Summary Judgment and Title VII After *Hicks*: How Much Evidence Does it Take to Make an Inference?

INTRODUCTION

Thirty years ago, federal legislation outlawed employment discrimination on the basis of race, color, religion, sex, or national origin.[1] Federal courts of appeal, however, continue to disagree about which facts are essential to an employee's "disparate treatment" claim.[2] This issue often arises when an employer moves for summary judgment.[3] Summary judgment tests whether the employee has produced sufficient evidence to create a triable issue on each factual element of her claim.[4] Some appellate courts require very little evidence of actual discrimination to deny an employer's summary judgment motion.[5] In these jurisdictions, a nondiscriminating employer may have to defend, at great expense, a meritless claim at trial.[6]

Consider Dan Dixon's engineering firm.[7] Dixon has been in business for five years and has twenty employees.[8] Recently, Dixon borrowed $25,000 from a bank to expand his office.

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[1] Civil Rights Act of 1964, Pub. L. No. 88-352; *see* 42 U.S.C. § 2000e-2(a)(1) (1988) (enumerating specific unlawful grounds for employment discrimination).

[2] *See infra* notes 114-60 and accompanying text (discussing split of authority in federal circuit courts of appeal). *See also infra* note 39 and accompanying text (defining "disparate treatment" form of employment discrimination).

[3] *See infra* notes 114-60 and accompanying text (discussing cases appealing summary judgment rulings).

[4] *See infra* notes 106-13 and accompanying text (discussing summary judgment).

[5] *See infra* notes 120-140 and accompanying text (discussing the "false is sufficient" view).

[6] *See infra* notes 161-86 and accompanying text (discussing problems that nondiscriminating employers confront).

[7] This is a hypothetical fact situation.

[8] Title VII of the Civil Rights Act of 1964 covers private employers with 15 or more employees. 42 U.S.C. § 2000e (1988).

When business faltered, the bank threatened to call Dixon's loan if he did not cut costs. In response, Dixon reduced salaries and discharged an employee, Leslie Perkins. Although Perkins generally had performed her job adequately, she failed to master new computer drafting technology. Dixon told Perkins that he discharged her because of the firm's reduced workload.

After following the appropriate procedures,[9] Perkins filed suit in federal district court, alleging that Dixon unlawfully discharged her because she is a woman. Perkins asserted the prima facie elements of a Title VII disparate treatment claim,[10] alleging that she is a woman who fulfilled her job's responsibilities and was the only employee whom Dixon discharged.[11] Perkins also asserted that Dixon did not discharge any of his fifteen male employees.[12]

After Perkins completes discovery, Dixon moves for summary judgment.[13] Dixon's motion does not contain evidence of his need to cut costs because such publicity may harm his firm's ability to attract new clients.[14] Instead, Dixon bases his motion

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[9] Before suing under Title VII, a discharged employee must file a claim for sex discrimination with the Equal Employment Opportunity Commission (EEOC), and wait for the EEOC to issue a right-to-sue letter. *See* 42 U.S.C. § 2000e-5(f)(1) (describing procedures plaintiff must follow after filing claim with EEOC); *see also infra* notes 37-39 and accompanying text (describing scope of and procedure under Title VII).

[10] *See* 42 U.S.C. § 2000e-2(a)(1) (enumerating Title VII's prohibitions against discrimination due to race, color, religion, sex, or national origin); *see also infra* notes 37-39 and accompanying text (summarizing grounds for Title VII cause of action, including sex discrimination).

[11] *See infra* notes 40-47 and accompanying text (describing requirements for prima facie case of disparate treatment under Title VII).

[12] *See infra* notes 46-47 and accompanying text (discussing prima facie element of circumstances suggesting discrimination).

[13] *See infra* notes 106-13 and accompanying text (summarizing summary judgment law and policy).

[14] In addition to the bank's threat in the hypothetical of calling the loan, a public statement of the firm's weak financial condition will jeopardize Dixon's ability to get a new state-funded project. *See* Calvin Sims, *Giving Denny's a Menu for Change*, N.Y. TIMES, Jan. 1, 1994, § 1, at 43 (noting 37.5% decline in Denny's restaurants' operating income due in part to publicity from dozens of recent discrimination lawsuits and concluding many people stopped coming to Denny's because of these lawsuits). Furthermore, Dixon cannot publicize the fact that several clients are not paying him because such a disclosure would jeopardize his ability to use those clients as references. *See* Philip Shenon, *F.B.I. Settles Suits by Black Workers on Discrimination*, N.Y. TIMES, Jan. 12, 1990, at A1 (suggesting that F.B.I. settled several cases out of court to avoid embarrassing disclosures that would harm agency's morale and reputation). Thus, Dixon can ill-afford either a trial on the merits or a costly

on evidence that he discharged Perkins because she failed to master new computer drafting technology.[15] Dixon also asserts that Perkins has no evidence that gender discrimination motivated his decision to discharge her.[16]

Perkins opposes Dixon's summary judgment motion with evidence that Dixon gave her favorable performance reviews that noted her progress learning the computer.[17] Perkins, however, submits no further evidence that gender discrimination motivated Dixon's decision to discharge her.[18] The district court hearing Dixon's motion must now decide whether the submitted evidence creates a triable issue of discrimination that the court should resolve at trial.[19]

Generally, when a plaintiff like Perkins asserts the prima facie elements of a disparate treatment claim, an employer may defend itself by articulating a legitimate, nondiscriminatory reason for discharging the plaintiff.[20] If the employer does so, the plaintiff can prevail only by proving that the employer's allegedly legitimate reason is a "pretext for discrimination."[21] Recently, in *St. Mary's Honor Center v. Hicks*, the United States Supreme Court attempted to define pretext for discrimination.[22]

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settlement. *See* E.R. Shipp, *The Litigious Groves of Academe*, N.Y. TIMES, Nov. 8, 1987, §12, at 62 (noting that faculty discrimination cases cost plaintiffs at least $52,000 in legal fees and university defendants substantially more); *see also* Sims, *supra*, at 43 (noting that Denny's has spent several million dollars on legal fees defending discrimination suits and $6,000,000 on advertising to mitigate bad publicity).

[15] *See infra* notes 53-68 and accompanying text (explaining that employer has burden of producing evidence of legitimate, nondiscriminatory reason for adverse employment act).

[16] *See infra* notes 130-57 and accompanying text (discussing why summary judgment granted where plaintiff fails to show more than falsity of employer's reason for employment decision).

[17] *See infra* notes 69-74 and accompanying text (explaining that discrimination plaintiff may show that employer's stated reason is false).

[18] *See infra* notes 120-37 and accompanying text (summarizing plaintiff's theory for establishing triable issue with evidence that employer's reason for discharge is false).

[19] *See infra* notes 106-13 and accompanying text (describing general standard for evaluating summary judgment motion).

[20] *See infra* notes 53-57 and accompanying text (summarizing employer's response to prima facie allegations in employment discrimination case).

[21] *See infra* notes 70-72 and accompanying text (discussing plaintiff's ultimate burden of persuasion in summary judgment proceeding).

[22] Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993) (defining pretext for discrimination as requiring plaintiff to prove employer's reason false and intentional discrimination to be real reason for the discharge). *But see id.* at 2260-66 (Souter, J., dissent-

Federal circuit courts have cited *Hicks* as authority for opposing standards for granting summary judgment in Title VII disparate treatment cases.[23] Some circuits have held that a factfinder may infer intentional discrimination if the factfinder believes the plaintiff's prima facie evidence and disbelieves the employer's allegedly legitimate reason.[24] Other circuits have applied a stricter standard, requiring the plaintiff to prove the prima facie elements, that the employer's reason is false, *and* that discrimination was the real reason for the employer's action.[25] Thus, the circuits disagree on whether a Title VII plaintiff can survive an employer's summary judgment motion merely by producing evidence of the prima facie elements and evidence that the employer's stated reason is false.[26]

This Comment examines the proper standard for granting summary judgment to employers in Title VII disparate treatment cases. Part I reviews Title VII and the disparate treatment claim generally.[27] Part II identifies the current split in authority re-

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ing) (arguing that factfinder's mere disbelief of employer's reason for adverse action may constitute proof that reason was pretext for discrimination); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 112-14 (1991) (arguing that court should direct verdict for plaintiff if factfinder disbelieves employer's reason for adverse action).

[23] *See infra* note 26 (noting that two circuit courts have cited *Hicks* for opposing views on proper summary judgment standard for employment discrimination cases); *see also infra* notes 102-05 and accompanying text (explaining that *Hicks* is ambiguous on question of what evidence plaintiff must produce to prove employer's reason is pretext for discrimination). *Compare Hicks*, 113 S. Ct. at 2749 (permitting trier of fact to infer discrimination from fact that employer's stated reason is false) *with id.* at 2752 (requiring plaintiff to prove both falsity of employer's reason and that real reason was discrimination). *See also infra* notes 124-28 and accompanying text (outlining opposing propositions).

[24] *See, e.g.*, Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994) (agreeing that evidence of prima facie elements and falsity of employer's reason permits inference of discrimination).

[25] *See, e.g.*, Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (adopting view that plaintiff in summary judgment proceeding must submit additional evidence of discrimination).

[26] *Compare Anderson*, 13 F.3d at 1123 (stating that *Hicks* may have adopted Seventh Circuit's rule that falsity of defendant's reason permits inference of discrimination) *with Bodenheimer*, 5 F.3d at 957 (holding that falsity of employer's reason is not sufficient to create triable issue of discrimination). *See also Bodenheimer*, 5 F.3d at 957 (noting confusion on question of what evidence plaintiff must produce in order to prove employer discriminated).

[27] *See infra* notes 31-105 and accompanying text (discussing basic components of Title VII disparate treatment claim).

garding the proper standard for granting employers' summary judgment motions.[28] Part III proposes that courts grant summary judgment against a disparate treatment plaintiff who only produces evidence of the prima facie elements and evidence that her employer's explanation for the discharge may be false.[29] This proposal reflects the proper application of Title VII and summary judgment law and will help prevent meritless claims from going to trial.[30]

I. BACKGROUND: TITLE VII AND DISPARATE TREATMENT

The federal Civil Rights Act of 1964 was a milestone of social change.[31] Congress passed the Act in response to the civil rights movement.[32] The Act set federal standards of equality when the nation was deeply divided by race and resistant to federal control.[33] Title VII of the Act provides victims of employment discrimination a private right of action against their employers.[34] The Act, however, fails to specify exactly what a Title VII plaintiff must prove to prevail at trial.[35]

Congress enacted Title VII to eliminate discrimination in the workplace.[36] Title VII prohibits discrimination on the basis of

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[28] *See infra* notes 106-86 and accompanying text (discussing current split in authority regarding proper standard for granting summary judgment in employment discrimination cases).

[29] *See infra* notes 187-245 and accompanying text (proposing that courts grant summary judgment against plaintiffs who only produce evidence of prima facie elements and evidence that employer's stated reason is false).

[30] *Id.*

[31] *See* William R. Doerner, *We Still Have a Dream*, TIME, Sept. 5, 1983, at 8 (reviewing social climate during 1963 March on Washington and noting legislation Congress passed in response, including Civil Rights Act of 1964).

[32] *Id.*

[33] *Id.*

[34] *See* 42 U.S.C. § 2000e-2(a)(1) (1988) (stating cause of action for employment discrimination).

[35] *See id.* (revealing absence of specific elements of proof necessary to withstand employer's summary judgment motion); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (noting lack of harmony in lower courts regarding elements of Title VII disparate treatment and on burdens of proof and production).

[36] *See McDonnell Douglas*, 411 U.S. at 801 (stating that language of Title VII plainly expressed purpose of Congress to assure equality of employment opportunities and to eliminate discriminatory practices and devices that fostered racially stratified job environments to disadvantage of minority citizens); *see also, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971) (stating objective of Congress to remove racial barriers in workplace);

race, color, religion, sex, or national origin.[37] It prohibits several types of discrimination, including "disparate treatment."[38] Disparate treatment occurs when an employer intentionally discriminates against an employee.[39]

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (asserting that "efficient and trustworthy workmanship" assured through fair employment practices is overriding interest shared by employer, employee, and consumer (citing *McDonnell Douglas*, 411 U.S. at 801)).

[37] 42 U.S.C. § 2000e-2(a)(1). Title VII declares unlawful an employer's failure or refusal to hire, to discharge, or to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin. *Id.* Title VII applies to all employers with 15 or more employees. *See* 42 U.S.C. § 2000e(b) (defining "employer" as person engaged in industry affecting commerce with fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year); *see also* EEOC v. Rinella & Rinella, 401 F. Supp. 175, 179-80 (E.D. Ill. 1975) (discussing distinction, for Title VII coverage purposes, between independent contractors and employees). Title VII also created the Equal Employment Opportunity Commission (EEOC) to enforce the law. 42 U.S.C. § 2000e-4. An aggrieved employee may file a claim with the EEOC against an employer. *Id.* § 2000e-5(b). The EEOC then investigates the charge. *Id.* The EEOC must notify the aggrieved party if it dismisses the charge or if within 180 days after the aggrieved party filed the charge, the EEOC has not filed a civil action or entered into a conciliation agreement with the respondent and aggrieved party. *Id.* After receipt of notice, the aggrieved party has 90 days to commence a private civil action. *Id.* § 2000e-5(f)(1). In 1972, Congress extended Title VII coverage to federal, state, and municipal employees. *Id.* §§ 2000e(f), 2000e-16. The Civil Rights Act of 1991 gives either party the right to a jury trial. 42 U.S.C. § 1981a(c) (Supp. IV 1992). The 1991 Act also provides that the plaintiff can recover compensatory and punitive damages. 42 U.S.C. § 1981a(1) (Supp. IV 1992). The original legislation provided that plaintiffs could recover back pay and injunctive relief. 42 U.S.C.A. § 2000e-5(g)(1) (West Supp. 1994).

[38] *See* 42 U.S.C. § 2000e-2 (1988) (listing forms of discrimination Title VII prohibits). The legislation also prohibits two other types of discrimination. *Id.* First, Title VII prohibits unintentional "disparate impact" discrimination where an apparently neutral policy causes disproportionate harm to one group. 42 U.S.C. § 2000e-2(k) (Supp. IV 1992). A disparate impact violation occurs where an employer's facially neutral policy is not job-related or required by business necessity, and results in discrimination. *Id.*; *see also, e.g.*, *Griggs*, 401 U.S. at 431 (finding disparate impact violation where employer's hiring criteria required either high school education or passing standardized test that was not job related, and where criteria disqualified African-Americans at greater rate than Caucasians). Second, Title VII prohibits intentional "pattern or practice" discrimination where a plaintiff shows one group's statistical underrepresentation to be caused by an employer's longstanding discriminatory policies. 42 U.S.C. § 2000e-2(a)(2) (1988). A pattern or practice violation occurs where the employer's policies result in a gross statistical disparity in the success rate of one group as compared to others. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (stating that proper comparison was between racial composition of defendant's teaching staff and that of qualified public school teacher population in relevant labor market); Castaneda v. Partida, 430 U.S. 482, 497 n.17 (1977) (stating that standard deviation greater than "two or three" would be suspect).

[39] 42 U.S.C. § 2000e-2(a)(1); *see also, e.g.*, *McDonnell Douglas*, 411 U.S. at 802-04 (setting

In a disparate treatment case, each party carries distinct evidentiary burdens.[40] First, the plaintiff must allege the prima facie elements of disparate treatment.[41] The burden then shifts to the employer to produce admissible evidence of a legitimate, nondiscriminatory reason for discharging the plaintiff.[42] Finally, assuming both parties meet their initial burdens, the plaintiff retains the ultimate burden of persuading the court that the employer intentionally discriminated against her.[43]

A. Plaintiff's Burden of Persuasion on the Prima Facie Elements

To state a valid disparate treatment claim under Title VII, a plaintiff must allege the following prima facie elements:[44] (1) that she is a member of a protected class; (2) that she performed her job adequately; (3) that the defendant employer discharged her; and (4) that the circumstances, if unexplained, suggest discrimination.[45] In the opening hypothetical, for example, Perkins' discharge suggests discrimination because Perkins was female, she performed her job adequately, and because Dixon did not discharge any of his fifteen male employees.[46] The prima facie elements create a rebuttable

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forth basic analytical structure of plaintiff's prima facie case, defendant's rebuttal, and plaintiff's opportunity to prove pretext); *Burdine*, 450 U.S. at 252-54 (defining defendant's burden as one of production of evidence to rebut presumption of discrimination); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) (stating that plaintiff does not have to produce direct evidence of defendant's intent to discriminate); Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2745 (1993) (holding that court may not grant plaintiff judgment as matter of law upon proof that defendant's allegedly legitimate reasons are false); *see also infra* notes 40-55 and accompanying text (discussing burdens of proof for disparate treatment claim).

[40] *See Burdine*, 450 U.S. at 252-53 (summarizing tripartite burden-shifting structure of Title VII disparate treatment claim in which burden of producing evidence shifts to employer but burden of persuasion remains with plaintiff).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] The prima facie elements of a Title VII claim vary according to whether an employer has refused to hire or has discharged a plaintiff. *See id.* at 253 n.6 (stating prima facie elements and noting that standard is flexible because Title VII facts will necessarily vary (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973))).

[45] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (referring to last prima facie element as circumstances that give rise to inference of unlawful discrimination).

[46] *See supra* notes 7-8 and accompanying text (describing circumstances surrounding

presumption that the defendant employer discriminated against the plaintiff employee.[47]

The importance of the prima facie elements lies not in their probative value but in their procedural significance.[48] The prima facie elements eliminate the most common nondiscriminatory reason for an adverse employment action: inadequate qualifications.[49] They also allow the plaintiff to proceed with discovery to uncover more substantial evidence of intentional discrimination.[50] Finally, the prima facie elements impose a burden of production on the employer that, if unmet, results in a judgment for the plaintiff.[51] The presumption compels this judgment upon an employer who has no evidence of a legitimate reason for discharging the plaintiff.[52]

B. Defendant's Burden of Producing Evidence of a Legitimate, Nondiscriminatory Reason for the Discharge

Once the plaintiff meets her initial burden, the employer may produce evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge.[53] Such evidence rebuts the

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Perkins' discharge).

[47] *See Burdine*, 450 U.S. at 253-54 (stating that prima facie case creates presumption because such acts, if unexplained, are probably based on discrimination).

[48] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2755 (1993) (asserting that *McDonnell Douglas* presumption is procedural device, designed only to establish order of proof and production); *see also* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989) (stating that prima facie discrimination case is not real prima facie case, but rather device to make defendant speak). *But see* Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981) (arguing that allocation of burdens of proof has substantive implications).

[49] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (explaining purpose of prima facie case in employment discrimination cases).

[50] *Id.*

[51] *See Burdine*, 450 U.S. at 254-55 (stating that court must enter judgment for plaintiff if trier of fact believes plaintiff's prima facie evidence and if employer does not meet burden of production); *see also infra* notes 47-52 (discussing presumption against employer).

[52] *See Hicks*, 113 S. Ct. at 2747 (affirming that court must find discrimination if employer fails to rebut plaintiff's prima facie case); *see also id.* at 2752 (reasoning that intentional discrimination finding is more likely when plaintiff proves employer's allegedly legitimate reason false); *Burdine*, 450 U.S. at 254 (stating that if employer is silent in face of presumption, then court must enter judgment for plaintiff because no issue of fact remains).

[53] *See Burdine*, 450 U.S. at 254-55 (explaining that employer can rebut presumption with admissible evidence of legitimate reason for plaintiff's discharge). The *Burdine* Court also stated that the defendant's explanation of its legitimate reasons must be clear and

presumption in favor of the plaintiff.[54] The employer's burden is one of production only, not of persuasion.[55] Thus, the employer must produce evidence of a legitimate reason, but need not convince the trier of fact that the reason is true.[56] If, however, the employer does not respond with evidence of a legitimate reason, and if any rational person would find the prima facie elements to be true, then a court must enter a directed verdict for the plaintiff.[57]

When the employer meets its burden of production, the prima facie case has served its procedural purpose and the presumption against the employer no longer exists.[58] Thus, the prima facie elements have little inferential value to lend the plaintiff's case.[59] As the Seventh Circuit Court of Appeals

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reasonably specific. *Id.* at 258.

[54] *See id.* at 255 n.10 (explaining that employer's stated reason destroys legally mandatory inference of discrimination arising from plaintiff's prima facie evidence); *see also* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (explaining that once employer meets burden of production, presumption is no longer relevant).

[55] *See Burdine*, 450 U.S. at 254 (explaining that employer need not persuade court proffered legitimate reasons actually motivated adverse employment action).

[56] *Id.*

[57] *See Hicks*, 113 S. Ct. at 2748 (explaining that if employer fails to meet burden of production then court must award plaintiff directed verdict if any rational person would believe evidence of prima facie elements (citing FED. R. CIV. P. 50(a)(1))). The Court also explains that if the employer fails to articulate a legitimate reason, but reasonable minds could differ on the truth of the prima facie elements, then there must be a trial. *Id.*

[58] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993) (explaining that once employer meets burden of production, presumption drops from case (citing *Burdine*, 450 U.S. at 255)). *But see Burdine*, 450 U.S. at 255 n.10 (noting that trier of fact may still consider prima facie evidence and inferences properly drawn from that evidence). *See also* Lanctot, *supra* note 22, at 112-14 (arguing that evidence of prima case retains probative value even after defendant's rebuttal). To some degree this argument depends on the strength of the evidence. *See* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572-73 (7th Cir. 1989) (stating that court ruling on employer's summary judgment must look at totality of evidence at time of motion). This Comment, however, addresses only the minimal required prima facie elements which, in the unique circumstances of a discrimination claim, merely eliminate a few of the common, legitimate reasons for rejecting someone; *see also supra* notes 10-18 and accompanying text (explaining that hypothetical facts state plaintiff only has evidence of essential prima facie elements and that employer's stated reason is false); *Burdine*, 450 U.S. at 254 (stating that employer rebuts presumption by meeting burden of production); *supra* notes 53-56 and accompanying text (explaining that presumption disappears after employer meets burden of production).

[59] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981) (explaining that Title VII prima facie elements only denote what law requires to create presumption and do not describe evidence sufficient to infer discrimination); *see also infra* notes 66-68 and accompanying text (explaining that prima facie evidence does not

explained in *Palucki v. Sears, Roebuck & Co.*,[60] the prima facie elements of employment discrimination do not function in the conventional manner in which such evidence creates, by definition, a triable issue.[61]

In *Palucki*, the plaintiff argued that evidence of the prima facie elements of discrimination and evidence contesting the employer's allegedly legitimate reason created, by definition, a triable issue of discrimination.[62] The court rejected this reasoning, stating that evidence of the prima facie elements alone does not entitle the plaintiff to a trial once the employer meets its burden of production.[63] That is, the prima facie elements do not define the plaintiff's burden of persuasion.[64] Thus, under *Palucki*, evidence supporting only the prima facie elements fails to create a triable issue of discrimination if the employer meets

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necessarily prevent granting summary judgment for employer); *infra* notes 216-26 and accompanying text (arguing that prima facie elements, once employer rebuts them, have almost no inferential value on question of discrimination).

[60] 879 F.2d 1568 (7th Cir. 1989). The Age Discrimination in Employment Act (ADEA) prohibits age discrimination. 29 U.S.C. §§ 621-634 (1985 & Supp. 1993). This Comment refers to age discrimination cases because courts also apply Title VII jurisprudence to age cases. *See infra* notes 126-28 and accompanying text (explaining applicability of ADEA cases to Title VII law).

[61] *See Palucki*, 879 F.2d at 1570 (explaining that discrimination prima facie case does not entitle plaintiff to trial as does conventional prima facie case); *see also Burdine*, 450 U.S. at 254 n.7 (explaining that in Title VII context "prima facie case" denotes only establishment of legally mandatory, rebuttable presumption and does not describe plaintiff's burden of producing evidence sufficient to infer discrimination).

[62] *Palucki*, 879 F.2d at 1570. Palucki alleged age discrimination and produced evidence of the prima facie elements. *Id.* Palucki submitted evidence that he was 41 and that his 20 years of work experience at Sears made him qualified for his position. *Id.* He also submitted evidence that Sears' executives discharged him on the basis of his age because Sears allegedly maintained a list of older employees, including Palucki, whom they wished to eliminate. *Id.* Sears asserted that it discharged Palucki for poor work performance and moved for summary judgment. *Id.* Sears submitted three written deficiency reports documenting Palucki's failure to maintain adequate security for jewelry items and other deficiencies. *Id.* at 1571. Palucki refuted Sears' legitimate, nondiscriminatory reason as a mere pretext for discrimination. *Id.* at 1570. Palucki submitted depositions from coworkers asserting that he performed adequately and asserting the existence of the older-employee list. *Id.* The district court granted Sears summary judgment and Palucki appealed. *Id.* at 1569. The Seventh Circuit affirmed summary judgment. *Id.* at 1573.

[63] *Id.*

[64] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981) (explaining that prima facie elements do not describe plaintiff's burden of producing enough evidence to permit factfinder to infer discrimination).

its burden of producing evidence of a legitimate reason for the discharge.[65]

Furthermore, the Seventh Circuit explained that when a plaintiff produces evidence contesting the employer's stated reason for the discharge, the plaintiff does not automatically defeat the employer's summary judgment motion.[66] Rather, the district court must determine whether all the evidence could persuade a rational juror that the employer discriminated against the plaintiff.[67] In *Palucki*, the court affirmed summary judgment because the plaintiff's evidence was insufficient to create a triable issue of discrimination.[68]

C. Plaintiff's Burden of Persuasion on Intentional Discrimination

Assuming the plaintiff presents evidence of the prima facie elements of disparate treatment and the employer produces evidence of a legitimate, nondiscriminatory reason for the discharge, the plaintiff retains the ultimate burden of persuading the court that the employer intentionally discriminated against her.[69] To meet this burden, the plaintiff must prove that the employer's alleged reason for the discharge was a pretext for discrimination.[70] Some courts have held that a plaintiff meets this burden merely by proving that the prima facie elements are true and that the employer's stated reason is false.[71] Other courts have held that a plaintiff must also prove that discrimination was the real reason for the employer's action.[72]

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[65] *See id.* (explaining that prima facie elements of discrimination only create presumption and do not define evidence that allows factfinder to infer discrimination).

[66] Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989).

[67] *Id.* At summary judgment, a court must review the evidence in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

[68] *Palucki*, 879 F.2d at 1570-72.

[69] *Burdine*, 450 U.S. at 253; *see also Hicks*, 113 S. Ct. at 2749 (explaining that after employer meets its burden of production, factfinder proceeds to decide if plaintiff has met her ultimate burden of proving employer intentionally discriminated against her).

[70] *See Burdine*, 450 U.S. at 253 (explaining plaintiff's opportunity to refute employer's stated reason in discrimination case (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973))).

[71] *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122-23 (7th Cir. 1994) (summarizing different approaches courts take regarding evidence necessary to prove pretext for discrimination); *see also infra* notes 129-49 and accompanying text (discussing "false is sufficient" view of pretext for discrimination).

[72] *See infra* notes 141-57 and accompanying text (discussing "false-plus" view of proper

Courts have struggled with this final stage in Title VII disparate treatment analysis in other procedural settings.[73] One question courts have confronted is whether to direct a verdict for the plaintiff if the plaintiff proves the prima facie elements of discrimination and that the employer's reason for the discharge is false.[74] Recently, the Supreme Court addressed this issue in *St. Mary's Honor Center v. Hicks.*[75]

Melvin Hicks was an African-American correctional officer who sued his employer, St. Mary's Honor Center (a state-run halfway house).[76] After disciplinary actions and demotions, St. Mary's discharged Hicks.[77] Hicks claimed that St. Mary's discharged him because of his race, in violation of Title VII.[78] Hicks alleged the following prima facie elements: (1) that he was a member of a protected class; (2) that he performed his job adequately; (3) that St. Mary's discharged him; and (4) that St. Mary's hired a white man to fill his position.[79] St. Mary's

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standard for summary judgment proceedings).

[73] *See, e.g.*, Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (holding that where trier of fact finds employer's reason false, court may not direct verdict for plaintiff); *Anderson*, 13 F.3d at 1122-23 (summarizing three different rules courts have developed on issue of pretext for discrimination in employment discrimination lawsuits).

[74] *See Hicks*, 113 S. Ct. at 2746 (stating issue as whether factfinder's rejection of employer's asserted reason mandates finding for plaintiff where factfinder also believes plaintiff's evidence of prima facie discrimination).

[75] *Id.*; *see also id.* at 2757 (Souter, J., dissenting) (disagreeing with majority's conclusion that finding employer's reason false is insufficient to support directed verdict for plaintiff).

[76] *Id.* at 2746.

[77] Hicks v. Saint Mary's Honor Ctr., 756 F. Supp. 1244, 1246 (E.D. Mo. 1991). Hicks began work at Saint Mary's in 1978 as a correctional officer. *Id.* Saint Mary's promoted him to shift commander in 1980. *Id.* In 1984, a new superintendent took over. *Id.* Prior to that time, Hicks had a satisfactory employment record. *Id.* Shortly thereafter, a disciplinary review board suspended Hicks for five days after finding he was not present at his assigned post. *Id.* at 1247. Two weeks later, Hicks violated workplace policy by failing to enter the use of one of Saint Mary's cars in a log. *Id.* The review board demoted Hicks from shift commander to correctional officer. *Id.* A few days later, Saint Mary's issued a letter of reprimand to Hicks for failure to properly investigate a fight among the inmates. *Id.* Less than one month later, when Saint Mary's notified Hicks of his demotion, the chief of custody ordered Hicks to open his locker and retrieve a manual. *Id.* Hicks refused and expressed a desire to "step outside" with the chief of custody. *Id.* The director of the Missouri Department of Corrections and Human Resources then terminated Hicks. *Id.* at 1247-48.

[78] Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 (1993).

[79] *Id.* at 2747. Saint Mary's did not challenge the district court's conclusion that Hicks established a prima facie case. *Id.* (citing *Hicks*, 756 F. Supp. at 1249-50). The district court also found that Hicks was the only supervisor disciplined for violations that subordinates committed, that Saint Mary's disregarded coworkers' more serious violations, and that

responded that it discharged Hicks because of the severity and number of his rules violations.[80]

Hicks, therefore, met his initial burden of establishing the prima facie elements of a disparate treatment claim.[81] St. Mary's also met its burden of producing evidence that it had discharged Hicks for a legitimate, nondiscriminatory reason.[82] Sitting as a trier of fact, the district court found that St. Mary's allegedly legitimate reason was false.[83] The court, however, also found that Hicks failed to prove that St. Mary's stated reason was a pretext for discrimination.[84] Thus, the district court rendered a verdict in favor of St. Mary's on the ground that Hicks failed to prove that the discharge was racially, rather than personally, motivated.[85] In other words, the district court concluded that Hicks did not meet his burden of proving intentional discrimination.[86]

The Eighth Circuit Court of Appeals reversed, holding that because the trial court found the prima facie elements to be true and St. Mary's stated reason false, it should have directed a verdict for Hicks.[87] The Eighth Circuit reasoned that because the district court found St. Mary's stated reason false, St. Mary's should be in no better position than if it had not met its

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Hicks' supervisor provoked the final confrontation that caused Hicks to threaten to fight the supervisor. *Id.* at 2748 (citing *Hicks*, 756 F. Supp. at 1250-51).

[80] *Id.* at 2747.

[81] *Id.* (citing *Hicks*, 756 F. Supp. at 1249-50).

[82] *Id.* at 2747.

[83] *Id.* at 2748 (citing Hicks v. Saint Mary's Honor Ctr., 756 F. Supp. 1244, 1250-51 (E.D. Mo. 1991)).

[84] *Id.* (citing *Hicks*, 756 F. Supp. at 1252).

[85] *Id.* at 2748 (citing *Hicks*, 756 F. Supp. at 1252); *see also id.* at n.2 (explaining that plaintiff failed to persuade trial court that racial discrimination motivated employer). The trial court did not believe race motivated Saint Mary's because, among other reasons, two blacks sat on the disciplinary review board, Saint Mary's did not discipline black employees who actually committed violations, and the total number of black employees at Saint Mary's had not changed. *Id.*

[86] *See Hicks*, 113 S. Ct. at 2748 (explaining that although Hicks did show that Saint Mary's stated reason was false, he did not show false reason was pretext for discriminatory motive (citing *Hicks*, 756 F. Supp. at 1252)).

[87] Hicks v. Saint Mary's Honor Ctr., 970 F.2d 487, 493 (8th Cir. 1992). The Supreme Court granted certiorari to resolve whether the district court's rejection of the employer's asserted reason for discharge, together with proven prima facie facts, mandated a verdict for the plaintiff. Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 (1993).

burden of production.[88] Thus, the Eighth Circuit effectively reinstated the presumption against St. Mary's and directed a verdict in Hicks' favor.[89]

The Supreme Court granted certiorari and reversed.[90] The Court held that even when a disparate treatment plaintiff persuades the factfinder that the prima facie elements are true and that the employer's alleged reason for the discharge is false, a court may not direct a verdict for the plaintiff.[91] The Court remanded the case for further proceedings.[92]

The Supreme Court held that once the employer rebuts the prima facie elements, these elements alone are not sufficient to mandate a verdict for the plaintiff.[93] The Court stated that a trier of fact cannot impose liability on an employer who rebuts the prima facie evidence unless the trier of fact also finds that the employer discriminated against the plaintiff.[94] The Court reasoned that to direct a verdict for the plaintiff simply because the factfinder disbelieves the employer's reason would violate established evidence law governing presumptions.[95]

An employer who produces evidence of a legitimate reason for discharging an employee does not bear the risk of nonpersuasion.[96] Rather, once the employer meets its burden of production, the presumption in favor of the plaintiff

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[88] *Hicks*, 970 F.2d at 492.

[89] *See id.* (reasoning that Saint Mary's was in no better position than if they had remained silent and had not stated legitimate reason).

[90] *Hicks*, 113 S. Ct. at 2742.

[91] *Hicks*, 113 S. Ct. at 2756 (stating that even if trier of fact finds employer's reason false, court may not award judgment as matter of law without finding of discrimination).

[92] *Id.*

[93] *See Hicks*, 113 S. Ct. at 2751 (calling "obvious" assertion that prima facie elements alone are insufficient to mandate verdict for plaintiff if rebutted by employer). The Court held that a rational factfinder can still find that Saint Mary's did not unlawfully discriminate against Hicks. *Id.*; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (holding that genuine dispute of material fact means reasonable jury could still return verdict for nonmoving party); *supra* notes 48-52 (discussing significance of discrimination prima facie case).

[94] *See Hicks*, 113 S. Ct. at 2749 n.4 (emphasizing that there must be finding of discrimination for trier of fact to impose liability).

[95] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (explaining that presumption does not shift burden of proof (citing FED. R. EVID. 301)).

[96] *Id.*; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (explaining that employer need not persuade trier of fact that stated legitimate reason actually motivated adverse employment act).

disappears.[97] Accordingly, a verdict for the plaintiff is only proper when the trier of fact finds that the employer unlawfully discriminated against the plaintiff.[98] In *Hicks*, the district court made no finding that St. Mary's discriminated against Hicks because of his race.[99] Thus, the Eighth Circuit's directed verdict was improper because it violated presumption law.[100] This was the only reasoning essential to the Supreme Court's holding because it was sufficient to reject Hicks' directed verdict.[101]

The Supreme Court's dicta, however, further confused the issue of what evidence is sufficient to prove that the employer's reason is a pretext for discrimination.[102] The Court failed to articulate what evidence permits the factfinder to infer that the employer intentionally discriminated.[103] As a result of the Court's inconsistent dicta, the circuit courts remain split on this question and cite *Hicks* for contradictory propositions.[104] In particular, the two interpretations of *Hicks* have confused courts' rulings on employers' summary judgment motions.[105]

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[97] *See Burdine*, 450 U.S. at 255 n.10 (explaining that employer's stated reason destroys mandatory inference of discrimination arising from plaintiff's prima facie evidence); *see also Hicks*, 113 S. Ct. at 2749 (explaining that once employer meets burden of production on evidence of legitimate, nondiscriminatory reason, presumption is no longer relevant).

[98] *See Hicks*, 113 S. Ct. at 2749 n.4 (stating that there must be finding of discrimination before court can hold employer liable).

[99] *See Hicks*, 113 S. Ct. at 2748 (holding that employer's reasons were false but that plaintiff failed to carry burden of proving race was real reason).

[100] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (explaining that Eighth Circuit's holding disregarded presumption law (citing FED. R. EVID. 301)); *see also Burdine*, 450 U.S. at 254 (explaining that employer does not have burden of persuasion on its allegedly legitimate reason).

[101] *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 n.3 (7th Cir. 1994) (characterizing as dicta additional language in *Hicks* that requires a disparate treatment plaintiff to prove discrimination was the real reason for her discharge).

[102] *Id.*

[103] *See id.* at 1122-23 (setting forth directed verdict for employer, trial, or directed verdict for plaintiff as three possible results of proceeding, and stating that *Hicks* only clearly ruled out directed verdict for plaintiff).

[104] *See infra* notes 114-60 and accompanying text (outlining split in authority among circuits regarding standards for summary judgment in employment discrimination cases).

[105] *See infra* notes 114-60 and accompanying text (pointing out split in authority on summary judgment standards).

II. STATE OF THE LAW: DISPARATE TREATMENT CLAIMS AT SUMMARY JUDGMENT

Summary judgment allows a court to grant judgment as a matter of law[106] to a party who establishes that the opposing party could not possibly prevail at trial.[107] When a party moves for summary judgment, it asserts the absence of any triable issue of material fact.[108] Summary judgment serves the goal of judicial economy, but risks unfairness to the opposing party who did not get her day in court.[109] The trial court, therefore, must in-

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[106] A court may grant judgment as a matter of law either before trial or during a trial. *See* FED. R. CIV. P. 50(a)(2) (authorizing court to grant judgment as matter of law anytime before submission of case to jury); *see also* FED. R. CIV. P. 56 (authorizing court to grant summary judgment before trial if evidence does not establish genuine issue of triable fact). Before trial, a party moves for summary judgment. *See infra* notes 107-13 and accompanying text (describing standards for summary judgment proceedings). During trial, a party moves for a directed verdict. *See infra* note 117 and accompanying text (explaining distinction between directed verdict and summary judgment). Both are judgments that courts render because the evidence is such that no rational factfinder could, based on the claim's substantive law requirements, find for the opposing party. *See* Shager v. Upjohn Co., 913 F.2d 398, 399 (7th Cir. 1990) (stating general standard for granting summary judgment in discrimination case). Only one distinction separates a summary judgment from a directed verdict: at summary judgment the court must view the evidence in a light most favorable to the opposing party because the motion precedes a fair hearing at trial. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (stating that, although standard for granting summary judgment mirrors that for directed verdict, at summary judgment court must draw inferences in favor of nonmoving party).

[107] *See* FED. R. CIV. P. 56; *see also Anderson*, 477 U.S. at 250-51 (lowering standard for granting summary judgment from no possibility of factual dispute to "mirror" of directed verdict standard requiring only that no reasonable jury could find for non-movant); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1573 (7th Cir. 1989) (stating that court must grant employer's summary judgment motion against age discrimination claim if evidence is such that plaintiff would not have fair chance of obtaining verdict (citing, *e.g.*, *Anderson*, 477 U.S. at 249)); *Shager*, 913 F.2d at 399 (stating that summary judgment was proper in age discrimination case only if no reasonable jury could find for plaintiff); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 595-97 (1986) (upholding grant of summary judgment in complex antitrust case even where there is doubt about facts because rational factfinder must believe them); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986) (stating that purpose of summary judgment is to identify and eliminate factually unsupported claims before trial); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 4.10 (4th ed. 1992) (explaining that evidence permits court to see whether, as matter of law, nonmoving party has any possibility of recovery).

[108] *See* FED. R. CIV. P. 56(c) (declaring standard for granting summary judgment); *see also Celotex*, 477 U.S. at 322 (supporting view that plaintiff's failure to show evidence of essential fact merits grant of summary judgment against her (citing FED. R. CIV. P. 56(c))).

[109] *See Palucki*, 879 F.2d at 1572 (stating that summary judgment is "practical tool of governance" designed to prevent costly trials where opponent of motion has little chance of prevailing); JAMES & HAZARD, *supra* note 107, § 4.16 (concluding that trilogy of decisions

terpret the evidence in a light most favorable to the party opposing the motion.[110]

With respect to issues on which the plaintiff has the burden of persuasion, a defendant can succeed on a motion for summary judgment in two ways.[111] First, a defendant may produce evidence to negate any essential element of the plaintiff's claim.[112] Second, a defendant may show that the plaintiff, after a full and fair opportunity for discovery, has no evidence to prove a critical element of her claim at trial.[113]

The circuits are split on the question of what evidence is sufficient to create a triable issue of intentional discrimination when the employer produces evidence of a legitimate reason for the discharge.[114] The circuits agree that a plaintiff must produce evidence supporting at least the prima facie elements of discrimination and evidence that the employer's reason for the

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in *Celotex*, *Anderson*, and *Matsushita* clearly relocated standard, making summary judgments easier to achieve). *But see* JAMES & HAZARD, *supra* note 107, § 411 (noting old view of summary judgment wherein "a litigant has a right to a trial where there is the slightest doubt as to the facts" (quoting Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2nd Cir. 1945))). *See generally*, Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433 (1987) (analyzing summary judgment requirements after *Celotex*).

[110] *See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) (stating that court must view plaintiff's evidence as favorably as reason will permit when considering employer's motion for summary judgment).

[111] *See infra* notes 112-13 and accompanying text (describing two theories upon which court may grant summary judgment).

[112] *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 160 (1970) (denying summary judgment to moving party that did not produce evidence negating essential element of opposing party's claim); *see also* JAMES & HAZARD, *supra* note 107, § 4.14 (explaining that one basis on which moving party can prevail is by offering evidence in support of motion that negates issue as to which nonmoving party has burden of proof). Traditionally, a defendant could succeed at summary judgment only in this way. *Id.*; *see also id.* § 4.11 (noting subsequent change from traditional rule). *Celotex* clarified the earlier leading decision, *Adickes*, that required a party moving for summary judgment to submit affirmative proof negating facts essential to a nonmoving party's case. *See id.* (analyzing Court's holdings on summary judgment (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) and *Adickes*, 477 U.S. at 157).

[113] *See Celotex*, 477 U.S. at 322 (holding that plain language of Federal Rule of Civil Procedure 56(c) mandates entry of summary judgment, after adequate time for discovery and upon motion, against party who fails to make showing sufficient to establish existence of element essential to that party's case and on which that party will bear burden of proof at trial); *see also* JAMES & HAZARD, *supra* note 107, § 4.14 (summarizing *Celotex* holding).

[114] *See infra* notes 116-60 and accompanying text (summarizing split in authority among circuits regarding summary judgment standards in employment discrimination cases).

discharge is false.[115] The circuits split, however, on whether a plaintiff must produce additional evidence that the employer's actual reason for discharging the plaintiff was unlawful discrimination.[116]

Although *Hicks* ruled on a directed verdict, its holding on Title VII substantive law also governs summary judgment motions because the standard for granting summary judgment is similar to the standard for granting a directed verdict.[117] The

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[115] *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122-23 (7th Cir. 1994) (summarizing areas of agreement and disagreement among circuits on pretext for discrimination).

[116] *See id.* (identifying "pretext-only" circuits that allow or compel finding of discrimination on plaintiff's facts and "pretext-plus" circuits that require additional evidence showing discriminatory animus). A number of circuits have held that a plaintiff may prove pretext for discrimination merely by proving that the employer's stated reason is false. *See, e.g.*, Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) (holding that plaintiff can prevail by proving employer's reason false); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.) (en banc) (stating that where employer's act remains unexplained, inference from plaintiff's evidence may be sufficient to prove discrimination), *cert. dismissed*, 483 U.S. 1052 (1987); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985) (holding that plaintiff only required to persuade factfinder that employer's reasons were false); Tye v. Board of Educ., 811 F.2d 315, 319-20 (6th Cir.) (noting that ability to prove employer's reasons untrue indirectly proves intentional discrimination), *cert. denied*, 484 U.S. 924 (1987); Visser v. Packer Eng'g Ass'n, Inc., 924 F.2d 655, 657 (7th Cir. 1991) (en banc) (holding that where plaintiff proves employer's stated reason is false, trier of fact may infer discrimination was real reason); MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988) (claiming that employer's false reason is itself evidence that may persuade factfinder that employer discriminated on prohibited basis); Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988) (holding that plaintiff may prove pretext either by showing discrimination was true motive or by showing employer's stated reason to be false); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) (holding that plaintiff should prevail if she establishes prima facie elements and that employer's reason is false, even if plaintiff has no direct evidence of discrimination).

Other circuits have held that a plaintiff can only prove pretext for discrimination by proving the employer's stated reason false and by proving that discrimination was the real reason for the adverse employment action. *See, e.g.*, White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir.) (holding that plaintiff may not meet her burden of proving discriminatory intent merely by proving employer's reason false), *cert. denied*, 469 U.S. 933 (1984); Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987) (holding that evidence merely contesting employer's reason is insufficient to present jury question); Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988) (holding that plaintiff cannot avoid summary judgment merely by contesting employer's allegedly legitimate reason); Bienkowski v. American Airlines, 851 F.2d 1503, 1508 (5th Cir. 1988) (holding that plaintiff must show more than falsity of employer's stated reason, such as direct evidence of discrimination); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (prohibiting Title VII liability in absence of specific finding that real reason for adverse act was race).

[117] *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 958 (5th Cir. 1993) (stating that *Hicks* is controlling on issue of what showing plaintiff must make to avoid summary judg-

circuit courts are split on the proper standard for granting summary judgment because they interpret *Hicks*' reasoning differently.[118] Arguments for each view find support in the *Hicks* opinion.[119]

A. The "False-Is-Sufficient" View

In *Anderson v. Baxter Healthcare Corp.*,[120] the Seventh Circuit held that *Hicks* prohibits summary judgment when a plaintiff produces evidence of the prima facie elements of discrimination and evidence contesting the employer's reason for the discharge.[121] The plaintiff, Arthur Anderson, was a fifty-one year old maintenance manager.[122] Anderson committed several serious and costly errors at work in a short period of time.[123]

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ment).

[118] *See infra* notes 119-60 and accompanying text (summarizing disagreement among courts interpreting *Hicks* regarding summary judgment standards).

[119] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2762-63 (1993) (Souter, J., dissenting) (noting two conflicting interpretations of Court's holding); *see also Anderson*, 13 F.3d at 1123 (acknowledging that *Hicks* is not entirely clear on which of two possible rules it adopted).

[120] *Anderson*, 13 F.3d at 1120. This Comment also refers to age discrimination cases, like *Anderson*, where courts have most clearly stated the applicable law. Because courts consistently analyze non-Title VII age discrimination claims under the same framework as Title VII disparate treatment claims, courts cite the two types of cases interchangeably. *See, e.g.*, LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993) (stating that age discrimination case follows burden-shifting paradigm of *McDonnell Douglas* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973))); *Anderson*, 13 F.3d at 1122 (stating that burden-shifting method of proof for Title VII cases under *McDonnell Douglas* applies to age discrimination claims (citing McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992))).

[121] *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123-24 (7th Cir. 1994) (reasoning that where inference of improper motive may rationally be drawn, trial is mandatory (citing *Hicks*, 113 S. Ct. at 2748-49)). The Seventh Circuit concluded prior to the *Hicks* decision that proving the employer's allegedly legitimate reason to be false permits, but does not compel, a verdict for the plaintiff. *Id. See also* Visser v. Packer Eng'g Ass'n, Inc., 924 F.2d 655, 657 (7th Cir. 1988) (holding that if employer offers false reason for why it fired employee trier of fact may or may not infer real reason was age (citing Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990))). The Seventh Circuit recently affirmed that holding was consistent with *Hicks*. *See Anderson*, 13 F.3d at 1123 (admitting that, although not entirely clear, Court in *Hicks* apparently adopted Seventh Circuit's "pretext only" rule); *see also id.* (stating that *Hicks* addressed question of which pretext rule is correct (citing *Hicks*, 113 S. Ct. at 2752-53)).

[122] *Id.* at 1121.

[123] The first incident in which Anderson committed a costly error occurred when he failed to discover that a valve in the plant's emergency water supply was closed in violation

Anderson's employer, Baxter, suspended Anderson, investigated the incidents, and finally discharged him for poor work performance.[124]

Anderson sued in federal district court, claiming that Baxter discriminated against him because of his age.[125] Although Title VII does not prohibit age discrimination, the Age Discrimination in Employment Act (ADEA) does.[126] Courts apply Title VII jurisprudence to ADEA claims.[127] Thus, proceeding under ADEA, Anderson produced evidence of the prima facie elements of age discrimination.[128]

Baxter moved for summary judgment, asserting poor work performance as a legitimate reason for Anderson's discharge.[129] Baxter submitted evidence that it discharged Anderson for the legitimate reason that he was incompetent.[130] Anderson submitted no evidence to show either that Baxter's stated reason was false or that discrimination was the real reason Baxter fired him.[131] The district court, therefore, granted Baxter's motion

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of fire marshal policy. *Anderson*, 13 F.3d at 1121. Shortly thereafter, a fire alarm annunciation system for which Anderson was responsible failed because its fuses were missing. *Id.* A few months later, Anderson failed to maintain a main electrical breaker according to orders from his supervisor. *Id.* The breaker shorted out, causing a building to be unheated for one January day. *Id.* Finally, the following month, a newly installed air handler motor shorted out and tripped the main breaker, knocking out all power to the building and creating smoke. *Id.* The smoke caused one employee to trip the fire alarm, forcing the building occupants to evacuate in the dark. *Id.* Anderson was responsible for verifying that the new motor was operating properly. *Id.*

[124] *Id.* at 1122.

[125] *Id.* Age discrimination against someone over 40 violates the Age Discrimination in Employment Act (ADEA). *See* 29 U.S.C. § 623 (1986) (defining scope of ADEA).

[126] 29 U.S.C. §§ 621-634 (1985 & Supp. 1993); *see also supra* note 120 and accompanying text (listing cases that apply Title VII jurisprudence to age discrimination claims).

[127] *See supra* note 120 and accompanying text (noting cases declaring Title VII applicable to ADEA claims).

[128] *See Anderson*, 13 F.3d at 1124 (stating that district court assumed that Anderson established prima facie elements of discrimination for purposes of ruling on summary judgment); *see id.* at 1122 (listing elements of prima facie case of age discrimination: plaintiff is at least 40 years old, is doing her job well enough to meet employer's legitimate expectations, employer discharged or demoted plaintiff, and employer sought replacement).

[129] *Anderson*, 13 F.3d at 1124.

[130] *See id. at 1121*, (stating Baxter's legitimate, nondiscriminatory reasons for discharging Anderson); *see also supra* note 123 and accompanying text (summarizing Anderson's misdeeds on job).

[131] *See Anderson*, 13 F.3d at 1126 (explaining that plaintiff failed to submit evidence indicating defendant's reason for discharge was pretext for discrimination).

for summary judgment.[132] On appeal, the Seventh Circuit affirmed summary judgment because Anderson had produced no evidence to show Baxter's stated reason was untrue.[133] However, the court noted that had Anderson produced such evidence, it would have denied Baxter's summary judgment motion.[134]

In *Anderson*, the Seventh Circuit cited *Hicks* for the proposition that a factfinder may infer unlawful discrimination if it believes the plaintiff's prima facie evidence of discrimination and disbelieves the employer's stated reason for the discharge.[135] Proponents of this view argue that the employer's false reason is a lie that should permit an inference of intentional discrimination.[136] Under this view, if a plaintiff produces evidence of the prima facie elements of discrimination and evidence contesting the employer's reason for the discharge, she creates a triable issue of discrimination and summary judgment is not appropriate.[137]

The Seventh Circuit selectively relied on the dicta in *Hicks* to articulate the false-is-sufficient view.[138] The court characterized as mere dicta that language in *Hicks* contrary to its own position.[139] Other courts, however, have cited *Hicks* as authority for an opposing view.[140]

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[132] *Id.* at 1122.

[133] *Id.* at 1126.

[134] *See id.* at 1123 (discussing rule allowing inference of discrimination where plaintiff has evidence of prima facie elements and evidence that employer's reason is false).

[135] *See id.* (citing Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993)). *But see also Anderson* at 1123 n.2 (acknowledging that holding in *Hicks* is not entirely clear and contains internal inconsistencies).

[136] *See Hicks*, 113 S. Ct. at 2762-63 (Souter, J., dissenting) (arguing that plaintiff's proof that employer's reason is false strengthens inference of unlawful discrimination); *see also* Visser v. Packer Eng'g Ass'n, Inc., 924 F.2d 655, 657 (7th Cir. 1991) (focusing on inferential significance of employer's lie to support finding of discrimination).

[137] *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994) (discussing rule allowing inference of discrimination).

[138] *Id* at 1124 n.3.

[139] *Id.*

[140] *See infra* notes 141-51 and accompanying text (discussing Fifth Circuit's "false-plus" rule for determining whether plaintiff can avoid summary judgment).

B. The "False-Plus" View

In *Bodenheimer v. PPG Industries, Inc.*, the Fifth Circuit held that *Hicks* requires a disparate treatment plaintiff to produce evidence of the prima facie elements of discrimination, evidence that the employer's stated reason for the discharge is false, *and* evidence that discrimination was the real reason for the employer's act.[141] Clifford Bodenheimer claimed that PPG discriminated against him on the basis of age.[142] He asserted the prima facie elements that he was over forty, that he was qualified, and that PPG discharged him and replaced him with someone younger.[143] PPG responded with evidence that it terminated Bodenheimer for a legitimate, nondiscriminatory reason.[144] The district court granted PPG's motion for summary judgment.[145] The Fifth Circuit affirmed after concluding that no rational factfinder could have found intentional discrimination based on the evidence.[146]

The Fifth Circuit relied on *Hicks* to determine what evidence a disparate treatment plaintiff must show to avoid summary judgment.[147] It acknowledged that, prior to *Hicks*, confusion persisted as to whether a plaintiff could meet her burden of production with evidence only of the prima facie elements and evidence contesting the employer's stated reason.[148] Stating

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[141] *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (stating that plaintiff must prove both that employer's reason for employment decision is false and that discrimination was real reason (citing Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993))); *see also id.* at 959 n.8 (explaining that court considering summary judgment in age discrimination case must decide whether plaintiff's facts could prove that, more likely than not, employer discriminated because of age).

[142] *Id.* at 956. The plaintiff, Bodenheimer, was a branch manager at PPG's New Orleans office. *Id.* PPG terminated him at the age of 57 when it merged his branch office with another. *Id.* PPG appointed the other office's manager, a 51 year old woman, to manage the newly merged office. *Id.* Bodenheimer claimed that PPG discharged him rather than his replacement because he was over 55 and eligible for retirement benefits while his replacement, at 51, was not. *Id.*

[143] *Id.* at 957. The plaintiff's allegations in *Bodenheimer* constitute the minimal prima facie claim for age discrimination. *Id.*

[144] *Id.* at 956. PPG claimed it discharged Bodenheimer as part of a workforce reduction and because the other manager possessed superior skills. *Id.*

[145] *Id.*

[146] *Id.* at 959.

[147] *See id.* at 957 n.4 (stating that *Hicks* applies to age discrimination cases).

[148] *Id.* at 957.

that *Hicks* "put the issue to bed," the Fifth Circuit adopted a different standard than that which the Seventh Circuit adopted in *Anderson*.[149]

The Fifth Circuit's interpretation of *Hicks* permits a factfinder to infer intentional discrimination only if the factfinder believes evidence of the prima facie elements, evidence that the employer's stated reason is false, and additional evidence that discrimination was the real reason for the discharge.[150] A factfinder, however, may not infer discriminatory intent solely from a plaintiff's prima facie evidence and evidence contesting the employer's stated reason.[151]

In *Bodenheimer*, the plaintiff met his burden of producing evidence of the prima facie elements.[152] PPG also met its burden of producing evidence of a legitimate reason for the discharge.[153] The Fifth Circuit, however, concluded that Bodenheimer did not satisfy his burden of producing evidence that PPG's reason was a pretext for discrimination.[154] For example, the court held that Bodenheimer's evidence that he was better qualified than his replacement could not prove discriminatory intent.[155] In rejecting this evidence, the Fifth

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[149] *Compare id.* (concluding that *Hicks* requires plaintiff to prove employer's reason false and that discrimination was real reason) *with* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123-24 (7th Cir. 1994) (concluding that *Hicks* does not require plaintiff to have evidence beyond that necessary to prove employer's reason false).

[150] *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (stating discrimination plaintiff must prove that employer's stated reason was not true and that discrimination was real reason (citing Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993))); *see also Hicks*, 113 S. Ct. at 2747 (stating that "pretext" means "pretext for discrimination" and requires proof that discrimination was real reason); *id.* at 2748 n.2 (noting that trier of fact found Hicks did not prove race was real reason for his discharge (citing Hicks v. Saint Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991))); McDonnell Douglas Corp v. Green, 411 U.S. 792, 804 (1973) (explaining that "pretext" means "pretext for the sort of discrimination prohibited by Title VII").

[151] *See Bodenheimer*, 5 F.3d at 959 n.8 (arguing that *Hicks* requires more of plaintiff than prima facie case and negating of employer's stated reason).

[152] *Id.* at 957 n.5. PPG conceded that Bodenheimer's evidence met his burden of persuasion to establish the prima facie elements for discrimination claim. *Id.*

[153] *See id.* at 958 (rejecting plaintiff's argument that employer had not met burden of production because its evidence was not credible).

[154] *Id.* at 958-59; *see also id.* (stating question as whether plaintiff's evidence would allow reasonable jury to conclude employer's reason was pretext for age discrimination). The court in *Bodenheimer* rejected the assertion that a manager's reference to the plaintiff's retirement package directly showed age discrimination. *Id.*

[155] *See id.* at 958-59 (discussing affidavits from two PPG customers stating that quality of

Circuit emphasized that discrimination law does not authorize courts to second-guess the business judgment of employers, nor to become personnel managers.[156] Thus, the Fifth Circuit affirmed summary judgment because Bodenheimer did not produce evidence that discrimination was PPG's real reason for discharging him.[157]

To summarize, once the plaintiff produces evidence of the prima facie elements and the employer produces evidence of a legitimate reason for its action, the Fifth Circuit requires the plaintiff to produce evidence contesting that reason and to produce additional evidence that discrimination was the real reason for the discharge.[158] If an employer moves for summary judgment, a court must grant the motion unless the plaintiff submits additional evidence of intentional discrimination.[159] Evidence of the prima facie elements and evidence negating the employer's stated reason does not, under this view, create a triable issue of discrimination.[160]

C. The Nondiscriminating Employer Problem

Under Title VII, whether the parties go to trial may depend solely on whether a court adopts the Fifth or the Seventh Circuit's holding regarding what evidence a plaintiff must produce to defeat an employer's summary judgment motion.[161] The Fifth Circuit's standard is less likely to result in a trial than the Seventh's because it requires a plaintiff to produce additional evidence of intentional discrimination.[162] This uncer-

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service at branch declined after PPG discharged Bodenheimer). The court also rejected Bodenheimer's own affidavit stating that he was better qualified than his replacement because he had more experience. *Id.*

[156] *See id.* at 959 (citing Bienkowski v. American Airlines, 851 F.2d 1503, 1507-08 (5th Cir. 1988)).

[157] *Id.*

[158] *See id.* at 959 n.8 (concluding that plaintiff must show more than falsity of employer's reason to create triable issue of discrimination).

[159] *Id.*

[160] *Id.*

[161] *Compare* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (holding that evidence showing falsity of employer's stated reason does not create triable issue) *with* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123-24 (7th Cir. 1994) (holding that evidence showing falsity of employer's stated reason creates triable issue).

[162] *See supra* note 149 and accompanying text (comparing two summary judgment

tainty merits consideration.[163] Although many courts are reluctant to grant summary judgment against a plaintiff, courts must also consider fairness to the defendant.[164] The cost and publicity of defending a meritless disparate treatment claim at trial can harm even those employers who prevail at trial.[165]

The hypothetical set forth in the Introduction illustrates how conflicting interpretations of *Hicks* may affect parties nearing trial.[166] In the hypothetical, Dixon did not discriminate against Perkins on the basis of sex.[167] He did, however, assert a false reason for his decision to discharge Perkins because the real reason — the firm's financial weakness — would impair Dixon's ability to obtain new clients.[168] Perkins produced evidence of the prima facie elements of disparate treatment and evidence contesting Dixon's stated reason for the discharge.[169] Performance reviews showed that Dixon was satisfied with Perkins' progress learning computer drafting, which contradicts Dixon's explanation that he discharged Perkins because of her failure to learn that skill.[170] Perkins, however, lacked additional evidence that sex discrimination was the real reason for her discharge.[171] Dixon moved for summary judgment, and the court must decide whether to grant the motion.[172]

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standards derived from holding in *Hicks*).

[163] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2757 (1993) (Souter, J., dissenting) (noting uncertainties *Hicks* creates and that plaintiffs may sue less frequently, thus undercutting Title VII's purpose). *But see* Shipp, *supra* note 13, § 12, at 62 (noting increase in faculty discrimination cases that federal courts hear despite plaintiffs' low success rate).

[164] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (stating that courts must give due regard to rights of persons opposing claims).

[165] *See* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (noting both private and public expenses of trial and concluding defendant entitled to summary judgment if plaintiff has no evidence to persuade reasonable jury).

[166] *See supra* notes 9-19 and accompanying text (describing Perkins' hypothetical lawsuit against her employer, Dixon).

[167] *See supra* notes 7-9 and accompanying text (stating that Dixon did not discharge Perkins on basis of gender).

[168] *See supra* note 15 and accompanying text (stating that Dixon claimed he discharged Perkins because she had not yet mastered computer drafting).

[169] *See supra* notes 10-12 and accompanying text (stating Perkins' prima facie allegations).

[170] *See supra* note 17 and accompanying text (describing Perkins' favorable performance reviews).

[171] *See supra* note 18 and accompanying text (stating that Perkins has no evidence showing discrimination was real reason for discharge).

[172] *See supra* note 19 and accompanying text (describing question before court in decid-

If the court adopts the Seventh Circuit's false-is-sufficient view of *Hicks*, it will deny Dixon's motion and the parties will go to trial.[173] Under this view, a triable issue of fact exists whenever the plaintiff can produce evidence of the prima facie elements and evidence that the employer's reason might be false.[174] Dixon will endure considerable harm to his business, while Perkins has only a small chance of winning.[175] Perkins' claim, based on little more than speculation of discriminatory motive, is meritless.[176] Nonetheless, the false-is-sufficient rule results in a trial.[177]

If, on the other hand, the court adopts the Fifth Circuit's false-plus view, it will grant Dixon's motion.[178] Under this view, a triable issue exists only when a plaintiff produces evidence of the prima facie elements of discrimination, evidence that the employer's reason for the discharge is false, and evidence that discrimination was the real reason for the discharge.[179] In the hypothetical, Perkins' discovery produced no evidence that sex discrimination was the real reason for her discharge.[180] She lacks evidence of an essential element of her claim.[181] Thus, the court must grant Dixon's motion under established summary judgment law.[182]

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ing Dixon's summary judgment motion).

[173] *See supra* notes 120-40 and accompanying text (describing consequences of rule allowing inference of discrimination).

[174] *See supra* notes 120-40 and accompanying text (describing rule more favorable to plaintiffs).

[175] *See supra* note 14 and accompanying text (describing cost of trial and how bad publicity causes damage to employer).

[176] *See supra* notes 8-14 and accompanying text (stating that Dixon did not discharge Perkins on basis of gender). Perkins' discrimination claim is meritless because the employer did not discriminate and Title VII does not prohibit nondiscriminatory criteria. *See* 42 U.S.C. § 2000e-2(a)(1) (1988) (listing Title VII's unlawful, discriminatory criteria).

[177] *See supra* notes 135-37 and accompanying text (explaining that if rule permits inference of discrimination then trial is mandatory).

[178] *See supra* notes 141-57 and accompanying text (explaining rule requiring evidence showing discrimination was real reason for adverse employment action).

[179] *See supra* notes 141-57 and accompanying text (explaining "false-plus" rule mandating standard for plaintiff to avoid summary judgment for employer).

[180] *See supra* notes 17-18 and accompanying text (explaining Perkins' evidence of discrimination).

[181] *See supra* notes 69-70 and accompanying text (explaining plaintiff's burden of proving intentional discrimination).

[182] *See supra* note 113 and accompanying text (explaining that court must grant

The hypothetical presents a nondiscriminating employer — something no court may assume.[183] Many employers, however, do not discriminate, and courts should use summary judgment to dispose of meritless claims.[184] Even in discrimination cases where intent is at issue, summary judgment is appropriate if the employer produces evidence of a legitimate reason and the plaintiff relies on the improbable inferences that constitute the prima facie elements of discrimination.[185] The substantive law of disparate treatment should distinguish between actual discrimination and mere speculation.[186]

III. PROPOSAL: COURTS SHOULD APPLY THE "FALSE-PLUS" STANDARD TO EMPLOYERS' SUMMARY JUDGMENT MOTIONS

Courts must decide whether a plaintiff creates a triable issue of discrimination based solely on evidence of the prima facie elements of a disparate treatment claim and evidence that the employer's alleged reason for the discharge is false.[187] This Comment suggests that such evidence alone does not merit a trial.[188] Title VII will function more effectively if courts also re-

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summary judgment when nonmoving party has no evidence of required element on which it has burden of proof).

[183] *See supra* note 14 and accompanying text (stating that Dixon did not discriminate on basis of gender); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (stating that court must view facts in light favorable to nonmovant).

[184] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986) (stating that principal purpose of summary judgment is to dispose of factually unsupported claims).

[185] *See* Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990) (holding that in age discrimination case plaintiff must show that employer's reason was not just false but coverup for discrimination).

[186] *See* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (noting that courts take critical look at plaintiffs' efforts to withstand summary judgment motions because of court workload crisis and realization that plaintiffs "more than occasionally" use Title VII as substitute for nonexistent job protection principles); *see also* LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 849 (1st Cir. 1993) (affirming summary judgment for employer on age discrimination claim because plaintiff's case was conclusory, improbable, and speculative).

[187] *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122-23 (7th Cir. 1994) (evaluating which "pretext" rule Supreme Court endorsed in *Hicks* (citing Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993))).

[188] *See infra* notes 197-245 and accompanying text (summarizing reasons courts should adopt Fifth Circuit's rule on granting summary judgment in employment discrimination cases).

quire plaintiffs to produce evidence that the real reason for an employer's action was unlawful discrimination.[189]

A. Courts Should Require Plaintiffs to Produce Evidence that Discrimination Was the Real Reason for the Discharge

If an employer produces evidence of a legitimate, nondiscriminatory reason for its action, all federal appellate courts require a plaintiff to produce evidence that the employer's reason is a pretext for discrimination.[190] This Comment proposes that courts adopt the Fifth Circuit's standard regarding what evidence is sufficient to meet this burden.[191] In *Bodenheimer*, the Fifth Circuit held that a plaintiff must produce not only evidence that the employer's reason for discharging her is false, but also that discrimination was the real reason.[192] Thus, a court must grant an employer's motion for summary judgment whenever a plaintiff fails to meet her burden of production on either of these essential elements of the substantive law.[193]

If a disparate treatment plaintiff cannot produce evidence of intentional discrimination beyond the prima facie elements and evidence contesting the employer's reason, then a court should grant the defendant's motion for summary judgment.[194] Only

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[189] *See* Shager v. Upjohn Co., 913 F.2d 398, 406 (7th Cir. 1990) (lamenting law requiring reversal of employer's grant of summary judgment in age discrimination case because court thinks competitive marketplace will punish discriminating employers faster, cheaper and more accurately than court system).

[190] *See Hicks*, 113 S. Ct. at 2749 (stating that after employer meets burden of producing evidence of legitimate reason, plaintiff must meet burden of persuasion by proving reason was pretext for discrimination (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981))).

[191] *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (holding that plaintiff must produce evidence that employer's reason is false and that discrimination was employer's real reason).

[192] *Id.*; *see* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993) (stating that pretext for discrimination requires plaintiff to show both that employer's stated reason is false and that discrimination actually did motivate employer).

[193] *See Bodenheimer*, 5 F.3d at 957 (holding that pretext for discrimination has two essential elements (citing *Hicks*, 113 S. Ct. at 2750)). The Supreme Court stated in *Celotex Corp. v. Catrett* the standard for granting summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). After adequate time for discovery, Rule 56(c) mandates summary judgment against a party who fails to produce evidence of a claim's essential element on which that party bears the burden of proof. *See id.* (analyzing summary judgment rule (citing FED. R. CIV. P. 56(c))).

[194] *See Bodenheimer*, 5 F.3d at 957 (stating that plaintiff has burden of proving dis-

additional evidence that discrimination was the real reason for the employer's act creates a triable issue of discrimination.[195] Courts should require the plaintiff to produce this additional evidence because the prima facie elements of discrimination are a procedural device and do not define the elements of the plaintiff's burden of persuasion.[196]

B. A Title VII Prima Facie Case is Insufficient to Merit Trial

Although the Fifth Circuit cited *Hicks* as authority for its holding in *Bodenheimer*, the court failed to apply properly the reasoning in *Hicks*.[197] In *Hicks*, the Court explained that the law of presumptions prohibits a court from directing a verdict for a plaintiff merely because she has persuaded the trier of fact that the prima facie elements exist and that the employer's stated reason is false.[198] According to *Hicks*, the rules governing presumptions also require a plaintiff to produce evidence that discrimination was the real reason for the employer's action.[199]

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crimination was true reason (citing *Hicks*, 113 S. Ct. at 2743)); *see also supra* notes 58-61 and accompanying text (explaining purposes of weak prima facie discrimination elements).

[195] *See* LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993) (explaining that genuine issue requires "sufficient evidence supporting the claimed factual dispute" to require a "choice between the parties' differing versions of truth" (citing Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990); quoting Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, (1976))).

[196] *See Palucki*, 879 F.2d at 1570 (stating that prima facie discrimination case is not strong enough to withstand employer's summary judgment motion); *see also id.* at 1570 (asserting that disparate treatment prima facie case is less persuasive than prima facie elements of other causes of action because it serves primarily to create presumption and force employer to speak); *infra* notes 217-18 and accompanying text (discussing inferential value of prima facie elements).

[197] *See Bodenheimer*, 5 F.3d at 957 (stating that *Hicks* "put the issue to bed" on question of plaintiff's burden of producing evidence of discrimination (citing *Hicks*, 113 S. Ct. 2751-52)).

[198] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (explaining that presumption does not shift burden of proof (citing FED. R. EVID. 301)).

[199] *See id.* at 2751-52 (stating elements on which plaintiff has burdens of production and persuasion). The plaintiff's prima facie allegations create a presumption against the employer. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If the trier of fact believes the prima facie evidence, and if the employer makes no response, then a court must render judgment for the plaintiff. *Hicks*, 113 S. Ct. at 2748. Where the employer does respond, however, it must only articulate a legitimate, nondiscriminatory reason in the form of admissible evidence. *Burdine*, 450 U.S. at 254. The employer's burden is one of production, not of persuasion. *Id.* The prima facie facts create a presumption that does not shift the burden of persuasion, which remains at all times with the plaintiff. *Id.*

Without such evidence, a factfinder could render a judgment against an employer based on only two findings: that the prima facie elements are true and that the employer's stated reason is not true.[200] Under the law of presumptions, however, the court cannot impose liability merely because the employer fails to persuade the trier of fact of its stated reason.[201] Liability can exist only if the falsity of the employer's reason and the prima facie elements create a valid basis for inferring discrimination.[202] The prima facie elements of discrimination, however, are of little inferential significance.[203]

A disparate treatment plaintiff can produce evidence of a prima facie disparate treatment claim without difficulty.[204] A plaintiff merely has to assert that she was a member of a protected class, that she was qualified for her position, that the

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Therefore, the risk of nonpersuasion also remains at all times with the plaintiff. *Id.; see also Hicks*, 113 S. Ct. at 2749 (stating that burden of proof remains at all times with plaintiff (citing FED. R. EVID. 301)). The employer cannot lose merely because it fails to persuade the trier of fact of the truth of its legitimate reason. *See supra* notes 90-101 and accompanying text (discussing holding in *Hicks*).

[200] *See* Anderson v. Baxter Health Care Corp., 13 F.3d 1120, 1123-24 (7th Cir. 1994) (stating rule allowing inference of discrimination based on prima facie elements and evidence that employer's reason is false (citing Visser v. Packer Eng'g Ass'n, Inc., 924 F.2d 655, 657 (7th Cir. 1991))).

[201] *See Hicks*, 113 S. Ct. at 2749 (explaining that presumption does not shift burden of proof (citing FED. R. EVID. 301)). To permit such an inference of discrimination would mean a court could hold an employer liable largely because the employer failed to persuade a trier of fact that its legitimate reason was true. *See id.* at 2747 (stating that factfinder's disbelief of employer's stated reason may, together with prima facie elements, suffice to show discrimination). Title VII does not create liability for stating untruthful reasons, but rather for intentional discrimination. *See id.* at 2750 (stating that Title VII does not impose liability on employers for failing to persuade trier of fact that its stated reason is true).

[202] *See* Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) (stating question at summary judgment as whether plaintiff produced evidence from which a rational factfinder could infer that employer lied). The *Shager* court held that such evidence permits an inference that the real reason was discrimination. *Id.*

[203] *See Hicks*, 113 S. Ct. at 2751 (noting that prima facie elements of disparate treatment constitute degree of proof "infinitely less" than what directed verdict requires and therefore proving employer's reason false cannot mandate verdict for plaintiff); *see also* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989) (stating that discrimination prima facie case is not "real" prima facie case in conventional sense because it is not strong enough to withstand employer's summary judgment motion); *infra* notes 204-09 and accompanying text (discussing inferential value of prima facie elements).

[204] *See Palucki*, 879 F.2d at 1570 (asserting that disparate impact prima facie case is less persuasive than prima facie elements of other causes of action because it serves primarily to create presumption and force employer to speak).

employer discharged her, and that there was a circumstance remotely suggesting discrimination.[205] The circumstance suggesting discrimination need only be, for example, that the employer discharged a woman and hired a man instead of another woman; or perhaps hired another woman, but one of a different race.[206] The burden of proving these elements at trial is not onerous.[207]

The prima facie elements on their own serve three purposes.[208] First, they eliminate some nondiscriminatory reasons, such as lack of basic qualifications, for the plaintiff's rejection.[209] Second, they prevent a judge from dismissing the plaintiff's claim before discovery.[210] Discovery allows the plaintiff every reasonable opportunity to uncover evidence of discrimination.[211] Third, they create a presumption which forces nondiscriminating employers to respond.[212] Because of their weak inferential value, however, the prima facie elements of a disparate treatment claim alone do not support an inference of discrimination.[213] Rather, courts mandate an inference of discrimination only when an employer fails to produce any evidence of a legitimate reason for its action.[214]

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[205] *See supra* notes 44-47 and accompanying text (discussing prima facie discrimination case).

[206] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6 (1981) (noting flexibility in prima facie elements of discrimination claim and stating that employer hired man several months after turning down plaintiff for position).

[207] *Burdine*, 450 U.S. at 253.

[208] *See Palucki*, 879 F.2d at 1570 (discussing limitations of discrimination prima facie case (citing *Burdine*, 450 U.S. at 255 n.10)).

[209] *See Burdine*, 450 U.S. at 254 n.7 (explaining limited function of Title VII disparate treatment prima facie elements).

[210] *See* FED. R. CIV. P. 12 (b)(6) (allowing court to dismiss complaint for failure to state claim); *see also supra* notes 44-47 and accompanying text (discussing prima facie elements of employment discrimination claim).

[211] *See Burdine*, 450 U.S. at 253 (noting that plaintiff may establish Title VII prima facie elements easily).

[212] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993) (stating that presumption places burden of producing explanation on employer); *see also Palucki*, 879 F.2d at 1570 (stating that presumption of discrimination is merely device to make employer speak).

[213] *See Hicks*, 113 S. Ct. at 2748 (stating that prima facie discrimination elements alone only result in verdict for plaintiff if employer does not respond to burden of production).

[214] *Id.*

A presumption of intentional discrimination is reasonable when the prima facie elements combine with an employer's failure to respond.[215] An employer, however, may produce evidence of a legitimate reason for the plaintiff's discharge.[216] The presumption then drops away and the prima facie elements command only slight inferential value.[217] The value of the prima facie elements as evidence of discrimination is minimal precisely because courts have eased the plaintiff's burden at the pleading and discovery stages.[218]

Opponents of this proposal contend that if the plaintiff proves that the employer's alleged reason for the discharge is false, she establishes the same mandatory inference of discrimination as when the employer fails to respond at all.[219] They argue that an employer's "lie" is as incriminating as its silence.[220] This argument fails, however, because the employer, by meeting its burden of production and eliminating the presumption in favor of the plaintiff, refocuses the inquiry on whether the plaintiff has produced sufficient evidence of unlawful discrimination.[221] The mandatory inference of discriminatory intent when the employer fails to respond merely forces the employer to articulate a legitimate reason.[222] This mandatory inference is artificial; when the legal presumption that creates it drops away, a court must evaluate the sufficiency

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[215] *See supra* note 57 and accompanying text (explaining consequence of employer's failure to meet burden of production).

[216] *See Burdine*, 450 U.S. 248, 252-53 (1981) (summarizing burden-shifting analysis that courts apply to Title VII cases).

[217] *See Burdine*, 450 U.S. at 255 n.10 (stating that presumption disappears when employer articulates legitimate reason for adverse employment action).

[218] *See supra* notes 204-07 and accompanying text (discussing elements of prima facie case that plaintiff can easily allege).

[219] *See Hicks*, 113 S. Ct. at 2762 (Souter, J., dissenting) (arguing that employer's failure to persuade factfinder of its stated reason strengthens inference stemming from prima facie case, even though inference is no longer mandatory).

[220] *Id.* at 2763.

[221] *See id.* at 2749 (stating that once employer has met burden of production, *McDonnell Douglas* framework of burdens and presumptions is no longer relevant, and that trier of fact proceeds to decide ultimate question of intentional discrimination); *see also* Veatch v. Northwestern Memorial Hosp., 730 F. Supp. 809, 819 (N.D. Ill. 1990) (doubting Congress intended Title VII to require employers to give true reasons for employment decisions when those reasons are not discriminatory).

[222] *See Burdine*, 450 U.S. at 254-55 (discussing nature of presumption in Title VII disparate treatment case).

of the plaintiff's evidence of discriminatory treatment.[223] Indeed, even if an employer fails to persuade the factfinder of a legitimate reason for the discharge, that failure does not increase the probative value of the plaintiff's prima facie evidence.[224]

Thus, as the Seventh Circuit held in *Palucki*, the prima facie elements of a disparate treatment claim are insufficient by themselves to prove discrimination.[225] The prima facie elements are primarily a procedural device and have little probative significance.[226] Furthermore, the law of presumptions prohibits imposing liability under Title VII based solely on an employer's failure to persuade a factfinder that its stated reason is true.[227] Finally, when a disparate treatment plaintiff produces evidence of the prima facie elements and evidence that the employer's stated reason is false, but nothing more, fairness demands that a court grant an employer's motion for summary judgment.[228]

C. Summary Judgment and Fairness

Summary judgment allows courts to isolate and dispose of factually unsupported claims when a plaintiff fails to produce evidence on one or more of a claim's essential elements.[229]

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[223] *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 958 (5th Cir. 1993) (stating that court in summary judgment discrimination case must decide whether plaintiff's evidence, if factfinder believes it, would more likely than not prove that employer discriminated against plaintiff).

[224] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2754 (1993) (noting that factfinder's disbelief of employer's reason for firing under preponderance of evidence standard does not mean employer lied); *see also* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989) (explaining that plaintiff by producing evidence of prima facie case and evidence to contest employer's reason does not necessarily create triable issue).

[225] *See supra* notes 60-68 and accompanying text (discussing *Palucki* case); *see also Burdine*, 450 U.S. at 254 n.7 (clarifying that prima facie discrimination case does not denote level of proof sufficient to allow inference of discrimination but rather defines evidence that creates presumption); *see also Palucki*, 879 F.2d at 1570 (stating that prima facie discrimination case is not strong enough to withstand summary judgment motion).

[226] *See supra* notes 58-65 and accompanying text (explaining low probative value of prima facie elements).

[227] *See Hicks*, 113 S. Ct. at 2747-48 (discussing law of presumptions).

[228] *See infra* notes 229-32 and accompanying text (examining summary judgment policies in context of employment discrimination claim).

[229] Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). *See also id.* at 327 (stating that principal purpose of summary judgment is to dispose of factually unsupported claims). This procedural device, however, requires reference to the substantive law's required elements.

This proposal submits that Title VII substantive law will more effectively impose liability only on those employers who discriminate if courts require a plaintiff to produce evidence that discrimination was the real reason for the employer's action.[230] Courts should not try employers if, after ample discovery, the plaintiff has evidence supporting only the most threadbare prima facie elements of her claim.[231] Under this proposal, courts will protect nondiscriminating employers by granting them summary judgment.[232]

Those who oppose this view claim that evidence of intentional discrimination is hard to find.[233] They argue that courts should try employers because, at trial, a factfinder can evaluate the credibility of the evidence.[234] This argument, however, underestimates the liberal discovery process available to plaintiffs.[235] Furthermore, the Equal Employment Opportunity Commission's investigation produces evidence available to a disparate treatment plaintiff.[236] Thus, if a plaintiff cannot produce some additional direct or circumstantial evidence that discrimination, rather than some lawful motivation, was the real reason for the employer's adverse action, a judge should conclude that a trial will waste the court's resources because the

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See supra notes 111-13 and accompanying text (explaining that summary judgment standard requires reference to substantive law).

[230] *See supra* notes 191-96 and accompanying text (describing proposed summary judgment rule in employment discrimination cases).

[231] *See* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (observing that courts resist efforts to withstand employers' motions for summary judgment because of court workload crisis and plaintiffs' use of Title VII as substitute for nonexistent principles of job protection); *supra* notes 106-09 and accompanying text (stating policy of summary judgment to eliminate meritless cases).

[232] *See Celotex*, 477 U.S. at 322 (holding that court may grant defendant summary judgment where plaintiff failed to produce evidence on element on which plaintiff had burden of persuasion).

[233] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2761 (1993) (Souter, J., dissenting) (arguing that plaintiff will not have opportunity to challenge credibility of reasons found in evidentiary record but not articulated by employer).

[234] *Id.*

[235] *See* FED. R. CIV. P. 26(b)(1) (stating relevance standard to define scope of allowable discovery); *see also* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.12 (1978) (interpreting relevance standard very broadly).

[236] *See* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 598 (1981) (holding that discrimination plaintiffs have access to EEOC's investigation files because plaintiff is not public to whom disclosure is illegal under Title VII (citing 42 U.S.C. § 2000e-5(b))).

plaintiff will not prevail at trial.[237] Moreover, permitting summary judgment under these circumstances is critical to a fair rule of law, because jurors' sympathies for plaintiffs often cause even nondiscriminating employers to lose at trial.[238]

Critics' argument that granting an employer summary judgment rewards employers who lie about their allegedly legitimate reason for discharging a plaintiff is also without merit.[239] Under this proposal, an employer can produce evidence of a false reason for its action and obtain summary judgment only if the plaintiff is unable to produce additional evidence that discrimination was the employer's real reason for discharging the plaintiff.[240] An employer, however, cannot move for summary judgment without producing evidence of a legitimate reason.[241] An employer's motion for summary judgment must include admissible evidence that meets the employer's burden of production.[242] Only in that way can the employer eliminate the presumption against it.[243] Furthermore, a plaintiff can delay summary judgment against her if she has not had a full and fair opportunity for discovery.[244] Liberal discovery rules make it difficult for an employer to fabricate a legitimate reason while hiding an improper one.[245]

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[237] *See supra* notes 141-57 and accompanying text (discussing false-plus interpretation of summary judgment rule under *Hicks*).

[238] *See* Visser v. Packer Eng'g Ass'n, Inc., 924 F.2d 655, 660-61 (7th Cir. 1991) (Flaum, J., dissenting) (observing that jurors find it difficult to reject discrimination plaintiffs' claims but easy to require employers to pay); *see also* Hannah A. Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353, 357-58 (1984) (asserting that most cases are won or lost on pretext for discrimination issue).

[239] *See Hicks*, 113 S. Ct. at 2763 (Souter, J., dissenting) (arguing that Court should not look beyond employer's "lie" for other reasons for discharge).

[240] *See id.* (explaining advantage dishonest employer can achieve by presenting false reason for employment action).

[241] *See supra* notes 53-57 and accompanying text (explaining employer's burden of production in summary judgment proceeding).

[242] *See* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (stating that employer can rebut presumption only with admissible evidence of legitimate reason for employment decision).

[243] *See supra* notes 53-68 and accompanying text (explaining that burden of production means that employer must be able to produce evidence of legitimate reason for employment decision).

[244] *See* FED. R. CIV. P. 56(f) (stating provision allowing party to delay summary judgment for lack of discovery opportunity).

[245] *See Hicks*, 113 S. Ct. at 2763 (Souter, J., dissenting) (noting that *Hicks* will require

CONCLUSION

The United States Supreme Court has struggled to define a clear standard for analyzing Title VII disparate treatment claims.[246] Its last attempt, *St. Mary's Honor Center v. Hicks*, was a five-to-four decision that contained contradictory language.[247] In *Hicks*, the Court failed to resolve the question of what evidence is sufficient to create a triable issue of discrimination when the employer has produced evidence of a legitimate, nondiscriminatory reason for discharging the plaintiff.[248]

The substantive law of disparate treatment clearly sets forth one essential element: proof of intentional discriminatory treatment.[249] On this the plaintiff has the burden of persuasion.[250] When an employer demonstrates that a plaintiff has no evidence of an essential element of her claim, the court must grant the defendant summary judgment.[251] The disparate treatment plaintiff has the burden of proving that intentional discrimination is the real reason for the challenged employment action.[252]

By themselves, the prima facie elements of disparate treatment create too weak an inference to merit trial,[253] and fairness demands summary judgment when a claim is purely specula-

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Title VII plaintiffs to engage in more discovery than before in order to uncover more evidence).

[246] *See supra* notes 38-39 (listing major Title VII disparate treatment cases).

[247] *Hicks*, 113 S. Ct. 2742.

[248] *See supra* notes 91-101 and accompanying text (explaining that holding in *Hicks* is narrow and confined only to reasoning necessary to reject lower court's directed verdict).

[249] *See* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (stating plaintiff's ultimate burden of persuasion in employment discrimination summary judgment proceeding).

[250] *Id.*

[251] *See supra* notes 106-13 and accompanying text (reviewing summary judgment rules).

[252] *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993) (defining meaning of pretext for discrimination).

[253] *See supra* notes 197-228 and accompanying text (arguing that prima facie case in employment discrimination context is inferentially weak).

tive.[254] Courts, therefore, should require the plaintiff to produce evidence of the prima facie elements and evidence that the employer's stated reason is, not just false, but hiding an actual discriminatory motive.[255] This rule allows summary judgment to eliminate purely speculative claims and gives the substantive law substance.[256]

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[254] *See supra* notes 229-45 and accompanying text (arguing that fairness and policy demand summary judgment where claim is purely speculative).

[255] *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (requiring evidence both that employer's stated reason is false and that real reason was discrimination (citing *Hicks*, 113 S. Ct. at 2747)).

[256] *See* Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9-10 (1st Cir. 1990) (upholding employer's summary judgment when plaintiff's discrimination case, although showing evidence that employer's stated reason was false, nonetheless rested on conclusory allegations, improbable inferences, and unsupported speculation).