, the plaintiff also must overcome case-made inventions which neuter the probity of her fact-bound evidence of discriminatory intent.

Thus, under existing application of Title VII, the plaintiff must plead a *plausible* claim to survive the pleading stage, then prove a prima facie case to stay alive at the MSJ stage; if the plaintiff passes those tests, then she *must disprove* or show to be *unbelievable or false* the business reason asserted, selected, crafted, or supplemented by the employer. Stated still otherwise, assuming the plaintiff pleads a plausible claim and mounts a prima facie case, she still must show the falsity or disbelief of the employer's selected reason in order get to a jury, while overcoming the land mines of court-made devices which neuter her evidence serving to keep her from getting to a jury.

The rub is that *the statute* does not require the employee to show the falsity or disbelief of the employer's asserted reason to prevail; rather, it only requires the plaintiff to create a jury-triable question of intent to discriminate against her due to protected status.¹⁷¹ Diverting the statutory intent inquiry into a case law formulation inquiry of having to show disbelief or falsity of the employer's reason, deals a triple whammy: (1) it is not only unfaithful to the intent inquiry mandated by the statute, but (2) also drives the result of the case to be decided by a judge rather than a jury, (3) on a different question of existence of an issue of disbelief or falsity of a business reason that is carefully formed—or maybe even contrived—by the employer strategically to be

168. See Sullivan, *supra* note 39, at 1622.

169. See *supra* notes 66-70 and accompanying text.

170. See *supra* notes 71-73 and accompanying text. Indeed, it can take the plaintiff six months after discharge to be able to learn the employer's reasons for its decision, for which the plaintiff must then marshal—at potentially considerable expense—discovery to attempt to create a genuine issue of material fact as to disbelief or falsity (employer lying or covering up) to get to a jury. See Hicks, 509 U.S. at 543 (Souter, J., dissenting). Ironically, it was the expense of subjecting *defendants* to discovery in antitrust cases that propelled adoption of the *Twombly*-higher standard of plausibility pleading in place of notice pleading. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59.

171. See 42 U.S.C. § 2000e-2(m) (2012).

unimpeachable upon the employer's MSJ.¹⁷² And, all this is compounded by the evidence-neutering devices discussed above. By thus allowing the employer to select and control—but not have to prove—the issue of the reasons for its actions, to which the plaintiff then must mount a case showing its falsity or belief to get to the jury, the statutory inquiry of intent is not only diverted elsewhere by the employer's strategic characterization of its business reason, but is ignored altogether by becoming a different issue of disbelief of reason rather than the statutory issue of motivation or intent.¹⁷³

The rationale for the employer merely having to articulate, rather than prove, its business decision, whereas the plaintiff has the burden to disprove it or show it to be false, is said to be a function of the burden-shifting formulation of the case law which states that the burden of proof in a Title VII case is always on the plaintiff.¹⁷⁴ But, if the plaintiff now (post-*McDonnell Douglas*) establishes both a plausible pleading and a prima facie case, it would not be inconsistent with the plaintiff retaining a burden of proving intent to discriminate for the court to require the employer now to *prove*—rather than to merely articulate—its business reason. For it is the employer who not only can strategically mold the reason it offers, but also can control the information, and access thereto, upon which it may attempt to advantageously position itself to prove the legitimacy of its decision.¹⁷⁵

In the posture proposed here, the plaintiff who meets the higher standard of pleading a plausible claim and also pleads a prima facie case, still joins issue with an employer who still has the right to assert whatever business reason it cares to select for its action.¹⁷⁶ However, given that wide berth of the employer, it should now have to carry the burden of proving to a jury the legitimacy of the reason it chooses to state for its action. After all, since the mounting of a prima facie case *alone* creates sufficient basis for judgment for the employee, even under existing law, unless the employer carries a burden of articulating a nondiscriminatory reason of proof as a matter of law, the employee prevails; the change proposed is to have the employer prove that was the

172. See *Hicks*, 509 U.S. at 539-40 (Souter, J., dissenting) (finding that the majority's formulation permits, or even compels, an employer to lie about the actual reasons for terminating an employee).

173. But see *id.* at 511 (majority opinion) (noting that disbelief of the employer's reason can become a part of the inquiry of intent).

174. See *id.* (reiterating "our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion'").

175. See Kaminshine, *supra* note 81, at 9.

176. See discussion *supra* notes 95-98.

motivating reason rather than merely to articulate it.¹⁷⁷ If the plaintiff generates a genuine issue of material fact as to whether the employer has carried its burden of *proving*—not merely articulating—a nondiscriminatory reason, then the case goes to the jury for determination of the ultimate intent question.¹⁷⁸ If the employer fails to carry its burden of proving the reason claimed for its decision, summary judgment may be granted against the employer upon the statutory issue of intent, rather than on the “framework” issue of whether the plaintiff has proven pretext (disbelief or falsity of the employer’s reasons).¹⁷⁹ Of course, if the employer has carried its burden of proving the LNBR for its action, evidence of disbelief or falsity of the employer’s business reason still would be probative, but no longer dispositive, of the baseline statutory issue of “motivating factor” intent.

Lastly, as to the potential criticism that this proposed revision in framework would force unfiltered cases to juries, it remains, as noted, that the judge still determines as a matter of law if there is sufficient evidence to mount a jury-triable case.¹⁸⁰ Fundamentally, this revision would serve the calendar control concerns of the judiciary by making summary judgment more of a two-way street by potentially positioning *plaintiffs* to move for summary judgment by showing that the employee demonstrated its burden of showing protected status as a motivating factor, and that under *Anderson*, the employer failed to carry its burden to prove an essential element of its case—the burden of proving its business reason or the reason’s legitimacy.

This seems to be the result of (1) the change to a heightened pleading standard, (2) the law that a *prima facie* case is alone sufficient to support judgment for plaintiff, and (3) the ability of the employer to not only select the reason for its action from the arsenal of facts it controls, but also (4) to buttress the reason with additional, supplemental reasons. Does not the plaintiff’s *prima facie* case and the employer’s right to select an articulated reason for its action, along with the evidence to support it or the supplementation of it, reasonably require the employer to prove its articulated reason as a straightforward issue created, as to a genuine issue of material fact? If so, the question of whether the employer has proven its reason in the face of the plausible

177. See *Hicks*, 509 U.S. at 528, 539 (Souter, J., dissenting).

178. See FED. R. CIV. P. 56(a); see also Kaminshine, *supra* note 81, at 11 & n. 50.

179. See Kaminshine, *supra* note 81, at 4 (“By knocking out the employer’s reason, the discriminatory explanation emerges as the victor—the real, but-for cause of the employment action.”).

180. See *supra* text accompanying note 83.

pleading and prima facie case should be the test for MSJ versus jury determination.¹⁸¹

The employer's mere articulation of a reason which it does not have to prove under current law, not only neutralizes the plaintiff's prima facie case but *also* simultaneously forces the plaintiff to prove a genuine issue of material fact as to falsity or disbelief, thereby summarily dropping the plaintiff into the summary judgment trick-box of court, rather than jury, resolution of the statutory intent question; in which judicial forum, the plaintiff's evidence of discriminatory motivation can be neutered by the court as a matter of law – hence ripe for dispositive motion – keeping the case from the jury. This is made all the more circular by the Supreme Court's characterization of the *McDonnell Douglas* formulation as a mere “procedural device” claimed to get the intent issue expeditiously to the jury.¹⁸² But precisely the reverse appears to be engineered by the employer's opportunity to cleverly craft bullet-proof business reasons for its actions which it need *only articulate*—not prove—coupled with further having to face the

181. Finally, if the EEOC can effectively rewrite Title VII to self-authorize itself by regulation to, upon request, dispense with its statutory obligation to investigate, and to attempt conciliation when it finds cause, *see supra* notes 130-31 and accompanying text, then arguably, it should easily require by regulation any employer against whom a charge is filed, to immediately state its specific reasons for its actions, so the employee does not have to resort to court litigation to flush out those reasons and discovery as to their credibility to attempt to mount a pretext case.

182. *See Hicks*, 509 U.S. at 521. Interestingly, the Supreme Court has posited that when the prima facie case is rebutted by the articulation of the business reason, the *McDonnell Douglas* burdens of allocation of proof drops out of the case, and the ultimate issue then reduces itself to the straightforward issue of discriminatory intent framed by the statute. Thus, the Court states that when the prima facie case is met by assertion of a legitimate business reason:

[T]he presumption raised by the prima facie case is rebutted and “drops from the case.”

The plaintiff then has “the full and fair opportunity to demonstrate, through presentation of his own case and through cross-examination of the defendant's witnesses, “that the proffered reason was not the true reason for the employment decision,” and that race was. . . .

....

... But whatever doubt Burdine might have created was eliminated by Aikens. There we said, in language that cannot reasonably be mistaken, that “the ultimate question [is] discrimination *vel non*.”

Id. at 507-08, 518 (emphasis in original) (citations omitted).

Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether “the defendant intentionally discriminated against the plaintiff.”

On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation. . . . In short, the district court must decide which party's explanation of the employer's motivation it believes.

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

headwind of the numerous court-created evidence-neutering devices. This is all grounded in the concept of the statutory requirement that the plaintiff always has the burden of proving discrimination (and that even disproving the employer's reasons does not necessarily result in automatically establishing that discrimination was the real reason, *Reeves, supra*).¹⁸³ But the application of all this cumulative court made law and interpretations have upended the statute's words and Congress' goal. The statutory obligation to prove discrimination can also be reasonably transformed into a "mandatory presumption" resulting from the plaintiff's mounting a plausible pleading and a *prima facie* case.¹⁸⁴ That "mandatory presumption," coupled with the employer's inability to *prove* (rather than merely articulate) legitimacy of its business decision (rather than the employee also having to prove *falsity* of the business reason which may have been strategically selected by the employer for litigation value from its pool of evidence), should be enough to establish employer liability.

V. CONCLUSION

The foundations for analyzing Title VII dispositive motions have become more restrictive, as have the analytical frameworks for evaluating them, resulting in dispositive motions being used increasingly to restrictively prune Title VII claims—which turn on sublime issues of motivation and intent claims—from juries. This has resulted initially from raising the bar of pleading required to survive a motion to dismiss. More broadly, however, the courts have replaced the statutory intent inquiry of the plaintiff in a Title VII disparate treatment case; the court requires the plaintiff to prove the falsity or disbelief of the employer's reason for its action—which is a detoured inquiry from the statutory intent question—while simultaneously allowing the employer to strategically select that reason (or even contrive it) to position the discovery record for summary judgment in its favor. This is further

183. See *Hicks*, 509 U.S. at 508, 511 (“[Plaintiff] retains that ‘ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.’” (second and third alterations in original) (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981))).

184. See *Burdine*, 450 U.S. at 254.

Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Id. Thus, mounting the *prima facie* case is more that procedural; it is substantive in Title VII cases. See *Hicks*, 509 U.S. at 528 (Souter, J., dissenting).

aided by the creation of artifices under the cover of the Rule 56 summary judgment rubric which transform evidence of discrimination from issues of intent for the jury into questions of law for the court—which the court may then use to divert the case from the jury (and from its docket). With the foundations thus changed, the entire foundation for the use of dispositive motions in Title VII disparate treatment cases should be reexamined to reassess whether they are serving the core purpose of achieving faithfulness to the statute. This article has presented suggestions for achieving that objective in a balanced fashion.

