St. Mary's Honor Ctr. v. Hicks: The Court's Reinterpretation of the McDonnell Douglas Framework in a Title VII Case - Can the Plaintiff Win Without a "Smoking Gun"?

Glenn H. Egor

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ST. MARY'S HONOR CTR. V. HICKS: THE COURT'S REINTERPRETATION OF THE MCDONNELL DOUGLAS FRAMEWORK IN A TITLE VII CASE — CAN THE PLAINTIFF WIN WITHOUT A “SMOKING GUN”?

INTRODUCTION

St. Mary's Honor Ctr. v. Hicks is a Title VII discharge case which, at first blush, seems to severely limit the framework set out in McDonnell Douglas Corp. v. Green for proving unlawful discrimination under Title VII. Hicks surprisingly held that a plaintiff who establishes a prima facie case and shows that the defendant’s justification for its actions are incredible is not entitled to a judgment as a matter of law. This five to four decision elicited Justice Souter's adamant dissent which contradicted the majority’s application of McDonnell Douglas.

The implications of the Supreme Court’s decision in Hicks are clearer when you consider the following employment discrimination scenario: forty percent of a business’ work force are black, and blacks comprise ten percent of the pool of qualified candidates. A minimally qualified black applicant applies for an opening, is rejected by a black hiring officer, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII. Meanwhile, the supervisor who conducted the company’s hiring is fired.

According to the majority opinion, written by Justice Scalia, a

   It shall be unlawful employment practice for an employer . . . (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

Id.
4. Hicks, 113 S. Ct. at 2748.
5. Id. at 2750-51. This hypothetical is the factual underpinning of the majority decision.
"mockery of justice" would ensue if the dissent's interpretation of *McDonnell Douglas* applies. As the majority stated, this is true because under the dissent's opinion:

not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be *incorrect*, they must assess damages against the company, *whether or not they believe the company was guilty of racial discrimination.*

The Court noted that "[t]he disproportionate minority makeup of the company's work force and the fact that its hiring officer was [black] will be irrelevant, because the plaintiff's case can be proved 'indirectly by showing that the employer's proffered explanation is unworthy of credence.'"

The Court's point here is that sometimes there may be a case where the defendant is incredible, but nonetheless, other evidence supports a nondiscriminatory motive. In other words, the employer's pretext may be concealing a benign, nondiscriminatory reason. This is unrealistic, according to the dissent, because there should always be evidence available to corroborate a business decision, such as "personnel records."*9*

The critical issue *Hicks* raises is what the factfinder should consider when trying to determine if there has been unlawful discrimination under Title VII. Should it be (a) simply "proof of pretext," or (b) "a totality of the circumstances" (i.e., all possible reasons hinted to in record); the majority preferred the latter test while the dissent favored the former. Part I of this Comment outlines the facts of *Hicks*. Part II traces the various aspects of its case history. Part III sets forth the relevant case law preceding the *Hicks' decision. Finally, Part IV harmonizes the majority's rationale with that of the dissent and concludes that this position does, in practice, provide the plaintiff with a "fighting chance" and offers alternative interpretations of *McDonnell Douglas/Burdine.*

6. Id.
7. Id. at 2751.
8. Id.
9. Id. at 2764 n.12 (Souter, J., dissenting).
10. Id. at 2760-61 (Souter, J., dissenting).
I. THE HICKS FACTS

Petitioner, St. Mary’s Honor Center ("St. Mary’s"), a halfway house operated by the Missouri Department of Corrections and Human Resources ("MDCHR"), employed Melvin Hicks, a black man, as a correctional officer. Hicks was hired in August 1978 and promoted to the supervisory position of shift commander in February 1980, but was demoted and discharged from this position in 1984.

In 1983, MDCHR conducted an extensive investigation of St. Mary’s administration. That investigation found several deficiencies, including poor upkeep, inadequate security measures and ineffective rules and regulations. As a result, numerous supervisory changes were made after this investigation. Steven Long, a white male, became the superintendent and John Powell, also a white male, became the chief of custody — a position requiring him to assume the role of Hick's immediate supervisor. Subsequent to these organizational changes, one less black was employed at St. Mary’s.

In 1981, a study by the MDCHR found that "too many blacks were in positions of power at [St.] Mary’s, and that the potential for subversion of the superintendent’s power, if the staff became racially polarized, was very real." Powell and Long stated, among others, that they were not aware of this study at the time of Hicks' discharge.

Hicks became the subject of frequent disciplinary actions for the first time after the reorganization, which placed him under the supervision of Powell. On March 3, 1984 Hicks was suspended for five days because his subordinates violated institutional rules. Hicks was later demoted from shift commander to correctional officer for his failure to ensure that his subordinates entered their use of a St.

12. Hicks, 113 S. Ct. at 2746.
13. Id.
14. Id.
17. Id. at 1252.
18. Id. at 1249.
19. Id.
20. Id. at 1246.
21. Id. at 1246-47.
Mary's vehicle into the official log book. For both of these incidents, a four-person disciplinary review board, composed of two whites and two blacks, met and recommended the appropriate discipline. Powell was on this board and recommended Hick's discharge. On March 29, 1984, Hicks received a letter of reprimand from Powell for an alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift. Finally, on June 7, 1984, Hicks was discharged for threatening Powell during an exchange of heated words which occurred in April, 1984. This final disciplinary action, resulting in Hicks' discharge, was initiated by Powell.

II. THE HICKS CASE HISTORY

Hicks initially brought suit in the United States District Court for the Eastern District of Missouri, alleging that St. Mary's violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and that Long violated Rev. Stat. § 1979, 42 U.S.C. § 1983, by demoting and then discharging him because of his race. After a full bench trial, the court found for St. Mary's and Long. The United States Court of Appeals for the Eighth Circuit, however, reversed and remanded, and the United States Supreme Court granted certiorari.

22. Id. at 1247.
23. Id.
24. Id. at 1247 n.7.
25. Id. at 1247.
26. Id. at 1247-48.
27. Id.
28. See Title VII, supra note 2.
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
Id.
31. Id. at 1252-53.
32. See Hicks v. St. Mary's Honor Ctr., 970 F.2d 487 (8th Cir. 1992).
The district court found that Hicks had established a prima facie case of racial discrimination because: (1) he was a member of a protected class; (2) he "met the applicable job qualifications of shift a commander"; (3) he was demoted and discharged; and (4) his shift commander's position remained open after his discharge and was eventually filled by a white male.34 The court further found that St. Mary's and Long introduced evidence of two legitimate, nondiscriminatory reasons for Hicks' demotion and discharge, including the severity of Hicks' violations of institutional rules and the overall accumulation of these violations over a short period of time.35 The court also found that Hicks proved that the reasons adduced by St. Mary's and Long for his demotion and discharge were not the true reasons.36 First, the court indicated that Hicks was the only person disciplined for institutional rule violations actually committed by his subordinates.37 Second, though the chief of custody claimed it was his policy to discipline the shift commander for his subordinates' rule violations, shift commanders were not so disciplined.38 Third, white employees were not always disciplined for committing more serious rule violations than those violations allegedly committed by Hicks.39 Fourth, the chief of custody "manufactured" a confrontation between himself and Hicks that led to Hicks' discharge.40

Nevertheless, the district court concluded that Hicks failed to overcome his "ultimate burden" by a preponderance of the evidence that his demotion and discharge were racially motivated.41 In doing so, the court noted that "although [Hicks] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."42 The court considered several facts before making its conclusion. First, though Hicks proved that he was disciplined more harshly than his co-employees, his black subordinates who actually committed the institutional rule violations for which Hicks was disciplined were not disciplined at all.43 Second, the court noted that between January and December of 1984, St.
Mary's hired thirteen blacks.\textsuperscript{44} Third, even after the reorganization the number of blacks at St. Mary's remained virtually constant.\textsuperscript{45} Fourth, the full-scale removal of employees from supervisory positions is often required when an institution is as poorly run as St. Mary's.\textsuperscript{46} Fifth, after Long became superintendent, two blacks and four whites held supervisory positions.\textsuperscript{47} The court noted that if the black person to whom the chief of custody position initially had been offered had accepted, then three whites and three blacks would have subsequently held supervisory positions.\textsuperscript{48} Sixth, the disciplinary review board that reviewed Hicks' violations, which led to his demotion, was composed of two blacks and two whites.\textsuperscript{49} Lastly, Powell and Long were never aware of the study which warned that black persons possessed too much power at St. Mary's.\textsuperscript{50} After considering these facts, the district court entered judgments in favor of St. Mary's on the Title VII action and in favor of Steven Long on the § 1983 action.\textsuperscript{51}

However, the Court of Appeals for the Eighth Circuit concluded that once the district court found that Hicks had proven pretext, he was entitled to judgment as a matter of law.\textsuperscript{52} Accordingly, the court of appeals reversed the judgments of the district court.\textsuperscript{53}

III. THE RELEVANT CASE LAW

A. The McDonnell Douglas Rule

Some background on the \textit{McDonnell Douglas} rule is necessary before exploring its application by the courts. There are basically two types of actions under Title VII: disparate treatment and disparate impact. Disparate treatment occurs when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin,"\textsuperscript{54} and the plaintiff must "prove that

\begin{itemize}
  \item 44. \textit{Id.}
  \item 45. \textit{Id.}
  \item 46. \textit{Id.}
  \item 47. \textit{Id.}
  \item 48. \textit{Id.}
  \item 49. \textit{Id.}
  \item 50. The court intimated, however, that had they "heed[ed] the warning of the Davis study," they would have then violated Title VII. \textit{Id.} at 1252.
  \item 51. \textit{Id.} at 1253.
  \item 52. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 493 (8th Cir. 1992).
  \item 53. \textit{Id.}
\end{itemize}
the defendant had a discriminatory intent or motive.\textsuperscript{55} Hick's Title VII claim was based upon a disparate treatment theory.\textsuperscript{56} The basic format for proving Title VII disparate treatment was elicited in the seminal case of McDonnell Douglas Corp. v. Green.\textsuperscript{57}

In McDonnell Douglas, the Supreme Court instituted a three-step analytical process. First, in order to prove a prima facie case, the plaintiff in a discharge case must prove that: (1) he was a member of a protected class; (2) he met the applicable qualifications for his job; (3) despite these qualifications, he was discharged; and, (4) the position remained open after his discharge and was then filled by a white male.\textsuperscript{58} Under the McDonnell Douglas framework, establishment of the prima facie case, in effect, creates a presumption of racial discrimination.\textsuperscript{59}

Next, if the plaintiff succeeds in proving this prima facie case, the burden must shift to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."\textsuperscript{60} Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case. Finally, if the defendant succeeds, the plaintiff must prove by a preponderance of the evidence that the reasons given by the defendant for the challenged employment action were pretextual.\textsuperscript{61}

B. The Application of McDonnell Douglas in the Courts

The most significant application of McDonnell Douglas occurred in Texas Dep't of Community Affairs v. Burdine,\textsuperscript{62} the Supreme Court decision whose interpretation of McDonnell Douglas is central to Hicks. The rule is now commonly referred to as the McDonnell
The first stage in McDonnell Douglas has been interpreted by Burdine to be a "rebuttable presumption" of discrimination. In the second stage of McDonnell Douglas, the employer's burden of production will "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." This second step shifts the burden of production, but not the burden of persuasion, which "remains at all times with the plaintiff." At the third step, if the employer carried its burden of production, the presumption raised by the prima facie case is rebutted and it "drops from the case." Thus, the trier of fact can then proceed directly to the ultimate question of intentional discrimination. In other words, upon reaching the third stage the employee then must go forward and prove intentional discrimination by a preponderance of the evidence.

In summarizing the plaintiff's burden in the third stage of the McDonnell Douglas framework, the Burdine Court stated that:

This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination. [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

The interpretation of this passage has been the subject of great controversy and has created divergent views among the circuits.
Although the Court carved out this *McDonnell Douglas*/Burdine format in 1980, only three years later, in *United States Postal Serv. Bd. of Governors v. Aikens,* it stated that “[t]he prima facie case method established in *McDonnell Douglas* was ‘never intended to be rigid, mechanized, or ritualistic. Rather, it is a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.’” *Aikens* further noted that because the question of intentional discrimination is “both sensitive and difficult,” it is best resolved by focusing on the ultimate question of discrimination, rather than the individual segments of the *McDonnell Douglas* allocation of burdens of proof.

IV. THE HICKS DECISION

A. The Majority Opinion

*Hicks'* ultimate holding dictates that a factfinder's rejection of the employer’s proffered reasons for its actions does not mandate a finding for the employee as a matter of law. In order to sustain a judgment at law, “there must first be a finding of discrimination.” Thus, “[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.” In sum, the majority held that if the factfinder deems the employer’s proposed reason for its employment action to be unpersuasive, this determination will not automatically validate the plaintiff’s proffered reason of race. This is ultimately a question for

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73. *Id.* at 715 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).
74. *Id.* at 716.
75. *Id.* at 716-17.
77. *Id.* at 2749 n.4 (emphasis omitted).
78. *Id.* at 2754.
79. *Id.* at 2756.
the factfinder to decide.\footnote{80}

In reaching this holding, Hicks reinterpreted and reconciled the McDonnell Douglas/Burdine rule. In particular, the Court reconciled Burdine's summarization of the third stage of the McDonnell Douglas framework, which states that once an employer meets his burden of production the plaintiff must have an opportunity to prove pretexts.\footnote{81} Basically, the majority wrote this off as inadvertent dicta by emphasizing that the plaintiff at all times retains the ultimate burden of proving that an employer's action was prompted by an impermissible motive.\footnote{82} The third stage of McDonnell Douglas/Burdine is further reconciled by the Court's interpretation of "pretext," which — according to the Court — should always be read to mean "pretext for discrimination."\footnote{83}

Turning to the Court's analysis, the majority first dealt with whether a prima facie case under McDonnell Douglas mandates a finding of intentional discrimination.\footnote{84} According to the majority, "[q]uite obviously" much less proof is required for a prima facie case than for a directed verdict.\footnote{85} The Court noted that the McDonnell Douglas prima facie presumption only exists to force the defendant to offer "some" response to a prima facie case.\footnote{86} If a defendant does so, then the "trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race."\footnote{87} At that point, "[t]he presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture."\footnote{88} Therefore, if the "defendant has succeeded in carrying its burden of production, the McDonnell Douglas framework — with its presumptions and burdens — is no longer relevant."\footnote{89}

Nevertheless, if the factfinder disbelieves the defendant's reason then it may infer intentional discrimination without any additional

\begin{footnotes}
\footnote{80}{Id.}\footnote{81}{See infra note 95.}\footnote{82}{St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752-53 (1993).}\footnote{83}{See infra text accompanying note 98.}\footnote{84}{Hicks, 113 S. Ct. at 2747.}\footnote{85}{Id. at 2751 (stating that the "McDonnell Douglas prima facie case is infinitely less than what a directed verdict demands").}\footnote{86}{Id. at 2749.}\footnote{87}{Id. (alteration in original) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).}\footnote{88}{Id. (quoting Burdine, 450 U.S. at 255).}\footnote{89}{Id.}
\end{footnotes}
proof. The Court noted that pretext "accompanied by a suspicion of mendacity may, together with the elements of the prima facie case, suffice to show intentional discrimination." Therefore, in some instances, a plaintiff may meet his ultimate burden of proof by combining proof of the elements constituting a prima facie case with evidence that defendant's proffered reasons for its acts were false. However, it is important to note that such finding of pretext does not always warrant a finding of illegal discrimination.

The Court stated that the application of such a rule "disregards the fundamental principle of Rule 301 [of the Federal Rules of Evidence, which states] that a presumption does not shift the burden of proof." The Court then reaffirmed the long-standing principle that "the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"

The Court then took issue with a number of interpretations made by the dissent. First, the Court vehemently disapproved of the dissent's reading of the third stage of McDonnell Douglas/Burdine. This stage is understood by the dissent to mean that the plaintiff wins merely if he proves pretext. In disagreeing, the majority stated that a "reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination

90. Id.
91. Id.
92. Id.
93. FED. R. EVID. 301 reads as follows:
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Id.
95. This third stage states that:
[T]he plaintiff must then [, after the employer has met his burden of adducing a nondiscriminatory reason,] have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but [rather] were a pretext for discrimination.
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).
96. See infra text accompanying notes 138-142.
was the real reason."97 According to the majority, the McDonnell Douglas/Burdine meaning of "pretext" is alluded to as meaning "pretext for discrimination."98 Thus, the majority reconciled McDonnell Douglas/Burdine by making a distinction between "pretext" and "pretext for discrimination," the latter being what is necessary to compel a judgment.

Next the Court reconciled Burdine's troubling phrase, stating that "the factual inquiry proceeds to a new level of specificity" once the employer has met his burden of production.99 This, as the Court noted, is not inquiring whether the employer's asserted reason is true or false; rather, this means that the "inquiry now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced."100

The next problematic phrase in Burdine is that "placing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."101 As read by the majority, this does not mean that the only factual issue remaining is whether the employer's reason is false, because "pretext" here means "pretext for discrimination."102 The Court noted that this simply addresses the "form rather than the substance of the defendant's production burden: The requirement that the employer 'clearly set forth' its reasons, gives the plaintiff a 'full and fair' rebuttal opportunity."103

Another hurdle the Court overcame is Burdine's statement that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination."104 The Court disagreed with the dissent's reading which held that

98. Id. at 2752 & n.6 (citations omitted). In McDonnell Douglas the Court stated that with respect to pretext for the sort of discrimination prohibited by Title VII, a plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." McDonnell Douglas, 411 U.S. at 804-05.
99. Hicks, 113 S. Ct. at 2752 (quoting Burdine, 450 U.S. at 255).
100. Id.
101. Id. (quoting Burdine, 450 U.S. at 255-56).
102. Id.; see supra text accompanying notes 97-98.
103. Hicks, 113 S. Ct. at 2752 (citations omitted).
104. Id. (quoting Burdine, 450 U.S. at 256).
“merger” means that pretext supplants the ultimate burden of persuasion and, thus, if the employer’s proffered reasons are pretextual, then the plaintiff is entitled to judgment. The Court noted that this reading would be unreasonable because it would be a merger “in which the little fish swallows the big one.” Instead, according to the majority, a reasonable reading would suggest that “proving the employer’s reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.

The most troublesome language which the majority reconciles in reaching its holding is where Burdine states that the plaintiff may succeed in persuading the court that she has been the victim of intentional discrimination “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” The majority conceded that this must mean that if the employer’s proffered explanation is unworthy of credence then the plaintiff must win. The Court, nevertheless, concluded that this “dictum contradicts or renders inexplicable numerous other statements, both in Burdine itself and in our later case-law.” Further, the Court reconciled this by finding that this dictum “must be regarded as an inadvertence, to the extent that it describes disproof of defendant’s reasons as a totally independent, rather than an auxiliary, means of proving unlawful intent.” Otherwise, as the Court noted, such a scheme would be analogous to a criminal case in which a trier of fact’s disbelief of the defendant’s alibi would warrant a guilty verdict.

105. See infra text accompanying notes 138-142.
106. Hicks, 113 S. Ct. at 2752.
107. Id.
108. Id. (emphasis added) (quoting Burdine, 450 U.S. at 256).
109. Id.
110. Id. at 2752-53; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n.18 (1973) (noting “[w]e . . . insist that respondent under § 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised”) (emphasis omitted).
Burdine held that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980).
111. Hicks, 113 S. Ct. at 2753.
112. See id. at 2753 n.7. The dissent failed to raise (perhaps the dissent felt it too trivial to include) the obvious point that this analogy is fatally flawed given the different burdens of proof in a criminal case as opposed to a civil case.
The Court raised the dissent’s and respondent’s point that this reading favors employers who lie over employers who remain silent, since a phony reason will enable the employer to survive a judgment and a silent employer will suffer a judgment.113 The majority responds by pointing out that the “McDonnell Douglas presumption is a procedural device, designed only to establish an order of proof and production.”114 Moreover, this like many other procedural devices places “perjurer[s] (initially, at least) in a better position than the truthful litigant who makes no response at all.”115

Next the Court responded to the dissent’s argument that now, after all burdens of production are met, the factual inquiry “is wide open, not limited at all by the scope of the employer’s proffered explanation” since the plaintiff now must rebut any and all conceivable explanations that may be “lurking in the record.”116 The majority states that this argument wrongly implies that the “articulated reasons” somehow exist “apart from the record.”117 However, “lurking in the record” is precisely where the Court noted that the defendant’s reasons are to be set forth.118 Since the defendant’s reasons are to be set forth “through the introduction of admissible evidence,”119 no unarticulated reason will be interjected into the trial.

Finally, the Court mentioned the strong policy behind Title VII discrimination cases and the difficulty proving them.120 Notwithstanding such issues, the majority, citing Aikens, stated that this does not mean that “courts should treat discrimination differently from other ultimate questions of fact.”121 Thus, courts should simply apply the legal rules of allocating the burdens and proof and not otherwise alter the ultimate issue of unlawful discrimination.122

113. Id. at 2754-55
114. Id. at 2755.
115. For example, defendants will suffer a judgment if they fail to answer a complaint, fail to contest critical averments in a complaint, or fail to submit affidavits creating a genuine issue of fact. Id.
116. Id.
117. Id. (emphasis in original).
118. Id. Although the reasons may be “vaguely” suggested, nevertheless, they must still be “articulated reasons” represented in the record. Id. at 2755-56.
119. Id. at 2755 (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).
120. Id. at 2756.
121. Id.
122. Id.
B. The Dissent's Opinion in *Hicks*

The dissent emphasized that *McDonnell Douglas/Burдine*'s central purpose is "to sharpen the inquiry into the elusive factual question of intentional discrimination."\(^{123}\) It follows, the dissent argued, that if the plaintiff is to have a fair opportunity to disprove the defendant's reasons, subtle discrimination can only be rooted out through circumstantial evidence, and the Court's finding is inapposite to this reasoning.\(^{124}\) The dissent argued that such a formula was necessary in light of congressional intent under Title VII to thwart subtle racial discrimination.\(^{125}\) Therefore, *McDonnell Douglas/Burдine* devised a framework that "would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence."\(^{126}\)

The dissent argued that a prima facie case raises an inference of discrimination, since a prima facie case is "indeed a proven case" (i.e., the elements of a prima facie case are established to a factfinder by a preponderance of the evidence).\(^{127}\) The dissent noted that because the most common nondiscriminatory reasons for firing have been eliminated by a prima facie case, "if otherwise unexplained, [the employer's acts] are more likely than not based on the consideration of impermissible factors."\(^{128}\) Thus, the dissent noted, once a prima facie case is shown, "the employer must either respond or lose."\(^{129}\)

Although the dissent agreed that the presumption of discrimination drops from the case if the employer meets his burden of production, it noted that the *McDonnell Douglas* framework is still relevant because the factual inquiry is narrowed to the question of pretext.\(^{130}\) Without such framework, the dissent stated, it would be "equally unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."\(^{131}\) The dissent noted that under

\(^{123}.\) Id. at 2757 (Souter, J., dissenting) (quoting *Burдine*, 450 U.S. at 255 n.8).

\(^{124}.\) Id.

\(^{125}.\) Id.

\(^{126}.\) Id.

\(^{127}.\) Id. at 2758 (Souter, J., dissenting).

\(^{128}.\) Id. (Souter, J., dissenting) (quoting *Fumco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

\(^{129}.\) Id.

\(^{130}.\) Id. at 2759 (Souter, J., dissenting).

\(^{131}.\) Id. at 2758 (Souter, J., dissenting). The dissent also found the majority scheme as
the Court’s scheme a plaintiff without direct evidence cannot win; thereby, rendering Burdine's alternative-indirect method useless and frustrating congressional intent.32

The dissent noted that this problem of proving discrimination without a “smoking gun” was overcome by the McDonnell Douglas requirement that the employer “articulate” his reasons through admissible evidence.133 The dissent noted that this requirement serves two purposes: (1) to burst the presumption of illegal discrimination, and (2) to “frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”134 The dissent stressed that the employer, as the bearer of the burden of production, chooses the scope of factual issues for trial by which he is then bound.135 Otherwise, according to the dissent, the employer’s explanation need not be “‘clear and reasonably specific’ if the factfinder can rely on a reason not clearly articulated.”136 Moreover, the dissent reasoned that this must be the case, given Burdine’s holding that “the factual inquiry proceeds to a new level of specificity” after the defendant has met his burden.137

The dissent contended that at the third stage of McDonnell Douglas/Burdine, the sole factual question is pretext.138 In support of this proposition, the dissent referred to the language in Burdine that states that at the third stage the plaintiff must show pretext (that the proffered reason was not the true reason for the employment decision) and this “merges” with the plaintiff’s ultimate burden of persuasion (that the plaintiff has been the victim of intentional dis-

“unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court.” Id. at 2761 (Souter, J., dissenting). The dissent disagreed that the McDonnell Douglas format becomes irrelevant once the employer meets his burden of production because McDonnell Douglas’s central purpose is to progressively “sharpen the inquiry into the elusive factual question of intentional discrimination.” Id. (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981)). The dissent called the majority decision a “flat misreading” of Burdine because the Court holds that the “enquiry is wide open, not limited at all by the scope of the employer’s proffered explanation.” Id. As the dissent noted, the requirement that the plaintiff be afforded a full and fair opportunity to demonstrate pretext means that the factual issues must be limited in the final stage of McDonnell Douglas. Id. This, as the dissent pointed out, is impossible if the factfinder can discern from the record reasons not articulated by the employer. Id.

132. See supra text accompanying note 108.
133. Hicks, 113 S. Ct. at 2758-59 (Souter, J., dissenting).
134. Id. at 2759 (Souter, J., dissenting) (quoting Burdine, 450 U.S. at 255-56).
135. See id.
136. Id. (quoting Burdine, 450 U.S. at 258).
137. Id. (quoting Burdine, 450 U.S. at 255).
138. Id. at 2760 & n.8 (Souter, J., dissenting).
The dissent attacked the Court’s interpretation of “merger” as contradictory and disharmonious within its immediate context in Burdine. This point, the dissent noted, is further illustrated by Burdine’s language that the plaintiff can meet this burden of persuasion “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” Therefore, the dissent concluded, this indicates that the case is narrowed to the question of pretext in the final stage of McDonnell Douglas/Burdine.

The dissent took issue with the Court’s interpretation that “pretext for discrimination” should appear where “pretext” actually does within the case law. The dissent stated that although McDonnell Douglas does refer to pretext as pretext for discrimination, this was simply a “sloppy” summarization of its opinion. This sloppy opinion was, as the dissent put it, “nail[ed] down” by Burdine’s holding that the plaintiff’s burden will be satisfied by simply proving an explanation unworthy of credence. The dissent argued that the “majority’s method of proving ‘pretext for discrimination’ changes Burdine’s ‘either ... or’ into a ‘both ... and.’” The dissent reasoned this because the majority requires that the plaintiff must not only show that the attributed reason for the employment decision was false, but also that the discrimination was the real reason. Indirect proof by way of pretexts will never be sufficient because the employer wins a judgment even if the plaintiff proves a prima facie case and pretexts. The dissent regarded the majority rationale as bootstrapping, due to the majority’s heavy reliance that the plaintiff has the “ultimate burden” of proving discrimination; thus, the dissent contended that the majority never answers the “practical question of how the plaintiff without such direct evidence can meet this burden.”

139. Id. at 2760 (Souter, J., dissenting) (quoting Burdine, 450 U.S. at 256).
140. Id. at 2760 n.6 (Souter, J., dissenting).
141. Id. at 2760 (Souter, J., dissenting) (quoting Burdine, 450 U.S. at 256).
142. Id.
143. Id. at 2759-60 n.5 (Souter, J., dissenting).
144. Id.
145. Id.
146. Id. at 2760 n.7 (Souter, J., dissenting); see supra text accompanying note 108.
147. Hicks, 113 S. Ct. at 2760 n.7 (Souter, J., dissenting). The dissent declared this scheme by the majority to be a “pretext-plus” approach. Id. at 2762 (Souter, J., dissenting).
148. Id. at 2762 (Souter, J., dissenting). The dissent recognized an inconsistency in the majority’s holding by noting the majority passage that proof of pretext “without more, ‘will permit the trier of fact to infer the ultimate fact of intentional discrimination.’” Id.
149. Id. at 2761 (Souter, J., dissenting). This is solved, according to the dissent, by
The dissent found the Court's holding inconsistent with Title VII policy because the plaintiff now has the "tremendous disadvantage... of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record." The dissent noted that "common experience" dictates its reading because employers who lie are most likely trying to cover up discrimination. Furthermore, the dissent declared, *McDonnell Douglas* becomes "meaningless" if the court can "look beyond the employer's lie by assuming the possible existence of other reasons the employer might have proffered without lying." The dissent concluded that the majority is "throwing out the rule for the benefit of employers [who lie]" because "[u]nder the majority's scheme, the employer who is caught in a lie, but succeeds in injecting into the trial an unarticulated reason for its actions, will win its case and walk away rewarded for its falsehoods." This scheme, as the dissent reasoned, will force employers to lie in order to successfully defend a prima facie case of discrimination in which the employer is unable to discover a nondiscriminatory reason for its decision. The dissent surmised that the employer will lie "and then hope that the factfinder will conclude that the employer may have acted for a reason unknown rather than for a discriminatory reason."

The dissent reasoned that the majority's attempt to rest on *Aikens* is flawed, since *Aikens* quotes *Burdine*’s key passage approvingly. *Aikens* states that the Court must "decide which party's explanation of the employer's motivation it believes." The dissent read this pas-
sage in harmony with its opinion because it “flatly bars the Court’s conclusion here that the factfinder can choose a third explanation, never offered by the employer.”

Lastly, the dissent credited the doctrine of stare decisis, which is particularly strong in statutory interpretation because legislative power is implicated. The dissent noted that congressional silence over the last twenty years on these cases amounts to acquiescence in *McDonnell Douglas* and its progeny. Further, the dissent criticized the majority for ignoring twenty years of precedent, established through *McDonnell Douglas* and *Burdine*, in which over half of the circuits have adopted the dissent’s scheme. In sum, the dissent found the majority scheme too burdensome on plaintiffs, ultimately chilling employees from bringing Title VII actions.

V. ANALYSIS

Discrimination is a sensitive issue and a strong national policy exists to discourage discrimination in the work force. It is necessary to give plaintiffs the proper opportunities to eliminate discrimination by their employers. However, Title VII should not be an extension of affirmative action. As the Court noted “Title VII ... does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.” Title VII was implemented to effectuate the national policy of bringing meritorious discrimination claims to court, but not to put employers in a position where they feel pressured to hire minorities or else risk losing a Title VII case. It is necessary to strike a proper balance.

Since neither the majority nor the dissent in *Hicks* seems to strike the proper balance needed in these cases, a modification of the current test is necessary. Each opinion favors too strongly one side or the other. The majority opinion will, in practice, make it easier to defend Title VII actions and place too heavy a burden on the plaintiff to prove his case. On the other hand, the dissent, by simply making “pretext” the ultimate issue, allows the plaintiff to prevail disproportionately, because plaintiffs will simply zero in on one prof-

160. *Id.*
161. *Id.*
162. *Id.* at 2765-66 (Souter, J., dissenting).
163. *Id.* at 2764-65 (Souter, J., dissenting).
164. *Id.* at 2763, 2766 (Souter, J., dissenting).
ferred reason and try to discredit it, thereby prevailing without ever actually proving discriminatory intent.

Although Hicks may seem too fact-bound to generate a rule of law and its holding ostensibly favors employers, there is language in Hicks that permits courts to apply the McDonnell Douglas/Burdine framework fairly to employees who lack direct evidence of discrimination; thereby striking the aforementioned balance. Specifically, Hicks states that “[t]he fact finder’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 a prima facie case, suffice to show intentional discrimination.”

Thus, pretext per se will not establish unlawful discrimination, but the plaintiff may win if an employer’s action is strongly suggestive of discrimination and is combined with the prima facie case. A factfinder’s disbelief of a defendant’s proffered rationale “may” allow it to infer the ultimate fact of intentional discrimination in some cases. In light of recent rulings, it seems as though this language has in fact provided a workable rule that courts have adopted without any great reluctance or uproar. In answer to the question: “can the plaintiff win with-

166. Seemingly, what the majority has done in Hicks, in clarifying McDonnell Douglas/Burdine, is remove a bright-line rule of “pretext equals discrimination” and substitute a more fact sensitive one. This is most appropriate in situations like Hicks where the record reeks of personal animosity as the true motive. To this extent Hicks should be limited to its facts since there was an evident underlying notion of personal animosity (as the trial court ultimately held).

167. Hicks, 113 S. Ct. at 2749 (emphasis added).

168. See, e.g., Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104 (8th Cir. 1994) (holding that Hicks established that once a prima facie case of discrimination is proven by plaintiff, “[n]o additional proof of discrimination is required”) (citing Hicks, 113 S. Ct. at 2749) (alteration in original), petition for cert. filed, 63 U.S.L.W. 3067 (July 19, 1994); Saulpau v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993) (finding that plaintiff may meet the ultimate burden of proof by combining her proof of the elements constituting a prima facie case with evidence that defendant’s proffered reasons for its acts were false and that a factfinder’s disbelief of a defendant’s proffered rationale may allow it to infer the ultimate fact of intentional discrimination in some cases), cert. denied, 114 S. Ct. 1189 (1994); Moore v. Eli Lilly & Co., 990 F.2d 812 (5th Cir.) (same), cert. denied, 114 S. Ct. 467 (1993); Nahrebeski v. Cincinnati Milacron Mktg. Co., 835 F. Supp. 1130 (W.D. Mo. 1993) (stating that “Hicks does not announce a new and rigid standard for determining whether an employer’s articulated reason for a particular employment decision is a pretext for discrimination”); Sterling v. H.P. Hood, Inc., No. 91-CV-1451, 1993 WL 379431 (N.D.N.Y. Sept. 22, 1993) (holding that under Hicks, the trier of fact’s rejection of the employer’s reason for its actions will not entitle judgment for the plaintiff in a sex discrimination claim); Bradley v. Key Mkt., Inc., Civ. A. No. 92-2023, 1993 WL 386319 (E.D. La. Sept. 16, 1993) (holding a plaintiff’s showing that an employer’s reason is illegitimate permits the factfinder to draw the inference that discrimination was the basis for the action); Holmes v. Marriott Corp., 831 F. Supp. (S.D. Iowa 1993) (finding that rejection of legitimate, non-discriminatory
out a ‘smoking gun’?" the answer is obviously “yes,” given the application of *Hicks*. As a practical matter, *Hicks’* emphasis on open-minded factual inquiries makes it more likely that trial judges will send cases to juries rather than rule summarily. This outcome is not a necessary evil, since these cases most often turn on subtle questions of credibility and intent that only a factfinder faced with a live witness should decide. Many scholars believe that summary judgment in civil rights actions has deprived plaintiffs of the fairer, more accurate decision-making assured by a factfinder’s decision at trial.

It appears that courts will mitigate the harshness of *Hicks* by interpreting “direct” evidence of discrimination loosely. For example, in *Saulpaugh v. Monroe Community Hosp.*, a sexual discrimination case, the court found “not one but *two* ‘smoking guns.’” The trial court (1) credited plaintiff’s testimony about her employer’s threats of reprisal should she complain; and, (2) intimated that plaintiff’s credibility was bolstered by the testimony of a former employee who described a similar pattern of sexual harassment and

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reasons for the challenged employment action offered by the employer under the *McDonnell Douglas*/Burdine* proof scheme permits the trier of fact to infer the ultimate fact of intentional discrimination without additional proof; *May v. Hobart Corp.* 839 F. Supp. 309 (E.D. Pa. 1993) (holding that under current law, a factfinder may infer discrimination from proof of pretext); *Brom v. Bozelli, Jacobs, Kenyon & Eckhardt, Inc.*, No. 89 C 7021, 1993 WL 313049 (N.D. Ill. Aug. 13, 1993) (ruling that pretext permits a trier of fact to decide the ultimate question); *Scales v. George Washington Univ.*, Civ. A. No. 89-0796-LFO, 1993 WL 304016 (D.D.C. July 27, 1993) (holding that a “demonstration that the employer’s proffered reason was pretextual permits the trier of fact to infer the ultimate fact of intentional discrimination”); *Elmore v. Capstan, Inc.*, Civ. A. No. 92-4004-DES, 1993 WL 290259 (D. Kan. July 8, 1993) (stating that plaintiff need not present direct evidence of discriminatory intent if he can prove that the defendant’s stated reasons for his discharge were a pretext of a racially discriminatory decision); *Saini v. Bloomsburg Univ. Faculty*, 826 F. Supp. 882 (M.D. Pa. 1993) (holding that rejection of the defendant’s proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Schweigert v. Provident Life Ins. Co.*, 503 N.W.2d 225, 228 (N.D. 1993) (commenting that “[t]he *Hicks* decision does not disturb the reality that success in establishing the incredibility of the employer’s asserted reasons will, in most instances, insure success for the plaintiff, because the incredibility of the employer’s reasons ‘will permit the trier of fact to infer the ultimate fact of intentional discrimination.’”) (quoting *Hicks*, 113 S. Ct. at 2749). *But see Waldron v. SL Industries, Inc.*, 849 F. Supp. 96, 1005 n.11 (D.N.J. 1994) (finding this passage in *Hicks* to be dicta).

169. See *Schweigert*, 503 N.W.2d at 228 (stating that *Hicks* holds discrimination to be a matter of fact, not law).


171. 4 F.3d 134 (2d Cir. 1993), cert. denied, 114 S. Ct. 1189 (1994).

172. *Id.* at 141 (emphasis added).
Moreover, Saulpaugh emphasized that Hicks will not cause panic because it does "no more than reiterat[e] the longstanding rule that despite shifting burdens of production, a plaintiff always shoulders the ultimate burden of proof." A possible corollary to this decision could be that the employer is now required to include amongst the possible legitimate nondiscriminatory reasons any genuine reasons, regardless of whether they are "unseemly or arbitrary . . . that [have] no relation to any legitimate business objective." Not only will this help clarify the record, but it will also encourage employers to proffer such a motive if in fact it is the truth. If courts are to prevent the McDonnell Douglas format from "be[ing] rendered meaningless," as understood by the dissent, the reason of personal animosity should be mandated among the realm of "legitimate nondiscriminatory" reasons. This reason, which the employer must adduce as a rebuttal to plaintiff's prima facie case, or be barred from raising it, would in turn entitle the employer to a judgment if the plaintiff is unable to show this reason (personal animosity) is unworthy of credence. On the other hand, if the employee is able to show that personal animosity is a pretext, then a factfinder may infer discriminatory intent.

This reading would, in effect, appease both the majority and the dissent. The majority would be content since pretext still would, as they held, not suffice in itself to render a judgment in plaintiff's favor. The dissent would approve of this reading because the employer would be forced to raise "personal animosity" as a "legitimate nondiscriminatory" reason or else forfeit such a defense. This would perpetuate what the dissent sees as the central purpose of McDonnell Douglas, i.e., the narrowing and focusing of issues necessary for plaintiffs to prove a Title VII case of discrimination. This would "frame the factual issue with sufficient clarity so that the plaintiff [would] have a full and fair opportunity to demonstrate pre-

173. Id.
174. Id. at 142.
176. Hicks, 113 S. Ct. at 2763 (Souter, J., dissenting).
177. Id. at 2758 (Souter, J., dissenting) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981)).
178. See Hicks, 113 S. Ct. at 2758-59 (Souter, J., dissenting).
179. Id. at 2761 (Souter, J., dissenting).
text[.]

because employers would be forced to put their reasons in the record, while at the same time freeing employees from the tremendous burden of discrediting every conceivable reason vaguely inferred by the record. Plaintiffs would still have to prove intentional discrimination to win a judgment.

It seems that showing "pretext" was never intended to mean that a judgment is warranted per se. A more likely interpretation is that showing pretext was simply a means to avoid a defendant's motion for summary judgment, pursuant to Rule 56,

because "pretext" in Burdine was in the context of summary judgment avoidance by a plaintiff. As Burdine stated, although the employer's reasons need not be proved by a preponderance of evidence at the second stage, they must be legally sufficient to justify a judgment for the defen-

180. Burdine, 450 U.S. at 255-56.

181. Rule 56 reads (in pertinent part):

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

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

182. Robert J. Gregory, There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After Hazen Paper Co. v. Biggins, 11 HOFSTRA LAB. L.J. 391, 426 n.185 (1994) (arguing that "a question of fact as to pretext should be sufficient, under Hicks, to bar summary judgment"); McGinley, supra note 170, at 256 (arguing that when a defendant moves for summary judgment, "the quantum and quality of the defendant's proof should determine the proof the plaintiff needs to present in order to raise a genuine issue of material fact. When a plaintiff raises a genuine issue of material fact as to whether a defendant's articulated reason is pretextual, the court should deny the defendant's motion"). See, e.g., Hairston v. Gainesville Sun Publ. Co., 9 F.3d 913 (11th Cir. 1993); Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991) (stating that "[t]he existence [of pretext] will ordinarily preclude the granting of summary judgment"); Chauhan v. M. Alfieri Co., 897 F.2d 123, 124 (3d Cir. 1990) (noting "[t]his case is close, but we find that the inconsistencies and implausibilities contained within [defendant's] explanation for its conduct are of sufficient magnitude to constitute enough evidence of pretext for the plaintiff to survive summary judgment"); Cotton v. City of Alameda, 812 F.2d 1245, 1248 (9th Cir. 1987) (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983)) (finding, in order to avoid summary judgment, plaintiff must "tender a genuine issue of material fact as to pretext"); Reiff v. Philadelphia County Court C.P., 827 F. Supp. 319, 324-25 (E.D. Pa. 1993) (stating that a plaintiff who offers reasonable sufficient evidence of pretext along with the elements of a prima facie case will survive a summary judgment motion); Lasher v. Metropolitan Structures, 753 F. Supp. 1450 (N.D. Ill. 1991) (denying summary judgment for defendant where there was conflicting evidence whether its asserted reason for termination — lack of work — was true). See also Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994); Washington v. Garrett, 10 F.3d 1421 (9th Cir.), reh’g denied, No. 92-55124, 1993 U.S. App. LEXIS 35602 (Nov. 5, 1993); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.) (en banc), cert. dismissed, 483 U.S. 1052 (1987); Nahrebeski v. Cincinnati Milacron Mktg. Co., 835 F. Supp. 1130 (W.D. Mo. 1993). But see Bodenheimer v. PPG Indus., 5 F.3d 555 (5th Cir. 1993); Waldron v. SL Indus., Inc., 849 F. Supp. 996 (D.N.J. 1994).
The majority accurately observes that showing pretext is far less than showing the requisite discriminatory intent needed to prevail. Therefore, it seems reasonable to infer that showing pretext was designed to thrust the case into a full blown trial, but not to force a judgment.

The Court in *Burdine* stated that "there may be some cases where the plaintiff’s initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant’s explanation." This supports the tenet that a plaintiff who has shown pretexts will get to a trial, at which time effective cross may disclose unlawful intent to discriminate. The above interpretation may be harmonized with *Hicks* because the “suspicion of mendacity” element noted by the *Hicks* court may be fulfilled by the effective cross-examination referred to in *Burdine*.

Pretext shows a triable issue of credibility warranting a trial and, thus, the plaintiff will survive a summary judgment motion. If the plaintiff’s cross-examination is effective and/or the defendant’s credibility is damaged or the plaintiff’s bolstered by other testimony, the factfinder can infer intentional discrimination and plaintiff may win a judgment. Plaintiffs who lack the proverbial “smoking gun” may win a judgment based on circumstantial evidence, but pretext alone is insufficient to compel such judgment.

*Glenn H. Egor*

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184. *Hicks*, 113 S. Ct. at 2751. See also *Burdine*, 450 U.S. at 253 (finding that establishing a prima facie case “is not onerous”); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d Cir.) (stating that a “prima facie case is easily made out”), cert. denied, 114 S. Ct. 88 (1993); West v. Swift, Hunt & Wesson, 847 F.2d 490, 491 (8th Cir. 1988) (stating that the burden of establishing a prima facie case of discrimination is “relatively light”).
185. See supra text accompanying note 181.
186. *Burdine*, 450 U.S. at 255 n.10.
187. The Court stated that a prima facie case together with a suspicion of mendacity may suffice for a judgment. *Hicks*, 113 S. Ct. at 2749.
188. See Saulpauh v. Monroe Community Hosp., 4 F.3d 134, 141 (2d Cir. 1993), cert. denied, 114 S. Ct. 1189 (1994); see also Warren v. Halstead Indus., 802 F.2d 746, 753 (4th Cir. 1986) (stating that “[p]laintiff’s initial evidence should be combined with the evidence arising from cross-examination in order to determine whether the defendant’s reasons are legally sufficient or whether they should be discredited” at trial), reh’g granted, 814 F.2d 962 (1987), on reh’g, 835 F.2d 535, and cert. denied, 487 U.S. 1218 (1988).