The Defendant Lies and the Plaintiff Loses: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases

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The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases

by
CATHERINE J. LANCTOT

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CATHERINE J. LANCTOT*

Consider the following employment discrimination case: A black male with a degree in accounting from a prestigious university applies for an entry-level position with an accounting firm. The firm's hiring partner reviews his resume, which reflects that the applicant graduated magna cum laude with a perfect grade point average in his major. The resume does not reflect the applicant's race. The hiring partner telephones the applicant and enthusiastically encourages him to come to the office for an interview the following week.

At the interview, however, the applicant detects a distinct shift in the partner's tone toward him. The partner now seems far less enthusiastic about the applicant's academic credentials. In fact, he tells the applicant that he may be "overqualified" for the available entry-level position and that he is likely to find the work "too tedious." The applicant assures the partner that he remains quite interested in an entry-level job because he wants to start at the bottom and work his way up through the firm. Nevertheless, the interview lasts only fifteen minutes. Three days later, the applicant receives a form letter rejecting him.¹

¹ This hypothetical is loosely based on the factual setting in Griffin v. George B. Buck Consulting Actuaries, 551 F. Supp. 1385 (S.D.N.Y. 1982). In Griffin, a black male who was a magna cum laude graduate of the University of Pennsylvania's Wharton School of Business, with a perfect 4.0 grade-point average in his majors of accounting and actuarial science, applied for a position at an actuarial firm. Id. at 1385-86. The plaintiff testified at trial that his interview with the firm's recruiter lasted only ten to fifteen minutes, and focused on neither his qualifications nor his substantive expertise. Id. at 1386. His interview with the personnel director lasted twenty to thirty minutes. Id. Three weeks later, he received a letter of rejection from the firm. Id. at 1386-87.

* Associate Professor of Law, Villanova University School of Law. A.B. 1978, Brown University; J.D. 1981, Georgetown University Law Center. Thanks to Anthony W. Norwood, Henry H. Perritt, Jr., Anne Bowen Poulin, Jennifer L. Rosato, and Michael J. Yelnosky for their helpful comments on earlier drafts of this article. Special thanks to Robert Babcock, Kimberly Butler, Janeen Olsen, and Maria Santucci for their excellent research assistance.
The unsuccessful applicant now sues the accounting firm under Title VII of the Civil Rights Act of 1964, claiming that the firm intentionally discriminated against him because of his race when it failed to hire him. In response to the applicant's complaint, the firm files a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, asserting that there are no genuine issues of material fact and that the firm is entitled to judgment as a matter of law. First, the partner explains that the plaintiff demanded a higher salary than that demanded by the white male who the firm ultimately hired. Second, the partner asserts that the plaintiff was overqualified for this entry-level job.

As required under Rule 56, the plaintiff responds to the motion with his own affidavit in which he sets forth his race and his excellent academic qualifications. He further asserts that no one in the accounting firm ever discussed salary with him; indeed, he contends that he would have accepted the job at the salary paid to the white male had it been offered to him. In his affidavit, the plaintiff also asserts that he discussed his resume with the hiring partner in the initial telephone conversation.

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3. Section 703(a)(1) of Title VII provides: “It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .” 42 U.S.C. § 2000e-2(a)(1) (1988).
4. See Fed. R. Civ. P. 56(c) (Summary judgment may be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).
5. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (“Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion . . . .”).
7. Rule 56(e) provides: When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.
8. See Griffin, 551 F. Supp. at 1386-87 (plaintiff testified that he had briefly discussed salary with recruiter but had never discussed it with personnel director, and that personnel director had later told him that salary issue had not been the reason for failing to hire him because the personnel director “had not taken his thinking process that far”).
and at that time the partner never mentioned the possibility that he might be overqualified for the position. Finally, the plaintiff contends that he specifically stated during his interview that he would be happy to perform whatever menial tasks were involved in the entry-level job.  

Although the plaintiff's affidavit provides evidence to rebut defendant's proffered reasons for not hiring him, it lacks specific evidence that the firm took his race into account when making its hiring decision. No one at the firm ever mentioned race during the interview, and the plaintiff has been unable to obtain any evidence that the firm has treated black applicants unfavorably in the past. In short, all the plaintiff has to defeat the motion for summary judgment is evidence raising an issue of fact as to the truth of the accounting firm's reasons for its employment decision. Can the plaintiff avoid summary judgment on this record?

Surprisingly, the answer to this basic question remains shrouded in controversy. The true reason for the firm's failure to hire the plaintiff is clearly a factual issue, raised by the contradictory affidavits of the applicant and the hiring partner. The more difficult question, however, is whether this factual dispute is material to the ultimate determination of whether the firm made its hiring decision because of the applicant's race. The factual dispute is "material" only if resolution of the dispute might affect the outcome in the case. As this Article will show, there is

9. In Griffin, the plaintiff testified that the personnel director never discussed the details of the trainee position with him. Id. at 1387. He stated that when he asked about his rejection, the personnel director said that the plaintiff had not "warmed up" to him during the interview, that other applicants would be better at working with the other actuaries, and that he did not have the kind of personality necessary for the job. Id. The personnel director also commented that the plaintiff did not seem to be interested in the "nitty-gritty" aspects of the trainee program. Id.

10. Cf. Id. at 1391 n.13 (limited statistical evidence on hiring of minorities by actuarial firm lacked probative value).

11. The ultimate issue of whether or not the plaintiff was the victim of intentional discrimination is a question of fact. See, e.g., Anderson v. Bessemer City, 470 U.S. 564, 566, 576 (1985) (reversing court of appeals for reviewing evidence of discriminatory intent de novo rather than referring to judgment of trial court that plaintiff had been victim of sex discrimination: "a District Court's finding of discriminatory intent in an action brought under Title VII . . . is a factual finding that may be overturned on appeal only if it is clearly erroneous"); Pullman Standard v. Swint, 456 U.S. 273, 293 (1982) (reversing court of appeals and reinstating trial court's factual finding that there had been no discrimination).

a significant split among the federal courts as to whether a plaintiff may prove discrimination merely by proving that the defendant's proffered explanation is untrue, or whether a plaintiff must have additional evidence of discrimination in order to succeed.

A brief review of the analytical framework for employment discrimination cases will illustrate this controversy. A district court faced with the accounting firm's motion for summary judgment will look to the familiar three-part model for disparate treatment cases first established by the Supreme Court's unanimous opinion in *McDonnell Douglas Corp. v. Green* 13 and later substantially refined by its unanimous opinion in *Texas Department of Community Affairs v. Burdine*. 14 Under *Burdine*, in order to prove intentional discrimination, the plaintiff first must establish a prima facie case that raises an inference of discriminatory intent. 15 In the hypothetical case, assume that the district court decides that the plaintiff will be able to establish at trial that he is a black male who applied for the position in question, that he had at least the minimum qualifications sought by the employer, and that after his rejection the employer ultimately hired a white male for the position. 16 This meets the plaintiff's burden of proving a prima facie case. 17 Upon establishing a  

14. 450 U.S. 248 (1981). Employment discrimination claims arise not only under Title VII, but also under a variety of other federal statutes, such as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1967); the antidiscrimination provision of the Employee Retirement Investment Security Act (ERISA), 29 U.S.C. § 1140 (1974); and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1866). Although both *McDonnell Douglas Corp.* and *Burdine* were Title VII cases, the *McDonnell Douglas Corp.-Burdine* model has been adapted for use in resolving claims under these statutes as well. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989) (42 U.S.C. § 1981); Dister v. Continental Group, 859 F.2d 1108, 1112 (2d Cir. 1988) (ERISA); Williams v. Edward Apffels Coffee Co., 792 F.2d 1482, 1485 (9th Cir. 1986) (ADEA).
16. In the *Griffin* case, after rejecting the plaintiff, the actuarial firm immediately hired a white applicant who had not passed any actuarial examinations, in contrast to the seven examinations the plaintiff had passed. The defendant did not attempt to argue that this applicant was more qualified than the plaintiff. *Griffin v. George B. Buck Consulting Actuaries*, 551 F. Supp. 1385, 1388 n.6 (S.D.N.Y. 1982).
17. *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253. In *McDonnell Douglas Corp.*, the Court explained that to establish a prima facie case a plaintiff claiming
prima facie case, the plaintiff enjoys a presumption that the defendant discriminated against him. The rationale for this presumption is that the plaintiff has eliminated the most common nondiscriminatory reasons for rejection—failure to apply and lack of minimal qualifications—thereby raising an inference that the true reason for his rejection is discrimination.\textsuperscript{18}

Under \textit{Burdine}, the second step is for the defendant to articulate a “legitimate, non-discriminatory reason” for its action.\textsuperscript{19} The defendant need not prove that the reasons offered are true; the burden is one of production only.\textsuperscript{20} Indeed, the Supreme Court has explained: “It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.”\textsuperscript{21} In the hypothetical, assume that the district court determines that the defendant will be able to satisfy this intermediate burden at trial. In fact, the firm has offered two legitimate, nondiscriminatory reasons for its failure to hire the plaintiff: his excessive salary demands and his inappropriate qualifications. Under \textit{Burdine}, upon articulation of these two reasons, the presumption of discrimination created by establishment of the prima facie case will be rebutted, and thereby destroyed.\textsuperscript{22} The court no longer presumes that the discriminatory failure to hire need only show that: (1) he is a member of a protected class; (2) he had the minimal qualifications required for the position for which he applied; (3) he was not hired; and (4) the employer continued to seek additional applicants. \textit{McDonnell Douglas Corp.}, 411 U.S. at 802. The Court further noted: “The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations.” \textit{Id.}, 411 U.S. at 802 n.13; see also International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (\textit{McDonnell Douglas Corp. “did not purport to create an inflexible formulation”}).

18. In \textit{Burdine}, the Court noted:

Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. \textit{Burdine}, 450 U.S. at 253-54. \textit{Cf. Griffin}, 551 F. Supp. at 1388-89 (Plaintiff proved prima facie case by showing that he had skills and qualifications necessary for entry-level position, and that after his rejection defendant continued to seek and hire actuarial trainees who had passed fewer examinations than had plaintiff, who had no experience in actuarial field, and the vast majority of whom were white.).


20. \textit{Id.} (“The defendant need not persuade the court that it was actually motivated by the proffered reasons.”).


22. See \textit{id.} at 255 n.10 (“A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff’s initial evidence.”). In \textit{Griffin}, the court conceded that the defendant had met this intermediate burden, stating: “If these perceptions actually motivated the decision not to hire Griffin, [the defendant’s] action had a nondiscriminatory basis.” 551 F. Supp. at 1389.
plaintiff is the victim of discrimination and must turn to the last step of the model.

The third and final step of the Burdine model is the "pretext" stage. The plaintiff now has "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." In the hypothetical case, the district court has before it both the plaintiff's claim of discrimination and the defendant's articulated justifications for not hiring the plaintiff. At trial, the court would have to decide whether the justifications offered by the defendant are pretexts for discrimination.

In deciding a summary judgment motion, however, the district court should not decide what the true reason for the employment action was, because that determination rests largely upon the credibility of the parties. Rather, the court simply must decide whether there is sufficient evidence from which a factfinder could infer that the stated justifications for rejecting the plaintiff were "pretextual." The problem here, as in many employment discrimination cases, is the absence of evidence that directly reflects employer bias. Can the plaintiff prove "pretext"

23. Burdine, 450 U.S. at 253.
24. See id. at 256; see also Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring) ("In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision' . . .") (quoting NLRB v. Transportation Management Corp., 462 U.S. 393, 400 n.5 (1983)).
25. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").
26. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

The factfinder in Title VII trials is ordinarily the court, because relief under the statute has been construed to be equitable in nature. See 42 U.S.C. § 2000e-5(g) (1988) ("[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). See generally Stephen F. Lazor, Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?, 53 Tex. L. Rev. 483, 487 (1975). Some recent cases have suggested, however, that Title VII plaintiffs are entitled to jury trials. See Walton v. Cowin Equip. Co., 733 F. Supp. 327, 339 (N.D. Ala. 1990); Beesley v. Hartford Fire Ins. Co., 723 F. Supp. 635, 642 (N.D. Ala. 1989). ERISA claims also have been construed to be equitable in nature and the weight of authority is that there is no right to a jury trial under that statute. See Ronald J. Cooke, ERISA Practice and Procedure § 8.13, at 8.50 (1991). In contrast, plaintiffs in discrimination cases brought under the ADEA and § 1981 are entitled to jury trials. See 29 U.S.C. § 626(c)(2) (1988) (right to jury trial under ADEA); Harris v. Richards Mfg. Co., 675 F.2d 811, 814 (6th Cir. 1982) (right to jury trial under § 1981).
without such evidence? In Burdine, the Supreme Court gave specific guidance to courts wrestling with this issue:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.\(^{27}\)

Burdine seems to indicate that in the hypothetical the plaintiff's evidence rebutting the firm's stated reasons for not hiring him could prove pretext, and thereby prove intentional discrimination, by "showing that the employer's proffered explanation is unworthy of credence."\(^{28}\)

Nevertheless, as this Article will show, Burdine has not conclusively resolved this issue. Instead, the outcome of a factual scenario like the hypothetical case hinges largely on the federal circuit in which the case has been brought. Most of the courts of appeals that have considered the question have followed Burdine and have held that a plaintiff may prove pretext, and thus prove intentional discrimination, by showing that the reasons the defendant offered for the employment decision are untrue.\(^{29}\)

Under this rule, which will be termed the "pretext-only" rule, the plaintiff does not need any other direct or indirect evidence of discriminatory animus, because the court may infer discriminatory intent from the fact that the defendant lied about its motivations. Thus, if this hypothetical race discrimination case had been brought in a "pretext-only" circuit, the plaintiff could win at trial simply by persuading the court that the accounting firm's proffered reasons for not hiring him were untrue.\(^{30}\)

\(^{27}\) Burdine, 450 U.S. at 256 (emphasis added).

\(^{28}\) Id. In United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983), Justice Blackmun reiterated this rule in his concurrence: "[T]he McDonnell Douglas framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." Id. at 718 (Blackmun, J., with Brennan, J., concurring).

\(^{29}\) See infra Part I.A. The inability of the courts to arrive at a common understanding of how a plaintiff proves a disparate treatment case belies the Supreme Court's optimistic observation in 1977 that disparate treatment "is the most easily understood type of discrimination." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

\(^{30}\) For example, in the Griffin case, the district court ultimately determined that the plaintiff had proved his case "by showing that the explanations presented by [defendant] are not worthy of credence." Griffin v. George B. Buck Consulting Actuaries, 551 F. Supp. 1385, 1389 (S.D.N.Y. 1982). According to the court, the defendant's purported reliance on plaintiff's salary demands was not credible because the accounting firm had not raised this reason until two years after plaintiff's rejection and because salary had not even been discussed during plaintiff's initial interview with the personnel director. Id. at 1389-90. As to defendant's as-
Under the "pretext-only" rule, the factual dispute over the employer's asserted justifications plainly is material to the outcome, and summary judgment would be denied on this record.\textsuperscript{31} For a significant minority of courts, however, including at least two federal circuits, the rule is quite different. This Article will show that in these jurisdictions, a plaintiff who can prove only that the defendant's articulated reasons were untrue will not prevail in an employment discrimination action.\textsuperscript{32} These courts reason that the plaintiff must produce some additional evidence to show not only that the employer has concealed some other reason by its pretextual explanation, but also that the reason concealed by the employer was \textit{intentional discrimination}. This rule, which will be termed the "pretext-plus" rule,\textsuperscript{33} in effect defines the pretext stage of the \textit{Burdine} model to require a dual showing by the plaintiff. The plaintiff must both negate the defendant's proffered reason \textit{and} affirmatively demonstrate that the real reason was discriminatory intent. If the hypothetical case had been brought in a "pretext-plus" jurisdiction, the plaintiff would be unable to survive the accounting firm's summary judgment motion, because he lacks any direct, comparative, or statistical evidence that shows an intent to discriminate on the basis of assertion that plaintiff appeared reluctant to perform the mundane tasks required of an entry-level employee because of his outstanding academic record, the court found that the firm actively sought applicants with excellent educational credentials, that it had identified no other applicants who had been rejected as overqualified, and that the personnel director had never asked plaintiff whether he would be willing to perform these required tasks. \textit{Id.} at 1390. The court thus concluded:

\begin{quote}
In light of the credibility of [plaintiff's] testimony, the various reasons that we find to question the dependability of [the Personnel Director's] testimony, and the evidence as a whole, we conclude that [plaintiff] has carried his burden of discrediting the reasons [the employer] offers for his rejection, and thus in establishing intentional discrimination under Title VII.
\end{quote}

\textit{Id.} at 1391.

31. Indeed, until the recent emergence of the "pretext-plus" rule, summary judgment traditionally had been disfavored in employment discrimination cases. \textit{See}, e.g., Hillebrand \textit{v. M-Tron Indus.}, 827 F.2d 363, 364 (8th Cir. 1987) (summary judgment should seldom be used in employment discrimination cases and prima facie case may be sufficient to avoid entry of summary judgment), \textit{cert. denied}, 488 U.S. 1004 (1989); Thornbrough \textit{v. Columbus & G. R.R.}, 760 F.2d 633, 640-41 (5th Cir. 1985) (summary judgment generally inappropriate in discrimination suits because of "nebulous questions of motivation and intent"); Lewis \textit{v. AT&T Technologies}, 691 F. Supp. 915, 918 (D. Md. 1988) ("When the validity of a complaint turns on questions of an employer's motive and intent, a court must be especially cautious in granting summary judgment.").

32. \textit{See infra} Part I.B.

33. This descriptive term has been used by at least one court. \textit{See} Valdez \textit{v. Church's Fried Chicken}, 683 F. Supp. 596, 631 (W.D. Tex. 1988) ("Put another way, the legal question at issue is whether an indirect showing of pretext alone is sufficient for plaintiff to prevail in the third stage, or whether plaintiff must make a showing of 'pretext-plus.' ").
race. In other words, the plaintiff could show that the defendant lied about the reasons for not hiring him, but the plaintiff would still lose his case.

Only one of these two rules can be correct as a matter of law. Either the plaintiff may prove discriminatory intent merely by proving that the defendant's reason is untrue, or he may not. Most disparate treatment cases are won or lost on the issue of pretext. Thus, resolution of this fundamental issue is critical to establishing consistency within the federal courts in employment discrimination cases. Today, not only are the circuits split on this issue, but in some jurisdictions both the "pretext-only" and the "pretext-plus" rules seem to exist side by side. Indeed, in the last four years the Supreme Court has twice granted certiorari to consider the "pretext-plus" question, but both times it failed to reach a final decision on the merits. Moreover, at least one Supreme Court Justice, Justice Scalia, indicated some support for the "pretext-plus" rule when he was a member of the Court of Appeals for the District of Columbia Circuit, suggesting that there may be some support for this minority rule within the Supreme Court should the issue arise again.

This Article undertakes to review the analytical underpinnings of the "pretext-plus" rule, and to show that the rule is fundamentally inconsistent with traditional principles of employment discrimination law and of evidence. Part I explains the competing rules governing proof of

34. See 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) ("disparate treatment cases are won or lost on the pretext issue, unless defendants are unable to produce any evidence of a legitimate reason for their behavior") (footnotes omitted).

35. See infra notes 48-49, 96-97 and accompanying text.

36. See infra notes 76, 84-90 and accompanying text.

37. See infra notes 137-46 and accompanying text.

38. The controversy over the "pretext-plus" rule has emerged primarily in motions for summary judgment, perhaps because summary judgment has become the principal procedural battleground for employers seeking to avoid discrimination trials. See Visser v. Packer Eng'g Assocs., 924 F.2d 655, 660-61 (7th Cir. 1991) (Flaum, J., with Bauer & Cudahy, JJ., dissenting) ("Put simply, employers and their counsel may well conclude that ADEA cases are won or lost on summary judgment, because jurors find it difficult to close their hearts to the plight of the terminated older employee but easy to open the purse strings of his employers."). Nevertheless, it has also arisen in other procedural contexts, such as defendants' motions for directed verdicts and judgments notwithstanding the verdict. In some instances, application of the "pretext-plus" rule has resulted in appellate reversal of verdicts for plaintiffs. Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 558-59 (7th Cir.), cert. denied, 484 U.S. 977 (1987); Nix v. WCLY Radio/Rahall Communications, 738 F.2d 1181, 1184 (11th Cir. 1984); Brooks v. Ashtabula County Welfare Dep't, 717 F.2d 263, 267 (6th Cir. 1983), cert. denied, 466 U.S. 907 (1984); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983); Loeb v. Textron, Inc., 600 F.2d 1003, 1019-20 (1st Cir. 1979); Gries v. Zimmer, Inc., 742 F. Supp. 1309, 1315 (W.D.N.C. 1990). It should be noted, however, that the legal issue implicated is a
intentional discrimination. After briefly discussing the “pretext-only” rule, this Part then reviews the rationale offered by “pretext-plus” courts to justify their contrary approach. The principal justification advanced for the “pretext-plus” rule is that it is unfair to defendants for a court or jury to assume that the motive concealed by an untrue reason is a discriminatory motive. The “pretext-plus” courts insist that the plaintiff, who retains the burden of proof at all times, must produce some additional evidence of discrimination in order to prevail once the presumption arising from the prima facie case has been rebutted. Any other rule, claim these courts, will improperly shift the burden of proof to the defendants and will involve federal courts in the inappropriate exercise of second-guessing the business judgments of countless employers.

Part II demonstrates why the “pretext-plus” rule is fundamentally unsound. In effect, the “pretext-plus” rule holds plaintiffs in employment discrimination cases to a higher standard than that imposed on plaintiffs in other civil cases by effectively denying them the opportunity to prove their cases by circumstantial evidence. The Article explains that, even after defendant rebuts the Burdine presumption of discrimination, the plaintiff still can prove discrimination because the evidence from the prima facie case retains its probative value. The inference of discrimination from that evidence, coupled with proof that the defendant lied about its reasons for the employment action, suffices to prove discrimination. As the Supreme Court specifically stated in Burdine: “[T]here may be some cases where the plaintiff’s initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant’s explanation.”

The “pretext-only” rule avoids the dangerous ramifications of the “pretext-plus” rule—the insulation of the employer’s articulated reason from any kind of meaningful scrutiny. In fact, as this Article concludes in Part III, the “pretext-only” rule requires entry of judgment for a plaintiff as a matter of law when that plaintiff proves by a preponderance of the evidence that the defendant’s reason is false. As a corollary to that rule, this Article asserts that courts should explicitly recognize as legitimate nondiscriminatory reasons any genuine reasons advanced by defendants, regardless of whether they are unseemly or lack some

matter of substantive law—what a plaintiff must ultimately prove to show intentional discrimination—and not a matter of procedure—what quantum of evidence a plaintiff must produce to survive a dispositive motion against him. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (“[W]hile the materiality determination rests on the substantive law, it is the substantive law’s identification of which facts are critical and which facts are irrelevant that governs.”).

relationship to business purposes. By so doing, the expressed concern of some "pretext-plus" courts that defendants might be held liable for conduct that is somehow inappropriate but not discriminatory would thereby be alleviated.

Without question, the "pretext-plus" rule makes proving employment discrimination cases substantially more difficult for plaintiffs. Moreover, it permits employers to avoid trial on the merits of an employment decision even when there are disputed issues of fact. The absence of any firm theoretical foundation for the "pretext-plus" rule suggests that other unspoken motivations may have led to its adoption by some courts. After reviewing the weaknesses in the various rationales advanced to support the rule, it is difficult to avoid the conclusion that many of the courts that have advanced the "pretext-plus" rule have done so largely out of skepticism about the prevalence of bias in the workplace or out of deep-rooted hostility to what they perceive as the proliferation of nonmeritorious discrimination claims.40

Some "pretext-plus" opinions have explicitly admitted that imposing this additional evidentiary burden on plaintiffs is motivated, at least in part, by a desire to reduce the number of employment discrimination cases tried in the federal courts. Judge Bruce Selya of the First Circuit Court of Appeals explained in one case that the "pretext-plus" rule is "crucial" to "to insure that [Title VII] does not become a cloak which is nonchalantly spread across the record' in every instance where one employee (or prospective employee) loses out to a rival of contrary race or gender."41 A Seventh Circuit opinion authored by Judge Richard Posner asserted that the workload crisis of the federal courts, and realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment.42

40. See generally Robert Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 Vand. L. Rev. 1205, 1209-10 (1981) (Burdens of proof are the battleground for substantive theories of discrimination; “[o]ne such procedural device that courts often use to limit the reach of substantive theories is to allocate the burdens of pleading and proof on the various elements of a claim for relief in a way that will favor a desired outcome.”).
42. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (Posner, J.). Judge Posner also expressed some general skepticism about age discrimination cases in his
Yet another opinion, authored by Judge Edith Jones of the Fifth Circuit Court of Appeals, rejected the "pretext-only" rule, asserting that "[t]here must be some proof that age motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of age to one ensuring dismissals only for 'just cause' to all people over 40."43

Justice Scalia offered what may be the most specific articulation of this view in a dissenting opinion authored when he was a member of the Court of Appeals for the District of Columbia Circuit:

[With]out careful and conscientious fact-finding the anti-discrimination laws can either be frustrated by, or be converted into instruments of, the very evil they are designed to prevent. The court's decision facilitates the latter development, permitting juries to render awards where no solid evidence exists. . . . If this case did not call for a directed verdict, it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury.44

At best, these assorted comments reflect a striking disregard for the strong national policy against employment discrimination that is embodied in federal law. Justice Scalia's comments are even more startling because of the open suggestion that small businesses would be economically wise not to hire minority employees due to potential liability for civil rights violations. These remarks may well reflect the increasing conservatism of the federal courts.45 Although they may not necessarily typify

opinion in Shager v. Upjohn Co., 913 F.2d 398, 406-07 (7th Cir. 1991), which somewhat reluctantly reversed entry of summary judgment for the defendant while disavowing any intent to impose personal views on the law:

So we must reverse. We are not entirely happy in doing so, being perplexed that the middle-aged should be thought an oppressed minority requiring the protection of federal law. But that is none of our business as judges. We are also sympathetic to the view that [if the employer discriminated, the employer] will pay a price in the competitive marketplace, and that the threat of such market sanctions deters age discrimination at lower cost than the law can do with its cumbersome and expensive machinery, its gross delays, its frequent errors, and its potential for rigidifying the labor market. But this sanguine view of the power of the marketplace was not shared by the framers and supporters of the Age Discrimination in Employment Act, and we shall not subvert the Act by upholding precipitate grants of summary judgment to defendants.

Shager, 913 F.2d at 406-07.

43. Bienkowski v. American Airlines, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988) (Jones, J.).
the rationales of all "pretext-plus" courts, these comments strongly suggest that the substantive rule these courts have advanced merits careful examination. Too many civil rights plaintiffs have run aground on the "pretext-plus" rule to permit that rule to continue to stand unchallenged. As this Article shows, this rule has no foundation in law and runs counter to the policies underlying employment discrimination statutes.

I. The Competing Rules Governing Proof of Intentional Discrimination at the "Pretext" Stage

Courts have developed two opposing rules to guide them in determining whether the employment discrimination plaintiffs have proven their causes: the "pretext-only" rule and the "pretext-plus" rule. Before undertaking a critical examination of these rules, a brief review of how each rule operates is in order.

A. The "Pretext-Only" Rule

Most courts of appeals that have considered the plaintiff's burden at the pretext stage have correctly concluded that the plaintiff may prevail simply by showing that the defendant's justification is untrue, without introducing any additional evidence of discrimination. This rule has been advanced by the Courts of Appeals for the Second,\textsuperscript{46} Third,\textsuperscript{47} for notion that virtually all Reagan judicial appointees brought conservative policy preferences to the bench).

46. The leading case in the Second Circuit is Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) ("Burdine made it plain that in addition to directly proving a discriminatory motive for firing, a plaintiff may prevail upon a showing that the employer's given legitimate reason is unworthy of credence . . . ."); see also, Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir. 1991) ("It is enough for the plaintiff to show that the articulated reasons were not the true reasons for the defendant's actions."); Ibrahim v. New York State Dep't of Health, 904 F.2d 161, 166 (2d Cir. 1990) (reaffirming \textit{Dister} standard); Gibson v. American Broadcasting Cos., 892 F.2d 1128, 1132 (2d Cir. 1989) ("evidence [of discrimination] may be established . . . indirectly by showing that the employer's proffered explanation is unworthy of credence"); Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989) ("A showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated."). But see Zahorik v. Cornell Univ., 729 F.2d 85, 94 (2d Cir. 1984) (to prove discrimination in denial of tenure, plaintiff must show more than disagreement about scholarly merits of candidate's academic work or teaching abilities; "[a]bsent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities.");

Graham v. Renbrook School, 692 F. Supp. 102, 107 n.7 (D. Conn. 1988) ("Disbelief of testimony, however, does not alone establish that the opposite of that testimony is in fact the truth. . . . It cannot, therefore, be considered as constituting evidence that is substantial.") (citation omitted).
Fifth, Sixth, Eighth, Ninth, Tenth, and District of Columbia

47. The leading case in the Third Circuit is Chipolini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.) (en banc) ("If the plaintiff [shows] that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent . . . . "), cert. dismissed, 483 U.S. 1052 (1987); see also, Siegel v. Alpha Wire Corp., 894 F.2d 50, 53 (3d Cir.) (plaintiff is only required to show that employer's proffered explanation is false and not that employer acted for discriminatory reasons), cert. denied, 110 S. Ct. 2588 (1990); Bhaya v. Westinghouse Elec. Corp., 922 F.2d 184, 192 (3d Cir. 1990) (Mansmann, J., dissenting) ("[N]ot only is 'smoking gun' evidence not required, but a specially tailored burden-shifting mechanism is available to a plaintiff who cannot produce direct evidence."); White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988) (plaintiff's indirect evidence that he was fired before pension benefits increased raised genuine issue of material fact as to pretext); Roebuck v. Drexel Univ., 852 F.2d 715, 726 (3d Cir. 1988) ("[I]f the plaintiff [proves] that the asserted reasons for the tenure denial were not the actual reasons, then the jury may infer that the employer actually was motivated in its decision by race; plaintiff is not required to provide independent, direct evidence of racial discrimination."); Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258, 262-63 (3d Cir. 1987) ("[T]he inferences from the plaintiffs' prima facie case, together with the testimony provided by the plaintiffs' expert which rebuts the proffered explanation by the defendant, may support a verdict in their behalf."); cert. denied, 488 U.S. 1004 (1989); Jackson v. University of Pittsburgh, 826 F.2d 230, 234 (3d Cir. 1987) (sufficient evidence that criticisms of plaintiff’s performance were “post hoc concoctions” to preclude entry of summary judgment); Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 202 (3d Cir. 1987) ("[A]n ADEA plaintiff can prevail by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age."); cert. denied, 484 U.S. 1019 (1988); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir.) ("a showing that a proffered justification is pretextual is itself equivalent to a finding that the employer intentionally discriminated") (emphasis in original), cert. denied, 469 U.S. 1087 (1984); Brieck v. Harbison-Walker Refractories, 624 F. Supp. 363 (W.D. Pa. 1985) (reaffirming Chipolini standard), opinion amended upon denial of reconsideration, 705 F. Supp. 269 (W.D. Pa. 1986), and aff'd in part and rev'd and remanded in part, 47 Fair Empl. Prac. Cas. (BNA) 1527 (3d Cir. 1987), and cert. dismissed as improvidently granted, 488 U.S. 226 (1988).

48. The leading case in the Fifth Circuit is Thornbrough v. Columbus & G. R.R., 760 F.2d 633, 647 (5th Cir. 1985) ("[P]laintiff is not required to prove that the [defendant] was motivated by bad reasons; he need only persuade the factfinder that the [defendant]'s purported good reasons were untrue."); see also, Norris v. Hartmarx Specialty Stores, 913 F.2d 253, 255-56 (5th Cir. 1990) (plaintiff's proof that the reasons for her discharge were pretextual entitled her to judgment under Title VII); Merrill v. Southern Methodist Univ., 806 F.2d 600, 605 n.6 (5th Cir. 1986) ("[I]f the employer meets this burden of production, plaintiff can resurrect his prima facie case and proceed to trial, by showing that the employer's justifications were pretextual."); Guthrie v. J.C. Penney Co., 803 F.2d 202, 208 (5th Cir. 1986) (sufficient evidence for jury to believe that reasons given for plaintiff's discharge were pretextual and find for plaintiff); Valdez v. Church's Fried Chicken, 683 F. Supp. 596, 632 (W.D. Tex. 1988) (plaintiff may prevail upon a showing of simple pretext, rather than a showing of pretext for discrimination).

Although Thornbrough is the leading case in the Fifth Circuit, at least one recent decision has indicated skepticism about Thornbrough's continued vitality. In Bienkowski v. American Airlines, 851 F.2d 1503 (5th Cir. 1988), the court reversed entry of summary judgment for a defendant in an ADEA case. Nevertheless, Judge Jones cautioned:

Even if the trier of fact chose to believe an employee's assessment of his performance rather than the employer's, that choice alone would not lead to a conclusion that the
employer's version is a pretext for age discrimination. More is required, such as 'direct' evidence of age discrimination, information about the ages of other employees in plaintiff's position, the treatment and evaluation of other employees, or the employer's variation from standard evaluation practices.

Id. at 1508 (footnote omitted). This opinion appears to advocate the "pretext-plus" rule. Moreover, the Bienkowski court qualified Thornbrough by claiming the Thornbrough plaintiff had such "plus" evidence, and by noting that "the Thornbrough court admitted that its decision stretches the ADEA to its limit." Id. Bienkowski specifically disapproved of the Third Circuit's rationale in Chipollini, arguing that there must be "some proof that age motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of age to one ensuring dismissals only for 'just cause' to all people over 40." Id. at 1508 n.6. In addition to Bienkowski, there appears to be some older precedent in the Fifth Circuit for the "pretext-plus" rule. See Reeves v. General Foods Corp., 682 F.2d 515, 523 (5th Cir. 1982) ("It was incumbent upon [plaintiff] to introduce substantial evidence to show that [defendant]'s articulated reasons were pretextual and that he had been discriminated against because of age.") (emphasis in original).

49. The Sixth Circuit appears to follow the "pretext-only" rule, although there is some older precedent for the "pretext-plus" rule. The leading "pretext-only" case is Tye v. Board of Educ., 811 F.2d 315, 319-20 (6th Cir.) ("[P]laintiff may indirectly prove intentional discrimination by showing that the defendants' justifications are untrue and therefore must be a pretext."). cert. denied, 484 U.S. 924 (1987); see also Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 890 (6th Cir. 1988) (applying Tye standard); Shore v. Federal Express Corp., 777 F.2d 1155, 1157 (6th Cir. 1985) (plaintiff proved by preponderance of evidence that defendant's nondiscriminatory reason was not worthy of belief); Lenz v. Erdmann Corp., 773 F.2d 62, 65 (6th Cir. 1985) (per curiam) (trial court erred in finding insufficient evidence of pretext to avoid summary judgment); cf. Miller v. WFIL Radio, 687 F.2d 136, 138-39 (6th Cir. 1982) (reversing entry of judgment for defendant in Title VII case, reasoning that although lower court disbelieved defendant's articulated reason, case must be remanded to determine whether alternative reason offered by lower court but never raised by defendant in first trial might actually have motivated defendant).

At least one older decision in the Sixth Circuit reflects the "pretext-plus" rule. In Brooks v. Ashtabula County Welfare Dep't, 717 F.2d 263 (6th Cir. 1983), cert. denied, 466 U.S. 907 (1984), the court reversed a judgment for plaintiff in a Title VII case, claiming that the district court had improperly found the defendant's reasons unworthy of belief when the plaintiff had not offered "affirmative evidence" that defendant's reasons were pretextual. Id. at 266. The court of appeals claimed that the district court had improperly "tested the justification for its credibility, veracity, and persuasiveness" when it considered the defendant's inability to support its reasons with documentation. Id. at 267. In essence, rather than treating the plaintiff's attack on the defendant's reasons as meeting the plaintiff's burden of disproving those reasons, the court asserted instead that the district court's consideration of evidentiary weaknesses in defendant's case improperly shifted the burden of proof. This analysis is incorrect. See infra notes 216-27 and accompanying text.

50. The leading case in the Eighth Circuit is MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988) ("As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."); see also Goetz v. Farm Credit Serv., 927 F.2d 398, 400-01 (8th Cir. 1991) (reaffirming MacDissi standard); Ingram v. Missouri Pac. R.R., 897 F.2d 1450, 1455 (8th Cir. 1990) (defendant held to have discriminatory intent after asserted reasons were shown to be untrue; record showed that some factor other than defendant's articulated reason operated to result in negative recommendation for plaintiff); Morgan v. Arkansas Gazette, 897 F.2d 945, 951-52 (8th Cir. 1990) (factfinder was permitted to use all available inferences and assess credi-
ibility of witnesses to determine existence of intentional discrimination); Washburn v. Kansas City Life Ins. Co., 831 F.2d 1404, 1408 (8th Cir. 1987) (plaintiff not required to present additional rebuttal testimony after defendant articulated legitimate nondiscriminatory reason; plaintiff's case-in-chief presented evidence on which jury could decide that defendant's reasons for discharge were pretextual); Dace v. ACF Indus., 722 F.2d 374, 379 (8th Cir. 1983) (inquiry in pretext phase "is not one of weighing the quality and quantity of the defendant's evidence against that of the plaintiff, but of determining whether the plaintiff's evidence supports a reasonable inference that [plaintiff] was not demoted for the reasons given"); cf. Wells v. Godfredson Motor Co., 709 F.2d 493, 495 (8th Cir. 1983) (although district court improperly determined that plaintiff had not proven her prima facie case, judgment for defendant in Title VII case was affirmed because defendant's justification was supported by preponderance of evidence).

At least one recent decision in the Eighth Circuit appears to have edged away from the "pretext-only" rule. In Gray v. University of Ark., 883 F.2d 1394 (8th Cir. 1989), the court affirmed entry of judgment for defendant in a Title VII case, noting that although "some of the reasons given . . . appear to be less than weighty, if not almost laughable," the district court had not found them to be false or unworthy of credence. Id. at 1402.

51. Although the law in the Ninth Circuit is not well developed on this issue, the leading case appears to be Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985) modified, 784 F.2d 1407 (1986). In Lowe, the court suggested that evidence of the prima facie case alone suffices to raise a genuine issue of material fact that will avoid entry of summary judgment. Id. at 1009 ("[W]hen a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fide of the employer's articulated reason for its employment decision."). The most recent case in the Ninth Circuit, however, suggests that more than the prima facie case is required. See Lindahl v. Air France, 930 F.2d 1434, 1437-38 (9th Cir. 1991) (Plaintiff cannot defeat summary judgment "simply by restating the prima facie case and expressing an intent to challenge the credibility of the employer's witnesses on cross-examination. She must produce specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible."). Other cases in the Ninth Circuit appear to have adopted the "pretext-only" rule. See, e.g., Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988) ("Pretext is established by showing either that a discriminatory reason more likely than not motivated the employer or that the employer's explanation is unworthy of credence."); Reynolds v. Brock, 815 F.2d 571, 575 (9th Cir. 1987) (genuine issue of material fact found to exist in case brought under Rehabilitation Act, 29 U.S.C. § 701 (1988), because defendant's reasons were discredited by indirect evidence of discrimination); Miller v. Fairchild Indus., 797 F.2d 727, 732-33 (9th Cir. 1986) ("Courts have recognized that in discrimination cases, an employer's true motivations are particularly difficult to ascertain . . . thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage.") (citation omitted), cert. denied, 110 S. Ct. 1524 (1990); Williams v. Edward Apfels Coffee Co., 792 F.2d 1482, 1486 (9th Cir. 1986) (if there is sufficient evidence to cast doubt on credibility of defendant's reason, plaintiff need not produce evidence in addition to that needed to prove prima facie case).

52. The law in the Tenth Circuit is not well developed on this issue. Although several opinions have suggested approval of the "pretext-only" rule, no opinion to date appears to have confronted the issue squarely. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991) ("The burden then shifts back to plaintiff, who must then show that the defendants' reasons are a pretext for discrimination, i.e., the proffered reasons were not the true reasons for the hiring decision."); Pitre v. Western Elec. Co., 843 F.2d 1262, 1266 (10th Cir. 1988) (allowing plaintiff to prove discrimination indirectly by showing that defendant's reason was unworthy of credence); Furr v. AT&T Technologies, 824 F.2d 1537, 1549 (10th Cir. 1987) ("The critical question for the jury is whether it believes the defendant's proffered
Circuits. The federal government has also taken this position in recent litigation. The Court of Appeals for the Third Circuit offered one of the most cogent explanations of the "pretext-only" rule in Chipollini v. Spencer Gifts, Inc., the only en banc decision to date advocating this rule, and later reaffirmed its holding in an unreported decision, Brieck v. Harbison-Walker Refractories. As the Supreme Court granted certiorari in both cases, they merit closer attention as illustrations of how the "pretext-only" rule operates.

Both Chipollini and Brieck were age discrimination cases. The plaintiff in Chipollini was a construction manager for a chain of stores. At age fifty-eight, after ten years of service, the company fired him, informing him that the reason for his discharge was a reduction in expenses reasons for the employment decision, rather than the plaintiff's assertion of impermissible discrimination."), cert. denied, 487 U.S. 1238 (1988); Carey v. United States Postal Serv., 812 F.2d 621, 626 (10th Cir. 1987) (plaintiff did not prove pretext either by direct evidence or by evidence that defendant's reason was not worthy of credence); Beck v. QuickTrip Corp., 708 F.2d 532, 533 (10th Cir. 1983) (district court found that defendant's reasons were "insubstantial and unreasonable" and that plaintiff "had indirectly met her burden of persuasion under Burdine").

53. Although there are relatively few cases on this issue in the Court of Appeals for the District of Columbia Circuit, the leading case appears to be Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986) (plaintiffs had shown that defendant's reason was "unworthy of credence as a matter of law" and "[s]uch a blatantly pretextual defense carries the seeds of its own destruction"); see also King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) ("Burdine makes it absolutely clear that a plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendants' rebuttal should prevail, even if he or she has offered no direct evidence of discrimination."); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984) (permitting indirect evidence that defendant's reasons were unworthy of credence because "[a]bsent a 'smoking gun' or other direct evidence of racial animus, a court would be hard-pressed to ever discern discrimination"); Lanphear v. Prokop, 703 F.2d 1311, 1317 (D.C. Cir. 1983) ("If . . . [plaintiff] shows [defendant's] reason to be specious, then in conjunction with his prima facie case [plaintiff] has carried his burden of proving discrimination by a preponderance of the evidence."); Townsend v. Washington Metro. Areas Transit Auth., 746 F. Supp. 178, 184 (D.D.C. 1990) ("[T]his record contains so many unexplained inconsistencies, irregularities, and holes that the Court simply cannot believe [defendant's] proffered legitimate, nondiscriminatory reasons."); cf. Krodell v. Young, 748 F.2d 701, 707-08 & n.5 (D.C. Cir. 1984) ("We are . . . not squarely presented with the question of whether a discrimination plaintiff can prevail solely on the strength of his or her prima facie case coupled with an effective rebuttal of the employer's explanation.").


and a moratorium on new store construction. A younger employee assumed Chipollini's duties and later his job title. Chipollini sued his employer under the Age Discrimination in Employment Act (ADEA), claiming that age had been a determining factor in his termination. The employer then filed a motion for summary judgment.

In support of its motion, the employer contended that Chipollini had been terminated "because of a reduction in force of executives necessitated by a virtual cessation of store construction and remodeling and because of his indifferent, uncooperative, and ineffective attitude regarding certain special projects." The defendant submitted portions of depositions that supported its evaluation of Chipollini's performance and submitted an affidavit from the president of the company, attesting to the need for a reduction in force of construction management personnel. In response, the plaintiff introduced specific evidence that challenged the defendant's articulated justifications. As in the hypothetical case, however, he had no evidence directly showing that the employer based its decision on age.

The district court concluded that the plaintiff had introduced no evidence that "necessarily" showed that the true reason for his discharge was age discrimination. The court acknowledged that Burdine permits proving pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence." Nevertheless, the court asserted that "on a motion for summary judgment, a plaintiff who relies on the 'indirect' method of proof must at least present the court with some basis for doubting the credence of the proffered explanation." Here, the court asserted, "plaintiff must show that the explanation is a pretext for

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57. Chipollini, 814 F.2d at 895.
58. Id.
59. Id.
60. Id. at 895. The defendant further explained that the replacement employee "seemed more flexible and easy-going, while the latter had become less effective as a worker, in addition to being less cooperative." Chipollini v. Spencer Gifts, Inc., 613 F. Supp. 1156, 1160 (D.N.J. 1985).
61. Chipollini, 814 F.2d at 896.
62. Id. at 900-01. The plaintiff submitted his own affidavit, portions of deposition testimony, and letters of recommendation written after his termination that cast doubt on the credibility of the defendant's reasons. Id.
63. Id. at 896. The district court conceded that the reasons given for firing Chipollini were "subjective ones, but that is sufficient, particularly when the job in question is an executive position involving discretion and personal relations rather than more objective productivity factors." Chipollini, 613 F. Supp. at 1160.
64. Chipollini, 613 F. Supp. at 1160 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).
65. Id.
discrimination."

The court found plaintiff’s evidence insufficient to make such a showing because it simply challenged the employer’s justifications for firing him, but did not also raise an inference of age discrimination. The court concluded:

[N]othing the plaintiff has proffered raises an issue of age as a factor that was considered along with the other intangibles. No statements made to plaintiff, no memos among defendant’s decision-making employees have been submitted; no statistics have been compiled; no pattern or practice of discrimination has been suggested. To allow a jury to infer age discrimination would simply be to invite speculation.

The court therefore granted the defendant’s motion for summary judgment.

Sitting en banc, the Court of Appeals for the Third Circuit reversed the district court’s judgment. Judge Mansmann’s opinion, on behalf of nine of the ten judges participating, explained that the appropriate test on summary judgment was “whether evidence of inconsistencies and implausibilities in the employer’s proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to that [sic] conclusion that the employer did act for discriminatory reasons.”

Here, “[b]ecause Chipollini offered no direct evidence of a discriminatory motive, questions regarding intent and its manifestations are, at this point, subsumed under the inquiry into employer pretext.” Indeed, the court of appeals rejected any requirement of additional evidence, noting that, under Burdine, once all legitimate reasons have been eliminated, it is more likely than not that the defendant acted with impermissible motives. The court explained:

If the plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reason, then the employer’s decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent . . .

The Chipollini court concluded that “the plaintiff is entitled to show that the employer’s explanation was pretextual by proffering evidence which is circumstantial or indirect as well as that which directly shows

66. Id. (emphasis in original).
67. Id. at 1160-61.
68. Id. at 1161.
69. Id.
70. Chipollini, 814 F.2d at 900 (emphasis in original).
71. Id. at 898.
72. Id. at 899.
discriminatory animus (‘smoking gun’ evidence”). Thus, “a plaintiff can prevail by means of indirect proof that the employer’s reasons are pretextual without presenting evidence specifically relating to age.” In announcing this rule, the court cautioned: “A defendant which is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict.” Although the Supreme Court granted a writ of certiorari in Chipollini, it ultimately dismissed the writ pursuant to agreement of the parties.

The Third Circuit soon reaffirmed Chipollini in Brieck. In Brieck, an employer laid off a fifty-five-year-old installation specialist after seventeen years of service. Of the four installation specialists the company laid off, the only one ultimately recalled was the youngest, a thirty-nine-year-old worker who had substantially less experience as an installation specialist than plaintiff. The company claimed that the replacement worker had broader experience than the plaintiff, and that the job now required such broad experience. Like the plaintiff in Chipollini, Brieck introduced evidence to show that the company’s justification was pretextual, arguing in particular that the employer was not even using the replacement worker’s allegedly broader experience. In granting the

73. Id. at 895.
74. Id. at 898 (emphasis added).
75. Id. at 899. The lone dissenting judge, Judge Hunter, argued that the “pretext-plus” rule required affirmance of the district court’s judgment in this case. Id. at 902-04; see infra notes 215, 258 and accompanying text.
76. The parties in Chipollini apparently settled the case before briefing began and thus the Supreme Court dismissed it pursuant to Supreme Court Rule 53 (now Rule 46) without ever hearing argument. See Chipollini v. Spencer Gifts, Inc., 483 U.S. at 1052 (dismissing certiorari pursuant to Supreme Court Rule 53). As of 1987, Rule 53 provided:
Whenever the parties thereto, at any stage of the proceedings, file with the Clerk an agreement in writing that any cause be dismissed, specifying the terms with respect to costs, and pay to the Clerk any fees that may be due, the Clerk, without further reference to the Court, shall enter an order of dismissal.
78. Id. at 365-66.
79. The plaintiff produced evidence from his own deposition and the deposition of the replacement worker to suggest that the additional skills that the replacement worker possessed were not being utilized on the job. From this, plaintiff argued that the employer’s articulated reason for retaining the younger worker instead of rehiring him was a pretext. Id.
employer's motion for summary judgment, however, the district court appeared to make factual findings as to the relative experience of the plaintiff and his replacement.\textsuperscript{80} The court concluded that it could not find that the plaintiff’s age was a determinative factor in his discharge, citing the “absence of proof that defendant’s justification for his layoff is a pretext for age discrimination.”\textsuperscript{81}

Again, the court of appeals reversed the entry of summary judgment and remanded the case for trial. In an unpublished opinion by Judge Mansmann, the court stated: “The district court erred in resolving this factual dispute. The question is not whether the employer’s asserted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible.”\textsuperscript{82} Here, as in Chipollini, “[t]he district court incorrectly required that the ADEA plaintiff’s evidence establish a direct inference that the employer discharged him because of his age.”\textsuperscript{83} In both cases, the theory underlying the court’s analysis was that such evidence would cast doubt on the credibility of the defendant’s articulated explanation.

The Supreme Court granted certiorari in Brieck and heard argument in October of 1987. Six weeks later, however, the Court dismissed the writ of certiorari as improvidently granted. Although the Court’s reasons for dismissing the writ in Brieck remain unexplained, a review of the record indicates that the Court’s determination rested less on its view of the merits and more on the view that the lower court’s decision to reverse the grant of summary judgment was too fact-bound to generate a rule of law.\textsuperscript{84} The legal issue as framed by the employer in the petition

\textsuperscript{80} \textit{Id.} at 366 (“Without considering age, we find that [plaintiff], in comparison to [the replacement worker], has 1. slightly more seniority; 2. slightly poorer performance evaluations; 3. little experience in areas related to installation specialist.”); see Brieck, 47 Fair Empl. Prac. Cas. (BNA) at 1528.

\textsuperscript{81} Brieck, 624 F. Supp. at 366. The court rejected the plaintiff’s claim that his replacement’s additional experience was not being utilized on the job, explaining: “Any question about the appropriateness of how [the replacement] now spends his time edges into the area of judicial scrutiny of business decisions, which is not part of our function.” \textit{Id.} The court reaffirmed its conclusion in a motion for reconsideration, stating that plaintiff’s affidavits were “conclusory and refer to no corroborating evidence.” Brieck, 705 F. Supp. 269, 269 (W.D. Pa. 1986).

\textsuperscript{82} Brieck, 47 Fair Empl. Prac. Cas. (BNA) at 1529.

\textsuperscript{83} \textit{Id.} at 1528.

\textsuperscript{84} Accord Jana E. Cuellar, Comment, \textit{The Age Discrimination in Employment Act: Handling the Element of Intent in Summary Judgment Motions}, 38 Emory L.J. 523, 532-33 n.64 (1989) (Supreme Court briefs in Brieck suggest that plaintiff may have raised other factual issues); see generally The Monrosa v. Carbon Black Export, 359 U.S. 180, 184 (1959) (“Examination of a case on the merits, on oral argument, may bring into ‘proper focus’ a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident.”). Dismissal of a writ of certiorari as improvidently granted, how-
for writ of certiorari was "[w]hether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate."\footnote{5} Thus, the "pretext-only" rule advanced by the Third Circuit in \textit{Chipollini} and \textit{Brieck} appears to have been clearly raised in the initial petition.\footnote{6} Much of the briefing also focused on the "pretext-only" rule. In particular, the Solicitor General's amicus brief filed in support of plaintiff's position contended that the case itself was "unexceptional" but that the employer's advocacy of the "pretext-plus" rule reflected a "double-barreled attack on established Title VII doctrine and on the court of appeals' assessment of the facts of record in light of the doctrine."\footnote{7} Nevertheless, briefing in the Supreme Court also reflected substantial focus on the lower courts' assessment of the factual record rather than on the "pretext-only" rule.\footnote{8} Similarly, although the oral argument focused on the Third Circuit's "pretext-only" rule, the parties also spent considerable time discussing the particular facts of \textit{Brieck}.\footnote{9} This focus ever, occurs for a variety of reasons. \textit{See generally} ROBERT L. STERN \textit{et al.}, \textit{Supreme Court Practice} 286-93 (6th ed. 1986); James F. Blumstein, \textit{The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals}, 26 \textit{VAND. L. REV.} 895, 921-38 (1973). In the absence of an explanatory opinion, one is left to speculate on the Court's motivations in taking such action in both these cases. \textit{See STERN \textit{et al.}, supra}, at 289 ("It is difficult to ascertain the reasons for a dismissal of the writ as improvidently granted when the Court's order expresses none."); \textit{cf.} Blumstein, \textit{supra}, at 929 (Supreme Court should write opinions to justify and explain dismissals of certiorari).


\footnote{6}{The plaintiff phrased the question as follows: "Whether a plaintiff in an action brought pursuant to the [ADEA] must present direct evidence of discrimination or indirect evidence of discrimination in the form of statistical evidence, in order to survive an employer's motion for summary judgment, or may such a plaintiff produce only indirect evidence that the employer's proffered reasons are a pretext for discrimination." Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at i, \textit{Brieck} (No. 87-271).}

\footnote{7}{Brief for the United States and the Equal Employment Opportunity Commission As Amicus Curiae Supporting Respondent at 7-8, \textit{Brieck} (No. 87-271).}

\footnote{8}{\textit{See} Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit at 1-4, \textit{Brieck} (No. 87-271); Brief for Respondent at 16-55, \textit{Brieck} (No. 87-271).}

\footnote{9}{\textit{See} Transcript of Oral Argument at 47-53, \textit{Brieck} (No. 87-271), \textit{microformed} on Oral Arguments of the Supreme Court, 1988 Term, Fiche 12 (Congressional Info. Serv.).}
may well have prompted the Court to dismiss the writ after oral argument, with only Justice White dissenting.  

*Chipollini* and *Brieck* nevertheless represent the general approach of the “pretext-only” courts. Under this majority rule, the courts follow the language of *Burdine* that permits a plaintiff to show pretext “indirectly by showing that the employer’s proffered reason is unworthy of credence.” For these courts, once the plaintiff proves the defendant’s articulated justification to be untrue, this proof is strong evidence that the defendant is concealing a discriminatory motive. The court will presume that if the defendant truly had a lawful motive, the defendant would have advanced it. In the hypothetical case, the plaintiff’s evidence rebutting the accounting firm’s reasons for refusing to hire him would suffice to avoid summary judgment. If the plaintiff succeeded in persuading the court at trial that the defendant’s articulated reasons were untrue, the court would have an ample basis to find that the plaintiff had been discriminated against on the basis of race.

**B. The “Pretext-Plus” Rule**

Despite the prevalence of the “pretext-only” rule, a substantial minority of the federal courts that have considered the issue have adopted the “pretext-plus” rule. The leading proponent of the rule has been the

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90. The exchange at the close of oral argument appears to support the Solicitor General’s assertion that the case hinged largely on an assessment of the factual record. The following colloquy occurred between the defendant’s lawyer and an unnamed Justice:

Counsel: [T]he issue here is whether a reasonable jury could conclude that there was age discrimination.

Counsel: [The case involves] two important principles. The court below said you could look at one piece of evidence and not the entire record as a whole. . . . [T]hat was inconsistent with this Court’s opinion in *Anderson* and in *Celotex*. Number two, the standard that the Court would apply into the AD[E]A is one which really does not deal with the ultimate question of discrimination, but simply whether or not you can raise a sufficient question of the judgment itself so as to allow a jury then to infer discrimination.

Question: I’m sorry that that wasn’t the question you presented to us when you asked us to take this case. The question presented is set forth in your petition is whether a plaintiff who alleges intentional discrimination can survive summary judgment merely — merely by questioning his employer’s business judgment without presenting any evidence, direct or indirect, that his employer’s judgment was, in fact, motivated by an intent to discriminate. That’s an interesting question. What you’ve just been talking about isn’t.

*Id.* at 52-53. The writ of certiorari was dismissed six weeks later. 488 U.S. 266.

Court of Appeals for the First Circuit, although there recently has been increasing debate within that court over the rule. In addition, opinions

92. Until recently, the First Circuit’s adherence to the “pretext-plus” rule seemed to be well settled. The leading case in the Court of Appeals for the First Circuit appears to be White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir.) (“Merely casting doubt on the employer’s articulated reason does not suffice to meet the plaintiff’s burden of demonstrating discriminatory intent . . . .”), cert. denied, 469 U.S. 933 (1984); see also Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 191 (1st Cir. 1990) (“the appellant cannot prove pretext solely by contesting the objective veracity of appellee’s action.”); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) (“[W]hen . . . the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer’s real motive: age discrimination.”); Freeman v. Package Mach. Co., 865 F.2d 1331, 1336 (1st Cir. 1988) (plaintiff’s burden on rebuttal “required persuasion in two respects”—to prove that the reasons are false, and to prove that they were pretexts aimed at masking age discrimination); Keyes v. Secretary of the Navy, 853 F.2d 1016, 1026 (1st Cir. 1988) (“it was plaintiff’s burden not only to show that the defendants’ proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts aimed at masking sex or race discrimination.”) (emphasis in original); Menzel v. Western Auto Supply Co., 848 F.2d 327, 330 (1st Cir. 1988) (“[E]ven if Menzel had succeeded in creating some doubt about the objective correctness of defendant’s decision to fire him, that would not be enough to sustain plaintiff’s appeal.”); Menard v. First Sec. Servs. Corp., 848 F.2d 281, 287 (1st Cir. 1988) (plaintiff’s evidence that he was performing well, introduced to counter defendant’s argument that he was performing poorly, was found to do “little but dispute the objective correctness of [defendant]’s decision.”); Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987) (“[E]vidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question.”); Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986) (“although [the plaintiff] did present evidence contesting the factual underpinnings of the reasons proffered by [the defendant] . . ., these, without more are insufficient in this case to present a jury question.”); cf. Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) (Plaintiff must prove pretext for discrimination, but “[t]he reasonableness of the employer’s reasons may of course be probative of whether they are pretexts.”).

93. Recently, the First Circuit’s “pretext-plus” rule has come under criticism from Judge Bownes, prompting some debate among other First Circuit judges. In Connell v. Bank of Boston, 924 F.2d 1169 (1st Cir. 1991), cert. denied, 111 S. Ct. 2828 (1991), the court affirmed entry of summary judgment for defendant in an ADEA case. The court affirmed the “pretext-plus” rule that the plaintiff must do more than cast doubt on the employer’s rationale, but must also show discriminatory intent. Id. at 1172. The court claimed, however, that this rule does not require “plus” evidence, stating:

We do not suggest that the plaintiff must, necessarily, offer affirmative evidence of age animus in addition to rebutting the employer’s evidence. Rather, the evidence as a whole, whether direct or indirect, must be sufficient for a reasonable factfinder to infer that the employer’s decision was motivated by age animus.

Id. at 1172 n.3. The court emphasized, however, that “in some factual settings, the mere showing of the falsity of the employer’s stated reasons may, along with the other facts and circumstances in the case, give rise to a reasonable inference of age discrimination.” Id. at 1175 (emphasis added). This statement strongly suggests that the “plus” requirement remains intact in the First Circuit. Judge Bownes, concurring in part and dissenting in part, claimed that “[t]he requirement that a plaintiff rebut an employer’s articulated reasons and also directly prove age discrimination is contrary to the express teaching of the Supreme Court . . . I believe our precedent is contrary to the explicit teaching of [Burdine].” Id. at 1182 (Bownes, J., concurring in part and dissenting in part). See also Olivera v. Nestle P.R., Inc., 922 F.2d
supporting the rule can be found in the Courts of Appeals for the Fourth, Seventh, and Eleventh Circuits, as well as some scattered cases. Perhaps because of this controversy, some recent decisions in the First Circuit have simultaneously asserted the “pretext-plus” rule and claimed that the burden may be met without additional evidence, a position that seems to be internally contradictory. See Villanueva v. Wellesley College, 930 F.2d 124, 127-28 (1st Cir.) (To show pretext, “the plaintiff must introduce evidence that the real reason for the employer’s action was discrimination, [but need not necessarily] adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant’s justification in order to prevail either at the summary judgment stage or at trial.”), cert. denied, 60 U.S.L.W. 3262 (U.S. Oct. 7, 1991); Campiano v. Banco Santander P.R., 902 F.2d 148, 158 (1st Cir. 1990) (“Once so glaring a pretext was unmasked, an important underpinning to a finding of discrimination clicked into place;” proof of pretext, when considered in light of surrounding circumstances, was sufficient to prove discrimination).

94. The law in the Fourth Circuit on this point is somewhat unclear, although there appears to be a strong preference for the “pretext-plus” approach in recent opinions. See, e.g., Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991) (“the plaintiff must then prove that the reason given was a mere pretext for discrimination and that age was a more likely reason for the employment action”); Spencer v. General Elec. Co., 894 F.2d 651, 659 (4th Cir. 1990) (“If the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant’s proffered nondiscriminatory reasons are pretextual and that the employment decision was based on a sexually-discriminatory criterion.”); Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988) (“[plaintiff] cannot avoid summary judgment in this case simply by refuting [defendant]’s non-age-related reasons for firing him”); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 243 (4th Cir. 1982) (Circumstantial evidence produced by plaintiff to show pretext was insufficient; “Without benefit of the presumption [of discrimination], age simply exists on this evidence as one of any number of possible reasons—including poor business judgment by the employer . . . for the demotion.”) (citations omitted); Gries v. Zimmer, Inc., 742 F. Supp. 1309, 1315 (W.D.N.C. 1990) (“To successfully prove pretext, the plaintiff must establish, first, that the stated reason . . . was not the true reason and, second, that the real reason for the employment action was discrimination.”); see also Collins v. Allied-Signal, Inc., 128 F.R.D. 643, 646 (E.D. Va.) (“The Fourth Circuit has placed the burden upon plaintiffs asserting ADEA claims to show that age was a determining factor in the termination.”), aff’d, 889 F.2d 1084 (4th Cir. 1989).

Although it did not clearly embrace the “pretext-plus” rule, one en banc decision by the Fourth Circuit reinstated a judgment for a defendant in a Title VII sex discrimination case, where a panel of that court earlier had reversed the district court’s judgment as clearly erroneous. Beatty v. Chesapeake Ctr., Inc., 835 F.2d 71, 73 (4th Cir.) (en banc), rev’g 818 F.2d 318 (4th Cir. 1987). In Beatty, the plaintiff claimed that she had been rejected for a job after being hired because she was pregnant when she first reported for work. Beatty, 818 F.2d at 320. The employer claimed that it had rejected the plaintiff because a supervisor had understood her to refuse to take a particular medical test required for employment because of her pregnancy, although testimony at trial appears to have established that she actually never refused to take the test. Id. The district court concluded that the defendant could have misunderstood the plaintiff’s comments about the test and that she had not been the victim of discrimination. Id. On appeal, a panel of the Fourth Circuit reversed, claiming that the employer’s story was inherently implausible for several reasons. Id. at 321. First, no reasonable person would have construed plaintiff’s comments as a refusal to take the medical test. Second, the employer
persisted in refusing to hire the plaintiff once the confusion was clarified. Finally, there was evidence that the employer had asked plaintiff when she had learned of her pregnancy, suggesting that the employer may have taken her pregnancy into account when making its decision. *Id.* The panel therefore concluded, with one member dissenting, that the defendant's explanation was "inherently incredible as a matter of law and must, therefore, be regarded as a pretext for discrimination." *Id.* at 322. Upon rehearing en banc, the court of appeals reversed the panel and reinstated the judgment of the district court, asserting that the defendant's articulated rationale was "neither so internally inconsistent nor so implausible as to possess no believability." *Beatty*, 835 F.2d at 73. It is unclear from the opinion, however, whether this result reflects adherence to the "pretext-plus" rule or whether it simply reflects deference to a district court's finding that the articulated reason had not been disproven.

There are a few cases in the Fourth Circuit that appear to follow the "pretext-only" rule. See *Monroe v. Burlington Indus.*, 784 F.2d 568, 572 (4th Cir. 1986) (plaintiff proved that defendant's reason was not credible and thus successfully proved discrimination); cf. *Lewis v. AT&T Technologies*, 691 F. Supp. 915, 920 (D. Md. 1988). In *Lewis*, the court held:

Once a court has determined that there is sufficient evidence to make out a *prima facie* case of employment discrimination, then evidence of a nondiscriminatory reason for the discharge does no more than pose a factual issue for the factfinder to resolve after having the opportunity to evaluate the credibility of the witnesses through first-hand observation of their demeanor at trial.

*Id.*

95. There is some ambiguity in the precedent in the Court of Appeals for the Seventh Circuit, although there appears to be a preference for the "pretext-plus" rule. See, e.g., *North v. Madison Area Ass'n for Retarded Citizens-Developmental Ctrs. Corp.*, 844 F.2d 401, 406 (7th Cir. 1988) (plaintiff's burden not met simply by showing pretext; he must also show that "but for" discrimination he would not have been discharged); *Beard v. Whitley County REMC*, 840 F.2d 405, 411 (7th Cir. 1988) ("We have held previously that pretext in this context means 'pretext for discrimination.' "); *Friedel v. City of Madison*, 832 F.2d 965, 975 (7th Cir. 1987) ("Plaintiffs must allege and support not only pretext, but also that the [defendant's] actions were pretext for discrimination based on a prohibited characteristic . . . .") (emphasis in original); *Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.) (approving district court's holding that plaintiff "has the ultimate burden of persuading the court that the reasons advanced . . . are a pretext and that a substantial or motivating factor in the defendant's decision was discrimination but for that discrimination, the plaintiff would have been appointed." ) (emphasis in original), cert. denied, 483 U.S. 1006 (1987); *Samuelson v. Durkee/French/Airwick*, 760 F. Supp. 729, 738 (N.D. Ind. 1991) ("disproving the employer's articulated nondiscriminatory reason is among the methods of proving pretext . . . but a Title VII claimant also must show that the articulated reason was a pretext for discrimination.") (citations omitted).

Other decisions in the Seventh Circuit appear to advance a version of the "pretext-only" rule in which proof that the defendant's reason is untrue permits, but does not compel, an inference of discrimination. As this Article will show, like the "pretext-plus" rule, this version of the "pretext-only" rule is also inconsistent with *Burdine*. See *infra* Part II.B(2)a. One recent Seventh Circuit case to take this position is *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990) In *Shager*, the court found: "If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. . . . It is important to understand however that the inference is not compelled." *Id.* The *Shager* court also noted that a case where the plaintiff has evidence only of a prima facie case and of the falsity of the defendant's justification "would be the kind of case that just barely survives the employer's motion for summary judgment: a case where the evidence of discrimination is entirely circumstantial, indirect." *Id.* at 402. See also *Visser v. Packer Eng'g Co.*, 924 F.2d 655, 657 (7th Cir. 1991) (en bane) ("If the employer offers a
pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age."); Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298, 1302 (7th Cir. 1990) (“The fact that [defendant’s] witnesses may have appeared less than truthful about at least two key factors . . . raised the reasonable inference that [defendant] was trying to hide some factor in its decision to fire [plaintiff].”); Benzies, 810 F.2d at 148 (although apparently requiring plaintiff to prove both pretext and discriminatory intent, the court concedes that “[a] demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law.”); Reeder-Baker v. Lincoln Nat’l Corp., 834 F.2d 1373, 1377 (7th Cir. 1987) (“employee thus bears the burden not only of persuading the trier of fact that the employer dissembled, but also that the employer’s pretextual reason hides an unlawful one”; nevertheless, if plaintiff successfully shows that employer’s reason is unworthy of credence, “[s]uch a showing permits, but does not compel, an inference of discrimination”); Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 18 (7th Cir. 1987) (“if a plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reasons, the employer’s decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent”), overruled on other grounds by Coston v. Plitt Theatres, 860 F.2d 834 (7th Cir.), and cert. denied, 485 U.S. 1007 (1988); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.) (“If the employer is trying to hide its real reason, that effort—coupled with the evidence making up the employee’s prima facie case—may convince the trier of fact that the real reason needed to be hidden and therefore probably was discriminatory.”), cert. denied, 484 U.S. 977 (1987); Smith v. BJ’s Wholesale Club, 54 Fair Empl. Prac. Cas. (BNA) 690 (N.D. Ill. 1990) (“A finding of pretext will lead to the determination that the real reason was discrimination... but that determination is not an inevitable consequence of a finding of pretext.”); cf. La Montagne v. American Convenience Prods., 750 F.2d 1405, 1409-10 (7th Cir. 1984) (“[t]he special virtue of the indirect method of proof is that it allows victims of age discrimination to prevail without presenting any evidence that age was a determining factor in the employer’s motivation”).

The confusion created in the Seventh Circuit by these two contradictory lines of authority is reflected in Veatch v. Northwestern Memorial Hosp., 730 F. Supp. 809 (N.D. Ill. 1990). In Veatch, the court denied defendant’s motion for summary judgment on all but one count of a Title VII complaint, noting that a plaintiff may prove the “ultimate issue” of intentional discrimination “indirectly by establishing that the non-discriminatory explanation proffered by the employer is not credible.” Id. at 816. This appears to be a statement of the “pretext-only” rule. The court then rejected, however, what it termed the “mechanical approach” advocated by Chipollini, which “recognizes that an employer may be held liable simply for lying about the real reason for discharging a member of a class protected by federal discrimination laws.” Id. at 818, 819. The court claimed that this approach

requires employers to face a trial whenever they have not advanced their real reasons for firing a protected employee who can assert adequate job performance. It is doubtful that Congress intended that Title VII require employers to produce, at the risk of a full-fledged trial and civil liability, their true reasons for firing employees when those true reasons have nothing to do with race or sex discrimination.

Id. at 819. This is the rationale ordinarily advanced to support the “pretext-plus” rule. The court then concluded: “Although the prima facie cases raise an inference of discrimination, the factfinder is not compelled to award victory to the plaintiff simply because the employer has not been candid about the real reason for the firing.” Id. at 819. This appears to be a statement of the Seventh Circuit’s variation of the “pretext-only” rule.

96. The Eleventh Circuit has two contradictory lines of authority on this issue. The leading Eleventh Circuit case advancing the “pretext-plus” rule is Clark v. Huntsville City Bd. of Educ., 717 F.2d 525 (11th Cir. 1983). The Clark court reversed a verdict for plaintiff in a Title VII case, stating:
opinions and dissents in the “pretext-only” circuits.97

The “pretext-plus” courts reject the widely held notion that a plaintiff can prevail in an employment discrimination case merely by disproving the defendant’s articulated justification. These courts purport to accept the traditional Burdine model of proving intentional discrimination, and thus must acknowledge that one component of that model is proof that the defendant’s proffered reason is untrue. Nevertheless, the “pretext-plus” courts disagree sharply with the “pretext-only” courts over the evidentiary significance of this showing.

The court thus may not circumvent the intent requirement of the plaintiff’s ultimate burden of persuasion by couching its conclusions in terms of pretext; a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability.

Id. at 529. A number of cases appear to follow this approach. See, e.g., Hawkins v. Ceco Corp., 883 F.2d 977, 981 n.3 (11th Cir. 1989) (“[M]erely establishing pretext, without more, is insufficient to support a finding of racial discrimination”), cert. denied, 110 S. Ct. 2180 (1990); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (“In the absence of evidence pointing to race as the explanation for the employer’s conduct, we must hold that [the plaintiff] has failed to meet his burden of proof.”); Robertson v. Georgia Dep’t of Corrections, 725 F. Supp. 533, 536 (S.D. Ga. 1989) (plaintiff must show “that the reasons given by the employer are pretextual, and that the employer’s actions were in fact motivated by discriminatory intent”).

The leading Eleventh Circuit case advancing the “pretext-only” rule is Sparks v. Pilot Freight Carriers, 830 F.2d 1554 (11th Cir. 1987). In Sparks, the court reversed the entry of summary judgment for an employer in a Title VII case because there was a genuine issue of fact as to whether the articulated reason was the real reason for the employer’s action. Id. at 1563-64. The employer claimed that it fired the plaintiff because when her supervisor’s secretary called her for another purpose, she informed the secretary that she would be out sick that evening. The employer took the position that “under its unwritten work rule an employee is required not only to notify the employer of her intention to be out sick, but also to initiate the call in which the notice is given.” Id. at 1563. The court stated that “[t]he implausibility of the alleged justification is sufficient to create a genuine issue of material fact as to whether [the defendant’s] articulated reason is pretextual.” Id. at 1564. A number of cases in the Eleventh Circuit have followed Sparks. See Hill v. Seaboard Coast Line R.R., 885 F.2d 804, 810-11 (11th Cir. 1989) (plaintiffs may show pretext by showing that employer’s reason is untrue); Roberts v. Gadsden Memorial Hosp., 835 F.2d 793, 798-99 (11th Cir.) (defendant’s proffered reason was not a legitimate nondiscriminatory reason because it was not credible), modified on other grounds, 850 F.2d 1549 (11th Cir. 1988); Williams v. City of Montgomery, 550 F. Supp. 662, 666-67 (M.D. Ala. 1982) (plaintiff showed that defendant’s proffered reasons were untrue), aff’d, 742 F.2d 586 (9th Cir. 1984), and cert. denied, 470 U.S. 1053 (1985).

According to proponents of the "pretext-plus" rule, a plaintiff "cannot meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason."98 Under the "pretext-plus" rule, the word "pretext" in the Burdine model means more than simply a "fabricated explanation."99 Rather, these courts treat the term "pretext" as if it were synonymous with "pretext for discrimination."100 Merely disproving the defendant's reason may demonstrate that the reason is a "pretext," but it does not demonstrate that the reason is a pretext for discrimination.101 Thus, under the "pretext-plus" rule, the plaintiff must

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99. See Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.) ("It is easy to confuse 'pretext for discrimination' with 'pretext' in the more common sense (meaning any fabricated explanation for an action."); cert. denied, 484 U.S. 977 (1987); EEOC v. Clay County Rural Tel., 694 F. Supp. 563, 575 (S.D. Ind. 1988) ("[T]he plaintiff bears the burden of not only persuading the court that the defendant dissembled, but also that the defendant's pretextual reason hides an unlawful one."); Gray, 658 F. Supp. at 723 ("[T]he court is convinced that plaintiff does not necessarily win even if the court is not convinced of the soundness of the reasons given or even if the reasons given are false. . . . Pretext doesn't simply mean that the reasons given are wrong or false."); Holly v. City of Naperville, 603 F. Supp. 220, 230 n.4 (N.D. Ill. 1985) ("'Pretext for the purposes of the McDonnell test is not the equivalent of false. . . . While falsity may prove a pretext for something, 'pretext' for McDonnell purposes means pretext of non-discrimination.").
100. See Keyes v. Secretary of the Navy, 853 F.2d 1016, 1026 (1st Cir. 1988) (plaintiff must show not only pretext, but also "that those reasons were pretexts aimed at masking sex or race discrimination.") (emphasis in original); Menzel v. Western Auto Supply Co., 848 F.2d 327, 328-29 (1st Cir. 1988) (plaintiff must prove that "reasons proferred are but a pretext, a 'coverup' for the wrong reasons"); Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.) (plaintiff must show both pretext and "that a substantial or motivating factor in the defendant's decision was discrimination.").
101. See Hawkins v. CECO Corp., 883 F.2d 977, 981 n.3 (11th Cir. 1989) ("Of course, merely establishing pretext, without more, is insufficient to support a finding of racial discrimination . . . . The plaintiff must show he suffered intentional discrimination because of his race.") (citation omitted), cert. denied, 110 S. Ct. 2180 (1990); Palucci v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989) ("But it does not follow . . . that if the plaintiff does rebut the employer's rebuttal — not in the sense of demolishing it but in the sense of contesting it with his own, contrary evidence — he automatically defeats summary judgment and secures his right to a trial."); Menzel v. Western Auto Supply Co., 848 F.2d 327, 330 (1st Cir. 1988) ("[W]e should emphasize that, even if [plaintiff] had succeeded in creating some doubt about the objective correctness of [defendant']s decision to fire him, that would not be enough to sustain plaintiff's appeal."); Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988) ("While [the] evidence may tend to demonstrate that [defendant']s termination of [plaintiff] was arbitrary, it does not reflect any intent to discriminate on the basis of age. [Plaintiff]"
produce some additional evidence other than the evidence supporting the prima facie case and other than the fact of the defendant's deception.  

The typical approach of the "pretext-plus" courts may be illustrated by examining the opinion of the Court of Appeals for the First Circuit in *Menard v. First Security Services Corp.* In that case, the employer, a large security company, discharged plaintiff from his management position when he was fifty-five years old. The plaintiff had been hired at age fifty-two and had been assigned to oversee security operations for a large account. During his first sixteen months on the job, he received praise for his outstanding performance. The employer claimed that his performance then deteriorated because of poor communication with the customer, and the company transferred the plaintiff to another position in sales and marketing. Defendant conceded that the plaintiff's performance in this position and in his next promotion as Assistant Area Manager was at least adequate. The company then promoted plaintiff to a position as Area Manager, but claimed that it again received numerous complaints from the most important client in that area about poor communications, understaffing, and poor service. When the client

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102. See *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 902 (3d Cir.) (en banc) (Hunter, J., dissenting) (not enough for plaintiff to show pretext; plaintiff "must go further, and show that the proffered explanation is a pretext specifically for age discrimination"), *cert. dismissed*, 483 U.S. 1052 (1987); *Richi v. Fruehauf Corp.*, 724 F. Supp. 1197, 1199 (W.D.N.C. 1989) ("An additional requirement to the *McDonnell Douglas* elements is that the plaintiff in an ADEA case must also introduce some evidence that the employer's conduct was actually based on age.") (emphasis in original).

103. 848 F.2d 281 (1st Cir. 1988).

104. *Id.* at 283.

105. *Id.*

106. *Id.* at 283-84.

107. *Id.* at 284.
threatened to terminate the account, the defendant decided to fire the plaintiff. The company replaced him with a thirty-year-old man.\footnote{108}

On this record, the district court granted summary judgment to the defendant, and the court of appeals affirmed. Although the court expressed some doubts as to whether the plaintiff had established a prima facie case,\footnote{109} it nevertheless assumed that he had and proceeded to consider whether the plaintiff could rebut the defendant’s legitimate nondiscriminatory reason—that he had been fired “as a result of criticisms received from two of [defendant]’s largest clients.”\footnote{110} The plaintiff contended that this reason was pretextual in light of his favorable job evaluations during the early part of his career, the company’s promotion of him to various positions even after the first set of complaints, his supervisor’s testimony that the clients’ problems could not be attributed to his performance, and his own testimony.\footnote{111}

The court found the plaintiff’s evidence to be inadequate to avoid summary judgment. The court asserted that the plaintiff had the burden “of proving, by a preponderance of the evidence, that defendant’s articulated reason was pretextual, \textit{and} that the real reason for the discharge was age discrimination.”\footnote{112} According to the opinion, the plaintiff’s evidence merely challenged the business judgment of his employer, and could not show discriminatory intent. “The issue in this ADEA action,” the court asserted, “is not whether [defendant] made a wise decision in determining that its problems with [its client] reflected adversely upon [plaintiff]. The issue is whether [defendant] fired [plaintiff] because of his

\footnote{108. \textit{Id.}}
\footnote{109. The court quoted language in \textit{Loeb v. Textron, Inc.}, 600 F.2d 1003, 1013 (1st Cir. 1979), which suggests that a plaintiff who challenges a termination must show as part of his prima facie case “that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative.” \textit{Menard}, 848 F.2d at 285. The defendant had introduced evidence in support of its motion for summary judgment to show that customers had serious communication problems with the company during the plaintiff’s tenure. \textit{Id.} at 285-86. In response, the plaintiff argued that he was not the cause of these problems, and he submitted the affidavit of his supervisor during this time period that stated the problems the customers had encountered did not stem from plaintiff’s performance. \textit{Id.} at 286. The court of appeals discounted the significance of this evidence because the supervisor had not been involved in discussions between the disgruntled client and higher-level company officials. \textit{Id.} at 286-87. On a motion for summary judgment, however, the court is required to consider the submissions in the light most favorable to the nonmoving party. \textit{See supra} note 12. It is questionable whether the court did so in this case.}
\footnote{110. \textit{Menard}, 848 F.2d at 287.}
\footnote{111. \textit{Id.}}
\footnote{112. \textit{Id.} (emphasis added).}
The court then concluded that the plaintiff had insufficient evidence of age discrimination:

[Plaintiff]'s proffered evidence does little but dispute the objective correctness of [defendant]'s decision. That is, while not disputing that [defendant]'s two clients were indeed unhappy at the times he was Manager, [plaintiff] insists that he was not to blame. But even assuming it could be shown that [defendant] was wrong to blame him, this would be insufficient to prove pretext or discriminatory intent. The evidence suggests no other reason for his discharge other than [client dissatisfaction with his performance].

Thus, the court upheld summary judgment for the employer.

This case illustrates both the rationale of the "pretext-plus" rule and its fundamental flaw. Plaintiff introduced evidence that cast substantial doubt on his employer's reasons for firing him. Taking the facts in the light most favorable to the plaintiff, there are at least two explanations available on this record for the factual conflict. One is the explanation offered by the court of appeals: that if the plaintiff in fact was not responsible for the various problems with the clients, then the defendant merely made an error in business judgment when it fired him. But there is another possible explanation for the dispute. The defendant may not have been mistaken. Rather, the employer may have known that the plaintiff was not at fault, but may have used the complaints as an excuse to fire him because it actually considered the plaintiff to be too old for the job. If a jury believed the testimony of the plaintiff and his supervisor, and drew inferences favorable to the plaintiff from the testimony, the jury easily could conclude that the defendant did not err, but rather that the

113. Id.

114. Id. The court also discounted plaintiff's claims that he had additional evidence showing age discrimination. First, plaintiff asserted that when the company fired him, he asked the vice president for Security Services if it was because of his age, and the vice president did not respond. Plaintiff claimed that this should be treated as an admission, but the court asserted that, in context, the vice president's silence had limited probative force because the vice president had not made the final decision to fire him. Id. Second, plaintiff sought to rely upon a company vice president's admission that the reason plaintiff's predecessor as area manager, a twenty-five-year-old male, had not been fired when he had encountered similar problems was that "[h]e was young, it was his first job. He had learned a lot we felt and it hadn't cost us the ultimate. He deserved another chance, which we'd have done for anybody else." Id. at 288. The court discounted the significance of this remark as well, claiming that this comment did not show disparate treatment of plaintiff because he himself had not been fired when he had encountered problems in his first assignment. Id. at 289. These findings by the court usurped the role of the factfinder in determining the appropriate weight to be given to these comments. In particular, the court of appeals appears to have ignored the significance of the use of the word "young" by the vice president as a justification for disparate treatment in an ADEA case. Instead, the court took the position that the fact that the plaintiff was hired at age fifty-two made it seem "less likely that his discharge three years later was based on company prejudice against older people." Id. at 289 n.4.
defendant lied. As this Article demonstrates, the logical inference from the lie is that the defendant lied to conceal its discriminatory purpose. The Menard court, like other "pretext-plus" courts, erred in discounting the possibility that the employer lied and in deciding without a trial that the employer simply made a mistake.

Consider the dramatic effect the "pretext-plus" rule has on employment discrimination cases by returning to the hypothetical with which this Article began. The defendant has articulated two legitimate, nondiscriminatory reasons for its failure to hire the plaintiff: his excessive salary demands and his overqualification for the job. The plaintiff's evidence strongly suggests that neither reason is true. Nevertheless, under the "pretext-plus" rule, the defendant's summary judgment motion will be granted. The plaintiff has shown only that he may be able to refute the defendant's explanation, but has no additional evidence to prove that the false explanation conceals discriminatory animus. The "pretext-plus" rule effectively prevents the plaintiff from presenting live testimony and having the factual question of "mistake" versus "intent" resolved at trial. Although the rule may ease congestion in the federal courts, it deprives a plaintiff who may have been the victim of discrimination of the opportunity to prove it.

C. How Much "Plus" Evidence Do the "Pretext-Plus" Courts Require?

Having shown that the "pretext-plus" courts require some additional evidence for plaintiffs to prevail, the next step before undertaking a detailed critique of the rule is to identify the "plus" evidence that would suffice to meet this burden. As this brief review will show, a plaintiff in a "pretext-plus" jurisdiction may be hard-pressed to generate additional evidence that will satisfy these courts.

For example, reliance solely on the evidence supporting the prima facie case ordinarily will not suffice for the "pretext-plus" courts,115 even though the Supreme Court has indicated that such evidence, when considered in conjunction with effective cross-examination of the defendant, could suffice to show pretext.116 Other courts have objected that factual assertions contained in the plaintiff's own affidavit, without additional

115. See Grigsby v. Reynolds Metals Co., 821 F.2d 590, 596 (11th Cir. 1987) ("[A] plaintiff may not in all cases merely rest on the laurels of her prima facie case in the face of powerful justification evidence offered by the defendant."); Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 254 (1st Cir. 1986) (upon rebuttal, prima facie case dissolves and prima facie case cannot be equivalent of a finding of discrimination); Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) (prima facie case may suffice for finding of discrimination only if defendant fails to articulate legitimate nondiscriminatory reason).

corroboration, also are insufficient to defeat summary judgment. Although a mere unsupported statement by a plaintiff that discrimination motivated the employer's decision probably would not suffice even for "pretext-only" courts, the "pretext-plus" courts have not always distinguished such statements from other testimony offered by plaintiffs. For example, in one case the plaintiff supported an assertion of discrimination with testimony that he had received regular promotions and pay raises, including a pay raise six months before his discharge, that he had received no complaints with respect to his performance, and that he had been discharged shortly after reaching the company's mandatory retirement age. Nevertheless, the court treated this evidence as insufficient to raise an inference of discrimination, claiming that the plaintiff "did nothing more than state his conclusion that he was terminated because of his age."

Some "pretext-plus" courts further insist that the plaintiff's additional evidence must be limited to that described in McDonnell Douglas — evidence that similarly situated employees were treated differently than plaintiff, or statistical evidence showing disparities relating to race, age, or sex. This conflicts with the express assertion by the Supreme

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117. See Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312, 1316 (5th Cir. 1986) ("[plaintiff]'s subjective belief of age discrimination, however genuine, cannot alone be the basis of judicial relief"); Hornsby v. Conoco, Inc., 777 F.2d 243, 246 (5th Cir. 1985) ("[W]e cannot allow subjective belief to be the basis for judicial relief when an adequate nondiscriminatory reason for the discharge has been presented."). But see Jackson v. University of Pittsburgh, 826 F.2d 230, 236 (3d Cir. 1987) ("There is simply no rule of law that provides that a discrimination plaintiff may not testify in his or her own behalf, or that such testimony, standing alone, can never make out a case of discrimination that will survive a motion for summary judgment."), cert. denied, 484 U.S. 1020 (1988).


119. Id. at 206. But cf. Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1465, 1467 (5th Cir.) (permitting opinion of coworker in ADEA case that employer was engaged in "youth movement"), cert. denied, 110 S. Ct. 129 (1989).

120. For example, in Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990), the court stated:

Particularly in a case like this one, where the employee's evidence of pretext is tenuous, these fragmentary tendrils do not suffice, without more, to prove that [defendant]'s dismissal of [plaintiff] was motivated by age discrimination. Here, there is no 'more' — no statistical evidence, no demonstration of discriminatory corporate policies, no instances of disparate treatment, no invidious pattern of age-related discharges or forced early retirements.

Id. at 10. See also Bienkowski v. American Airlines, 851 F.2d 1503, 1508 (5th Cir. 1988) ("More is required, such as 'direct' evidence of age discrimination, information about the ages of other employees in plaintiff's position, the treatment and evaluation of other employees, or the employer's variation from standard evaluation practices."); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 904 (3d Cir.) (en banc) (Hunter, J., dissenting) (direct evidence is not required, but plaintiff should have indirect evidence such as comparative or statistical data),
Court in its recent decision in *Patterson v. McLean Credit Union*\(^{121}\) that "[i]n [proving pretext, plaintiff] is not limited to presenting evidence of a certain type. . . . The evidence which [plaintiff] can present in an attempt to establish that [defendant's] stated reasons are pretextual may take a variety of forms."\(^{122}\)

To meet this requirement in the hypothetical case, for example, in addition to evidence undercutting the defendant's articulated justifications, the plaintiff might produce evidence that the firm has never hired a black accountant despite the fact that one hundred black candidates had applied. Similarly, he might have other black applicants testify that their interviews were equally cursory and that the hiring partner expressed doubts about their qualifications and interest in the job. Such evidence, however, is not always readily available. More importantly, the absence of such evidence does not negate the probability that discrimination occurred in this case. The plaintiff could have been the only black applicant for the job, or the employer might not have records reflecting the race of past applicants. Nevertheless, in some "pretext-plus" courts, even if the plaintiff could generate this type of circumstantial evidence, it still might be treated as inconclusive.\(^{123}\)

Indeed, some "pretext-plus" courts seem unwilling to accept even comparative evidence—evidence comparing the plaintiff's treatment to that of another similarly situated employee—as enough of a "plus" to prove discrimination. An example of how one "pretext-plus" court has

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\(^{121}\) *cert. dismissed*, 483 U.S. 1057 (1987); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 558 (7th Cir. 1987) (plaintiff had no direct evidence, and "none of the usual forms of indirect evidence, such as statistics or comparable cases"); Aguayo v. R.J. Reynolds Tobacco Co., 670 F. Supp. 1094, 1097 (D.P.R. 1987) ("Attacking the quality of the defendant's business decision is insufficient to prove pretext. . . . Furthermore, he presented no statistical evidence to show that this firing conforms to a pattern of hiring or retaining younger managerial employees.") (citation omitted); Holly v. City of Naperville, 603 F. Supp. 220, 231 n.4 (N.D. Ill. 1985) ("[P]laintiff in an ADEA claim must produce some evidence, such as employer statements, statistics or a pattern and practice of discrimination in order to survive a summary judgment motion.").


122. *Id.* at 187. Similarly, in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court explained:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

*Id.* at 324.

treated comparative evidence is *Nix v. WLCY Radio/Rahall Com- munications*. In *Nix*, a radio station fired a black radio announcer for allegedly violating its " antimoonlighting" policy, which precluded its employees from holding other jobs. The station learned about the alleged violation at the same time that it learned of a similar allegation about a white coworker. Although neither employee had actually violated the antimoonlighting rule, the station retained the white employee but refused to rehire the black employee. After the black employee filed charges of discrimination, the station replaced him with another black employee. The radio station asserted at trial that its justification for firing the plaintiff was its original belief that he had violated the antimoonlighting rule, despite the fact that, according to the court, this belief was mistaken. The district court found this articulated reason "incredible in light of the facts found herein" and held for the plaintiff.

The Court of Appeals for the Eleventh Circuit took the unusual step of reversing the district court's finding of discriminatory intent as clearly erroneous. The court asserted that the lower court's ruling violated the "pretext-plus" rule, explaining:

The court thus may not circumvent the intent requirement of the plaintiff's ultimate burden of persuasion by couching its conclusion in terms of pretext; a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability.

Here, although the court admitted that it found "some support for the district court's conclusion that the articulated reason for Nix's firing was

124. 738 F.2d 1181 (11th Cir. 1984).
125. *Id.* at 1183.
126. Nix filed a claim of discrimination with the EEOC in March of 1976. The radio station hired a black replacement later that summer. *Id.*
127. *Id.* at 1184.
128. *Id.*
129. *Id.* at 1187. In most contexts, the "clearly erroneous" standard allows great deference to the trial court. *See Fed. R. Civ. P. 52(a) ("Findings of fact shall . . . not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."). In Pullman-Standard v. Swint, 456 U.S. 273 (1982), the Supreme Court explained: "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Id.* at 287. *See also Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinders' choice between them cannot be clearly erroneous . . . . This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.") (citations omitted). Such reversals are more common, however, when the "pretext-plus" rule is applied. *See supra* note 38.
not the true reason," it concluded that there was insufficient "plus" evidence to support a finding of discriminatory intent.

The court conceded that Nix could have successfully proven a prima facie case "based on differential application of work or disciplinary rules," even though he had been replaced ultimately by another black male. Moreover, in Nix, the plaintiff seems to have had appropriate "plus" evidence—both evidence that rebutted the defendant's articulated justification by showing that he had not violated the station's antimoon-lighting policy, and comparative evidence showing that the defendant had treated a similarly situated white employee more favorably. The court of appeals agreed that this evidence could have been sufficient to support a finding that the articulated reason was pretextual. Nevertheless, the court reversed the district court's factual finding of discrimination.

The purported reason offered by the Nix court for this conclusion was that the plaintiff could not prove a prima facie case because the two employees were not similarly situated. The white employee's alleged violation had occurred before his tenure with the radio station, and thus the policy did not apply to him at all, while the black employee's alleged violation had occurred while he was subject to the policy. This distinction seems specious at best, because in fact neither of the employees actually violated the station's policy, and thus the timing of their nonviolations could have no factual significance. Nevertheless, the court com-

131. Id. at 1185.
132. Id. The defendant had claimed that Nix had not proven a prima facie case under McDonnell Douglas Corp. because he had been replaced by a member of the same protected class. The court rejected this contention because there are alternative methods of proving the prima facie case that do not focus on the race of the replacement worker. Id. It explained that in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), the Supreme Court held that an employer would violate Title VII if it fired black employees who stole cargo but did not fire white employees who had committed the same offense. Similarly, here Nix alleged that he had been treated differently from a similarly situated white employee. Thus, "[t]he prima facie case is established even if the plaintiff's replacement is also a member of the protected class." Nix, 738 F.2d at 1185. In this case, "Nix could therefore establish a prima facie case of racial discrimination by establishing that he was fired but [the white worker] was retained for 'nearly identical' conduct." Id. at 1186. See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) ("Especially relevant . . . would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired."). The Nix court did note that the race of the plaintiff's replacement was not irrelevant to the determination of pretext, although such evidence could support either Nix's allegation that the defendant hired a black replacement to avoid liability for its discrimination, or defendant's allegation that its hiring of a black replacement indicated that it had not acted with racial animus in firing Nix. Nix, 738 F.2d at 1186 n.1.
133. Id, 738 F.2d at 1187.
134. Id. at 1186.
pounded its error by claiming that this comparative evidence had no probative value on the issue of discriminatory intent. Thus, the court asserted: "Although WLCY's decision to fire Nix, and its refusal to reconsider that decision, might seem unfair or even 'incredible' to outside observers, Nix cannot prevail in his Title VII action for he has not established discriminatory intent." The court concluded: "Nix may have shown that he was fired for violating a rule that he did not violate. But Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules."

As in many "pretext-plus" decisions, the Nix court deprived the plaintiff of the opportunity to prove his case circumstantially. Admitting that the rationale offered by the defendant might seem unbelievable, the court nevertheless determined that the only conclusion to be drawn from the employer's conduct was that the employer was misguided. But there is another conclusion that is at least equally available under these facts—the conclusion that the defendant intentionally discriminated against the plaintiff. The Nix decision is particularly troubling because the plaintiff appears to have had precisely the type of evidence that the "pretext-plus" courts claim to seek, and because the court of appeals reversed the district court's factual finding of discrimination after a full trial on the merits.

Before joining the Supreme Court, Justice Scalia also demonstrated some skepticism about the value of comparative evidence in Carter v. Duncan-Huggins, Ltd., a case decided while he was still a member of the Court of Appeals for the District of Columbia Circuit. In a strongly worded dissent, then-Judge Scalia criticized a finding of discrimination in a case where plaintiff, the only black employee in a small company, produced evidence at trial that she routinely had been treated differently from white employees. The court of appeals upheld the jury finding of discrimination, explaining that "[t]he plaintiff demonstrated that she was singled out for unique treatment in all aspects of her employment."
Then-Judge Scalia objected to any reliance on such testimony to support a finding of intentional discrimination. He asserted: “The majority’s analysis of the evidence involves a basic error of law—that evidence of differential treatment constitutes evidence of racial motivation for differential treatment.” He went on to state: “The ‘numerous other pieces of circumstantial evidence’ the majority refers to—the ‘many discrete instances of disparate treatment and broken promises’—are not circumstantial evidence of racial motivation, but only (if they were established) of an intent to disfavor [plaintiff]. That is not against the law.”

In this narrow view, the term “discrimination” is not synonymous with “discrimination on the basis of race,” because even a black plaintiff who proves with comparative evidence that she was treated differently from similarly situated white employees has not produced any circumstantial evidence of racial motivation. In other words, under Justice Scalia’s extreme version of the “pretext-plus” rule, proof that the defendant offered an untrue justification to conceal intentional unfavorable treatment of the plaintiff would not suffice to prove impermissible discrimination absent some specific evidence of illegal bias. This approach is inconsistent with that expressed by the Supreme Court in International Brotherhood of Teamsters v. United States, in which the Court described disparate treatment cases as follows: “The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical although it can in some situations be inferred from the mere fact of differences in treatment.”

If taken literally, Justice Scalia’s view would virtually foreclose plaintiffs’ use of comparative evidence unless there was some direct evidence of discriminatory intent. For example, in his dissent in Carter, then-Judge Scalia further criticized the district court’s finding of discrim-

140. Id. at 1239 (Scalia, J., dissenting).
141. Id. at 1246 (Scalia, J., dissenting) (emphasis added).
142. Id. at 1246-47 (Scalia, J., dissenting). Indeed, then-Judge Scalia apparently relied on the testimony of the defendant’s witnesses that there was no intent to discriminate on the basis of race, while rejecting plaintiff’s testimony to the contrary as “conclusory.” Id. at 1246.
144. Id. at 335 n.15 (emphasis added); see Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In Patterson, the Court stated:
[Plaintiff] could seek to persuade the jury that [defendant] had not offered the true reason for its promotion decision by presenting evidence of [defendant]'s past treatment of [her] . . . . While we do not intend to say this evidence necessarily would be sufficient to carry the day, it cannot be denied that it is one of the various ways in which [plaintiff] might seek to prove intentional discrimination on the part of [defendant].

Id. at 188.
ination, based on plaintiff's rebuttal of defendant's articulated reasons, because "in the entire trial there was only one fragment of attempted proof of racial motivation [uncontroverted evidence of a racist joke told by a supervisor]...[t]he only shred of evidence, gathered from [plaintiff's] one-and-one-half years of employment...that could conceivably suggest any racial animus against her."145 Such a requirement, however, would violate the clear admonition of the Supreme Court that it is error for a court to require a plaintiff to produce direct evidence of discrimination.146 Nevertheless, even with direct evidence, some plaintiffs have failed to persuade "pretext-plus" courts to permit them to reach a factfinder with their discrimination claims. For example, one ADEA plaintiff who had been fired produced not only evidence challenging the reasons given for his dismissal, but also evidence that a security manager for the corporation told another employee that the plaintiff had "literally outlived his usefulness, that it was time to make way for new people within the ranks."147 The security manager also stated that the plaintiff and his supervisor did not get along: either the supervisor had "a difficult time relating" to the plaintiff because the plaintiff was old enough to be her

145. Carter, 727 F.2d at 1245 (Scalia, J., dissenting).

146. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. ...[T]he District Court should not have required [plaintiff] to submit direct evidence of discriminatory intent."); International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) ("[T]he McDonnell Douglas formula does not require direct proof of discrimination."); cf. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination."). The rule may be different in mixed motive cases. In Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989), the Court proposed a new method of proof for mixed motive cases, in which there is evidence of both discriminatory and nondiscriminatory motives for the employer's decision. In such cases, the Court held that the burden of persuasion shifts to the defendant to prove that the same employment decision would have been reached absent the discriminatory motive. See id. at 258 (Brennan, J., with Marshall, Blackmun, & Stevens, JJ.). Justice O'Connor concurred in this rule but indicated that before the burden would shift, "a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."). Id. at 276 (O'Connor, J., concurring) (emphasis added). As Justice O'Connor appears to have been the fifth vote for this rule, it is unlikely that the mixed motive rule will apply to any cases other than cases in which the plaintiff has presented direct evidence of discrimination. Indeed, so-called mixed motive cases may actually be cases in which the plaintiff has sufficient direct evidence of discrimination to raise an inference that discrimination was at least one motivating factor in the decision. See Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1313 n.2 (7th Cir. 1989); Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1568 (2d Cir. 1989). At least one commentator disagrees. See Charles A. Sullivan, Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII, 56 BROOK. L. REV. 1107, 1157-61 (1991).

father, or the plaintiff had difficulty because the supervisor was young enough to be his daughter. The security manager's two statements appear to raise the age discrimination issue directly. The Court of Appeals for the First Circuit nevertheless upheld the district court's refusal to permit the case to go to the jury. The court claimed that there was insufficient evidence to show that the security manager's views were relied upon by the company in making its decision to fire the plaintiff. Moreover, the court took the position that evidence of age-related conflicts between plaintiff and his younger supervisor "could equally have been discrimination on the part of [plaintiff]." Once again, the court usurped the role of the factfinder in determining the credibility and weight of these statements, which at a minimum were admissions by an employee of the defendant and thereby had some probative value. In short, even under the "pretext-plus" rule, direct evidence of discriminatory animus should suffice to permit a plaintiff to survive summary judgment on the issue of intentional discrimination. That it does not always do so casts substantial doubt on the rule's theoretical underpinning.

With the probative value of direct, comparative, and statistical evidence in doubt in "pretext-plus" jurisdictions, the only method of proof left would appear to be circumstantial proof—evidence that undercuts the credibility of the defendant's articulated reason. This evidence, however, is precisely the type of evidence rejected by the "pretext-plus" courts. Ironically, it is likely to be the easiest evidence for the plaintiff to present.

148. Id.
149. Id. at 255.
150. Id. The court continued: "[A]lthough [plaintiff] did present evidence contesting the factual underpinnings of the reasons proffered by [defendant] for firing [plaintiff], these, without more are insufficient in this case to present a jury question." Id. Judge Aldrich filed a separate opinion, dubitante, in which he expressed concern that the court had improperly deprived the plaintiff of his right to a jury determination of his age discrimination claim. If a defendant has to give a reason, and offers one, can it be ruled as a matter of law that the jury has to credit it? It may be that somehow this is so here because of plaintiff's ultimate burden of showing pretext, but if, as it would seem, the court is saying that plaintiff cannot make a case for the jury by affirmatively showing the reason was untrue, I think the defendant has escaped too easily. Id. at 260 (Aldrich, J., dubitante). See also Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9-10 (1st Cir. 1990) (rejecting evidence in ADEA case that plaintiff's supervisor had commented in a report that the defendant's sales force was "getting too old" as insufficient "plus" evidence because the plaintiff was not a member of the sales force but rather a manager; "It is too large a leap to apply the report's conclusions to managers — let alone to attempt to draw an inference of discriminatory intent toward those in managerial positions."); Menard v. First Sec. Serv. Corp., 848 F.2d 281, 288-89 (1st Cir. 1988) (employer explained that another employee with work record similar to that of plaintiff had not been fired because he was "young," but this evidence, coupled with evidence that employer's explanation was untrue, insufficient to avoid entry of summary judgment for employer).
obtain, because it frequently involves evidence of the plaintiff’s own qualifications or work performance. The question is whether rejection of the probative value of such evidence has any principled basis. Part II of this Article answers this question.

II. The Fallacy of the “Pretext-Plus” Rule

The question underlying the “pretext-plus” debate is simple. Can an employment discrimination plaintiff prevail simply by catching the defendant in a lie? In order to resolve this issue, two questions must be answered. First, is the presumption of discrimination rebutted if the defendant’s articulated justification is found to be untrue? On this initial point, the “pretext-plus” courts are correct in answering yes. As the next section will show, under Burdine and traditional evidentiary principles, the defendant’s legitimate nondiscriminatory reason rebuts the presumption of discrimination regardless of whether the reason later proves to be false, and the presumption may not be revived once it has been rebutted. Contrary to the conclusion of many “pretext-plus” courts, however, the destruction of the presumption does not end the inquiry.

The second question to be considered is whether the plaintiff can prevail, even in the absence of the presumption, by disproving the defendant’s articulated reason and then relying on the defendant’s lie as evidence of discriminatory intent. As to this question, both Burdine and traditional evidentiary principles clearly support the “pretext-only” rule. The following section shows that the evidence supporting the prima facie case, taken in conjunction with the evidentiary inference that may be drawn from the defendant’s lie, suffices to prove intentional discrimination. After showing the analytical framework for the “pretext-plus” rule to be fallacious, the Article considers some of the practical arguments that have been advanced in its support.

A. Can the Defendant Rebut the Presumption of Discrimination with a Legitimate Nondiscriminatory Reason That Later Proves to Be Untrue?

The first issue to be considered is whether an untrue reason suffices to rebut the presumption of discrimination established by the prima facie case. As will be shown, both the Supreme Court’s opinion in Burdine and the law of evidence indicate that even a false justification is sufficient to rebut the presumption.
Return to the hypothetical case, in which the plaintiff has proven his prima facie case, thereby entitling him to a presumption of discrimination. Assume first that the accounting firm failed to articulate any reason for its decision, and instead simply stood silent in the face of the presumption. Under *Burdine*, the defendant would lose as a matter of law, because, as the Court explicitly stated: "If the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." The Court has explained that a defendant who offers no justification for his conduct will be presumed to have discriminated because "these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Once the accounting firm did articulate legitimate, nondiscriminatory reasons for its conduct, however, that evidence destroyed the presumption of discrimination. Nevertheless, permissible inferences that could be derived from the evidence supporting the prima facie case survive and may be considered by the trier of fact.

The issue is how to treat a defendant’s reason that the plaintiff later proves to be untrue. Is such a reason the equivalent of the defendant’s standing silent, in which case the presumption would not be rebutted? Or does such a reason meet the requirement in *Burdine* of “articulating” a legitimate, nondiscriminatory reason, thereby destroying the plaintiff’s principal advantage in an employment discrimination case?

Surprisingly, the Supreme Court has not explicitly resolved this point. Nevertheless, it seems clear that *Burdine* permits the presumption of discrimination to be rebutted by a false reason for the employment action. First, in *Burdine*, the Court explicitly stated that “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons,” suggesting that the truthfulness or falsity of the defendant’s articulated reason is irrelevant at this stage. As will be seen, some “pretext-plus” courts have construed this statement to mean that drawing an inference of discrimination from the defendant’s false reason would shift the burden of proof. A more logical explanation of this statement is that the Court simply sought to re-emphasize that the defend-
The statement, however, does not conclusively determine whether a defendant may meet its burden of production with evidence that later proves to be untrue. Logically, the answer must be yes because if *Burdine* were read to require that the truth or falsity of the defendant's reason be determined before the presumption of discrimination is destroyed, then the step of proving pretext would be redundant. Rather, under *Burdine*, the purpose of requiring the defendant to justify its conduct is simply to "raise[ ] a genuine issue of fact as to whether it discriminated against the plaintiff." Indeed, it is not until the third stage of the model—the pretext stage—that the court must decide which version of the facts it believes.

Second, the Court never suggested in *Burdine* that the reason offered by the employer must be believed to satisfy the employer's burden. It merely insisted that the justification be supported by "admissible evidence" and be "legally sufficient to justify a judgment for the defendant." As the next section shows, there is an analytical distinction between evidence that is credible, and thus legally sufficient to support a judgment, and evidence that ultimately is credited by the finder of fact. In fact, the *Burdine* Court explicitly recognized the possibility that defendants might fabricate reasons in order to destroy the plaintiff's presumption of discrimination, but it nevertheless asserted that this possibility would not undermine the three-part model it had developed.

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155. *See id.* at 255 n.8.
156. *Id.* at 254-55.
157. *See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983) ("[A]t the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation. . . . [T]he district court must decide which party's explanation of the employer's motivation it believes.") (footnote omitted).
158. *Burdine*, 450 U.S. at 258.
159. *Id.* at 255.
160. *Id.* at 258. In reaching this conclusion, the Supreme Court considered the contrary approach that the Fifth Circuit took in *Burdine*. The court of appeals had required defendants to *prove* rather than to *articulate* a legitimate, nondiscriminatory reason for the employment decision, following a rule it had established in *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977). *See Burdine v. Texas Dept of Community Affairs, 608 F.2d 563, 567 (5th Cir. 1979), vacated, 450 U.S. 248 (1981). The reason for adopting this rule was the fear that "[i]f an employer need only articulate — not prove — a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions." *Turner*, 555 F.2d at 1255. The court explained:

> For example, an employer could articulate as his reason for dismissal that an employee had a poor attendance record when in fact the employee had a good attendance record. The employee's attendance record would be presumed to be poor, and the employee would have to show that his poor attendance record was not the real reason for his dismissal.

*Id.*
Third, allowing a reason that later proves to be false to rebut the presumption serves the policies underlying imposition on defendant of a burden of producing, but not proving, a legitimate, nondiscriminatory reason. These policies, articulated by the Court in Burdine, suggest that the truth or falsity of the reason simply is not at issue at this stage. According to the Court in Burdine, the defendant’s legitimate nondiscriminatory reason serves two functions: presenting a legitimate reason for the employment action, and “fram[ing] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”161 Moreover, the Court stated that “[t]he sufficiency of the defendant’s evidence should be evaluated by the extent to which it fulfills these functions.”162 Both these functions are fulfilled by a defendant’s articulated justification that is later proven to be false. First, such a reason presents an arguably legitimate basis for the employment action at issue. Second, it frames the factual issue so that the plaintiff knows what the defendant’s justification is and then may attack its credibility.

Permitting the employer to rebut the presumption of discrimination by offering a reason that later proves to be false is fully consistent with the Burdine formulation.163 The next question to consider is whether this conclusion is supported by the law governing presumptions generally. As the next subsection demonstrates, under the Federal Rules of Evidence, presumptions are rebutted by contrary evidence even if the evidence later proves to be untrue.

Nevertheless, in Burdine, the Supreme Court expressly rejected this rationale, explaining:

We do not believe, however, that limiting the defendant’s evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant’s explanation of its legitimate reasons must be clear and reasonably specific. . . . Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff’s access to the Equal Employment Opportunity Commission’s investigatory files concerning her complaint. . . . Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext.

Burdine, 450 U.S. at 258 (citations omitted).

161. Burdine, 450 U.S. at 255-56.
162. Id. at 256.
163. See Gray v. University of Ark., 883 F.2d 1394, 1401 (8th Cir. 1989) (“An employer may meet its intermediate burden of production by articulating even an untrue reason for terminating a member of a protected class.”); Tye v. Board of Educ., 811 F.2d 315, 319 (6th Cir. 1987) (“It is clear that Burdine allows the defendant to satisfy his intermediate burden by offering an untrue reason for the decision.”).
(2) Traditional Evidentiary Principles

In traditional evidentiary terms, the issue of what is needed to meet the defendant's intermediate burden in Burdine hinges on defining the quantum of evidence necessary to meet a burden of production and thereby rebut a presumption. Under the Federal Rules of Evidence, presumptions are governed by Rule 301, which provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.\textsuperscript{164}

Rule 301 reflects the so-called "bursting bubble" theory of presumptions.\textsuperscript{165} Under this theory, once the opposing party meets its burden of production, the presumption disappears from the case and no longer has any evidentiary significance.\textsuperscript{166} In Burdine, for example, the Court explained that upon articulation of a legitimate nondiscriminatory reason, the presumption of discrimination "drops from the case."\textsuperscript{167}

\textsuperscript{164} FED. R. EVID. 301.
\textsuperscript{165} See Hugh J. Beard, Jr., Title VII and Rule 301: An Analysis of the Watson and Atonio Decisions, 23 AKRON L. REV. 105, 116-26 (1989) (tracing history of Rule 301); Mack A. Player, The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases, 49 Mo. L. REV. 17, 21 n.12 (1984) (asserting that Burdine Court adopted a modified version of the "bursting bubble" theory, because "[o]nce the presumption is met by contradictory evidence, it ceases to have any probative value."). Some commentators have suggested that Rule 301 has done little to clarify the complex law of presumptions. See 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 300-01 (1990) ("Despite the thousands of pages that have been written since the days of Thayer describing, defining and detailing the consequences of presumptions, the subject remains elusive and confusing. The difficulty lies not so much in deciding what a presumption is, but in determining what a presumption does.") (footnotes omitted); WRIGHT ET AL., supra note 12, § 5122, at 552 ("Rule 301 deals with one of the most complex topics in the law of evidence."); Edmund M. Morgan, Presumptions, 12 WASH. L. REV. 255, 255 (1937) ("Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair.").
\textsuperscript{166} WEINSTEIN & BERGER, supra note 165, at 300-04 ("[O]nce the applicable standard is met, the presumption disappears and the case is decided as though there had never been a presumption.").
Rule 301 does not define, however, what is meant by "going forward with evidence to rebut or meet the presumption." Rather, it merely emphasizes that the burden that shifts to the opposing party—the employer in an employment discrimination case—is a burden of production, not persuasion. The principal difference between a burden of production and a burden of persuasion is that the party with the burden of persuasion must convince the factfinder that its version of the facts is more likely than not to be true. The party with the burden of production has no such requirement. Rather, that party need only introduce evidence that "is sufficient to support a finding contrary to the presumed fact."

Under the "bursting bubble" theory, the truth of a defendant's evidence is irrelevant to whether defendant has met its burden of rebutting a presumption. One of the leading commentators on the law of evidence has stated that, under the bursting bubble theory, the presumption disappears "whenever there is evidence in the case from which a jury could reasonably find the non-existence of the presumed fact. It is immaterial that neither judge nor jury believes the testimony." Therefore, on the threshold issue of whether the presumption has been rebutted, it appears


170. See id. § 338, at 953 ("The evidence must be such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved . . . .").

171. See id. § 344, at 975; Wright et al., supra note 12, § 5126, at 608-09; Belton, supra note 40, at 1216 ("The burden of producing evidence . . . is the obligation imposed upon a party during trial to present evidence on the element at issue. The evidence presented must be of sufficient substance to permit the factfinder to act upon it.").

172. It is important to distinguish between evidence that is credible and evidence that is truthful. In this context, credible evidence is evidence that is capable of being believed. Evidence may be credible—that is, capable of being believed—but ultimately found to be untruthful because the factfinder does not believe the testimony. See David W. Louisell & Christopher B. Mueller, Federal Evidence § 69, at 555 (1977). According to these authors, under the bursting bubble theory:

[The evidence introduced to controvert the presumed fact need only convince the judge to the point of concluding that the jury could reasonably find in favor of the party against whom the presumption is directed on the issue involved. Under this view, the question whether the evidence is believed by the jury is extraneous to the judge's function.

Id. See generally Edward W. Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5, 18 (1959) (under the bursting bubble theory, "evidence to overcome a presumption must be credible, substantial, sufficient to support a finding, or of like purport").

173. Weinstein & Berger, supra note 165, at 300-03 (emphasis added) (citing Edmund W. Morgan, Basic Problems of Evidence 34-36 (1962)); see Miguel A. Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 Stan. L. Rev. 1129, 1145 n.91 (1980) (test under bursting bubble theory is "one of sufficiency and not credibility").
to be settled, both under Burdine and under traditional evidentiary principles, that a presumption may be rebutted by a lie.\(^\text{174}\)

(3) Alternative Theories for Retaining the Presumption of Discrimination if the Defendant’s Reason Is Proven to Be Untrue

Although the analysis under Burdine and traditional evidentiary principles appears to be straightforward, not all courts have been willing to permit an employer to rebut the presumption of discrimination with a reason that later proves to be untrue. Such a rule arguably gives the employer a strong incentive to fabricate nondiscriminatory reasons for the employment decision at issue.\(^\text{175}\) Under this scenario, the lying defendant is in a better position than the defendant who says nothing in defense of its actions, because the presumption of discrimination has been

\(^{174}\) Nevertheless, this issue may be the most difficult one for the “bursting bubble” theory. Cf. Christopher B. Mueller, Instructing the Jury upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301, 12 LAND & WATER L. REV. 219, 243 (1977) (The bursting bubble theory “runs into deep trouble in cases in which (i) only a presumption can carry the issue to the jury, (ii) the opponent of the presumed fact introduces sufficient evidence of its nonexistence to support a finding thereof, . . . but (iii) this counterproof is disbelieved.”) (emphasis in original).

\(^{175}\) Although no court appears to have yet addressed this issue, permitting a defendant to improve its litigating position by lying at the intermediate stage of an employment discrimination trial may pose an ethical dilemma for the defense attorney as well. Under the ethical rules, an attorney must not knowingly “fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the clients,” Model Rules of Professional Conduct Rule 3.3(a)(2) (1989), and must not knowingly “offer evidence that the lawyer knows to be false.” Id., Rule 3.3(a)(4). If the lawyer does offer false material evidence “and comes to know of its falsity, the lawyer shall take reasonable remedial measures.” \textit{Id.} Such “reasonable remedial measures” in a civil proceeding may include, if necessary, disclosure of the deception to the court. \textit{Id.}, Rule 3.3 cmt. In an employment discrimination case, a defense attorney who presented false testimony as to the employer’s legitimate nondiscriminatory reason, and later came to know of its falsity, would be obligated to disclose the perjury to the court if lesser remedial measures failed. Furthermore, knowingly presenting a false nondiscriminatory reason in a motion for summary judgment would also violate Rule 3.1 of the Model Rules of Professional Conduct and would likely violate Rule 11 of the Federal Rules of Civil Procedure as well. See Model Rules of Professional Conduct Rule 3.1 (1989), which states: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law,” and Fed. R. Civ. P. 11, which states:

The signature of an attorney or party constitutes a certificate by the signee that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

\textit{Id.}
destroyed by the lie.\textsuperscript{176} The plaintiff who once had a presumption in his favor now holds a substantially weaker position. With the mandatory presumption gone, the factfinder is free to infer the presumed fact from the evidence that once supported the presumption but is not required to do so.

In light of these concerns, at least two different rationales have been advanced, primarily by "pretext-only" courts, for retaining the presumption of discrimination. In addition to the concern about employer fabrications, these rationales are motivated to a significant extent by the notion that the presumption of discrimination is a necessary component of plaintiff's proof. Before demonstrating the weakness in that analysis, the two rationales for preserving the presumption will be addressed.

\textbf{a. The "Resurrection" Rationale}

The "resurrection" rationale holds that the presumption of discrimination, which disappears upon articulation of a legitimate, nondiscriminatory reason, resurrects if the plaintiff later proves that reason to be untrue. The Court of Appeals for the Fifth Circuit advanced this theory in \textit{Thornbrough v. Columbus and Greenville Railroad Co.},\textsuperscript{177} a 1985 case reversing entry of summary judgment for the employer in an ADEA

\textsuperscript{176} During oral argument in \textit{Brieck}, two unidentified Justices raised this point with counsel for the employer in the following colloquy:

\textbf{Question}: In your view is [sic] the summary judgment stage, is the defendant better off if he puts in no evidence at all or if he puts in a false defense and it's proven to be false? Would [sic] be in the same position in both or would [sic] be better off under one rather than the other?

\textbf{Question}: Better than lying.

[Defense Counsel]: He would be better off actually in that scenario putting in a false reason.

\textbf{Question}: I thought that was your position.

\textbf{Question}: Exactly.

Transcript of Argument at 27, Harbison-Walker Refractories v. Brieck, 47 Fair Empl. Prac. Cas. (BNA) 1527 (3d Cir. 1987) (No. 87-271), \textit{microformed on} Oral Arguments of the Supreme Court, 1988 Term, Fiche 12 (Congressional Info. Serv.), \textit{cert. dismissed as improvidently granted}, 488 U.S. 226 (1988). In contrast, the Solicitor General and the Equal Employment Opportunity Commission argued in \textit{Brieck} that this was a fundamental weakness of the "pretext-plus" rule, asserting that "if the plaintiff shows that the defendant's proffered explanation is a pretext, he should be left, at the very least, in the same position he would be in if he had established an unrebutted prima facie case." Brief for the United States and the Equal Employment Opportunity Commission As Amicus Curiae Supporting Respondent at 13, \textit{Brieck} (No. 87-271), \textit{microformed on} U.S. Supreme Court Records and Briefs 1988/89 FO Card 6 of 7 (Congressional Info. Serv.).

\textsuperscript{177} 760 F.2d 633 (5th Cir. 1985).
case. In that case, the court adhered to the "pretext-only" rule and permitted the plaintiff to prove discrimination indirectly, stating: "Although [defendant] makes much of [plaintiff]'s lack of affirmative proof of discrimination, [plaintiff] is not required to prove that the [defendant] was motivated by bad reasons; he need only persuade the factfinder that the [defendant]'s purported good reasons were untrue."

The *Thornbrough* court asserted that *Buridine*'s provision for "indirect" proof hinges on "the resurrection of the presumption initially created by the plaintiff's prima facie case." The court explained that under *Buridine* and the Supreme Court's earlier decision in *Furnco Construction Corp. v. Waters*, once all legitimate reasons have been eliminated, the employer is presumed to have acted on the basis of discriminatory animus. The *Thornbrough* court then argued:

By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, we presume that the employer was motivated by discriminatory reasons.

The court therefore concluded: "Thus, in our view, unlike Humpty-Dumpty, the employee's prima facie case can be put back together again, through proof that the employer's proffered reasons are pretextual."

The "resurrection" theory has been justifiably criticized by some "pretext-plus" opinions. To the extent that it suggests that the pre-

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178. *Id.* at 646. In *Thornbrough*, a railroad company discharged plaintiff from his position as vice president. He was fifty-six years old and had been employed by defendant for five years. Upon his termination as part of a furlough for economic reasons, the company divided his duties among three younger employees. The company did not terminate other younger employees holding positions similar to that of plaintiff. *Id.* at 637. The plaintiff had no direct evidence, statistical evidence, or evidence of a general pattern of disfavoring older employees. *Id.* at 643. Nevertheless, the court held that evidence that the company discharged older workers while retaining similarly situated younger employees sufficed to prove a prima facie case. *Id.* at 645. Moreover, the plaintiff's dispute with the employer over the reasons for his termination sufficed to raise a genuine issue of material fact. *Id.* at 647.

179. *Id.* at 646-47.

180. *Id.* at 639.


183. *Id.* at 640. See also Merrill v. Southern Methodist Univ., 806 F.2d 600, 605 n.6 (5th Cir. 1986) ("If the employer meets this burden of production, plaintiff can resurrect his prima facie case, and proceed to victory, by showing that the employer's justifications were pretextual."); Valdez v. Church's Fried Chicken, 683 F. Supp. 596, 633 (W.D. Tex. 1988) ("[T]his Court believes it is appropriate to resurrect the presumption of discrimination after plaintiff has shown pretext. This court does not find resurrection of the presumption of discrimination to be an unwarranted departure from *Buridine*.").

184. See Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir.) (rejecting suggestion that inference revives upon showing of pretext as "formalistic approach . . . not in keeping with
 presume itself may be revived, the "resurrection" theory is inconsistent both with Burdine and with Rule 301 of the Federal Rules of Evidence. Under Burdine and its progeny, the presumption of discrimination disappears upon articulation of the employer's justification. Nothing in Burdine suggests that the presumption can later be restored if the articulated justification proves to be untrue. Moreover, such a result would violate Rule 301. Under Rule 301, the presumption disappears once the opposing party has met its burden of production. Restoring the presumption would be inconsistent with the "bursting bubble" theory advanced by that Rule. The "resurrection" rationale therefore provides little support for plaintiffs seeking to retain the presumption of discrimination.

b. The "Nonrebuttal" Theory

These same weaknesses are apparent in the "nonrebuttal" theory advanced by some courts, which treats a presumption rebutted by a lie as if it had never been rebutted at all. In Bishopp v. District of Columbia, for example, the Court of Appeals for the District of Columbia Circuit asserted that a false explanation offered by a defendant did not meet the requirements of Burdine. The court explained:

Defendant's explanation for its decision was unworthy of credence as a matter of law. Such a blatantly pretextual defense carries the seeds of its own destruction. That is, it does not even satisfy the defendant's "intermediate burden" of producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Other courts and commentators have also advanced the theory that an untrue reason offered in justification by defendants will not rebut the presumption of discrimination.89

85. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (once presumption is rebutted, it "drops from the case," but the evidence that supported presumption may still be considered).
86. See Beard, supra note 165, at 163 n.270 ("[T]he credibility of the rebuttal evidence, even if totally destroyed, cannot revive the prima facie case to any degree whatsoever."); cf. Louisell & Mueller, supra note 172, at 542 n.49; Player, supra note 165, at 34.
87. 788 F.2d 781 (D.C. Cir. 1986).
88. Id. at 789 (quoting Burdine, 450 U.S. at 257).
89. See Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) ("Yet
The "nonrebuttal" theory is inconsistent with Burdine's express statement that "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons."\textsuperscript{190} Contrary to Bishopp, an articulated justification that later proves to be untrue is "admissible evidence" that would allow a conclusion that the employer's action was free of discriminatory intent. That the factfinder may ultimately conclude otherwise does not diminish the value of the evidence. It plainly meets the burden of production imposed upon the defendant. Moreover, like the "resurrection" theory, the "nonrebuttal" theory ignores the specific provisions of Rule 301. As previously noted, Rule 301 requires only that a defendant introduce admissible evidence to rebut the presumption. It does not require that the factfinder conclude first that the evidence is credible.\textsuperscript{191}

when the employer's nondiscriminatory reason is shown to be unworthy of belief, and could not therefore have been the real cause, the employer has in substance failed to articulate a valid explanation for discharging an employee and, moreover, has placed its credibility in question."); Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 18 (7th Cir. 1987) ("[I]f a plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reasons, the employer's decision remains unexplained . . . . ")), overruled on other grounds by Coston v. Plitt Theatres, 860 F.2d 834, 836 (7th Cir. 1988), and cert. denied, 485 U.S. 1007 (1988); Harris v. Marsh, 679 F. Supp. 1204, 1285 (E.D.N.C. 1987) ("Arbitrary reasons leave the plaintiff's presumption of illegal motivation unrefuted."); Sullivan, supra note 146, at 1116 n.42 ("If the defendant's proffered reason is disbelieved, there remains no 'legitimate nondiscriminatory reason' in evidence. Therefore, any inference of discrimination from plaintiff's prima facie case remains unrebutted."); see also Marina C. Szteinbok, Note, Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After Aikens, 88 COLUM. L. REV. 1114, 1122 (1988) (If plaintiff proves defendant's reason to be false, "the inference of discrimination arising from the prima facie case remains unrebutted."); Transcript of Oral Argument, Harbison-Walker Refractories v. Brieck, 47 Fair Empl. Prac. Cas. (BNA) 1527 (3d Cir. 1987) (No. 87-271), microformed on Oral Arguments of the Supreme Court, 1988 Term, Fiche 12 (Congressional Info. Serv.), cert. dismissed as improvidently granted, 488 U.S. 226 (1988), where Justice White asked:

If this excuse that the employer gives is false, it is a non-existent — it's just non-existent. Why aren't you back in the same position as you would have been had you said nothing at all? The prima facie case is made out. You come out with a trumped up charge — trumped up excuse which is really a nullity. Why aren't you back in the same position as you were?

\textit{Id.} at 23-24.

190. \textit{Burdine}, 450 U.S. at 254.

191. \textit{See} Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1563 n.17 (11th Cir. 1987) ("Lack of credibility is grounds for rebuttal; it is not, at least in the form asserted here, the basis for a claim that the defendant has not met its burden of production."); Mueller, \textit{supra} note 174, at 253 (nonrebuttal approach presents "insuperable difficulties" and appears to shift the burden of proof to the defendant, at least insofar as proving the facts offered in counterproof).
c. The Underlying Error

In some respects, the "resurrection" courts and the "nonrebuttal" courts, which are "pretext-only" courts, and the "pretext-plus" courts have fallen victim to the same error. All these courts apparently assume that the presumption of discrimination is a necessary component of a plaintiff's proof when the plaintiff lacks direct evidence of discriminatory intent. The "resurrection" and "nonrebuttal" courts strain to find some theory to preserve the presumption. The "pretext-plus" courts recognize that the presumption has been destroyed, but then erroneously conclude that the plaintiff cannot prove discrimination without it.

To use the colorful analogy of the *Thornbrough* court, the "resurrection" courts insist that Humpty Dumpty—the presumption of discrimination—can be put back together again. The "pretext-plus" courts adhere to Mother Goose's original intent, insisting that once Humpty Dumpty has fallen, "all the King's horses, and all the King's men, cannot put Humpty Dumpty together again." The "nonrebuttal" courts argue that Humpty Dumpty never fell off the wall in the first place. But does the plaintiff really need Humpty Dumpty? 192 Or, to return to the more prosaic language of law review articles, must the plaintiff retain the presumption of discrimination in order to prevail? As the next section demonstrates, the presumption of discrimination is unnecessary for the plaintiff to succeed.

B. Can the Plaintiff Prove Discrimination by Demonstrating That the Defendant's Proffered Explanation Is Untrue?

Assume that the "resurrection" and "nonrebuttal" courts are wrong, and that, under *Burdine* and Rule 301, the presumption of discrimination evaporates forever upon defendant's articulation of a legitimate, nondiscriminatory reason for the adverse employment action. Plaintiff's remaining evidence is the evidence that proved the prima facie case and the evidence that undercuts the credibility of the defendant's proffered justification. The first question to be considered is whether the evidence supporting the prima facie case alone retains any probative

192. The variety of meanings given to the presumption may have been anticipated by Lewis Carroll in the following well-known colloquy between Humpty Dumpty and Alice:

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 238 (Grosset & Dunlap 1991) (1865).
value. The second question is whether this evidence, in conjunction with evidence rebutting the defendant’s explanation, would suffice to prove discrimination. \textit{Burdine} strongly suggests that the answer to each of these questions is yes.

(1) \textit{Does the Evidence Supporting the Prima Facie Case Retain Any Probative Value Once the Presumption of Discrimination Has Been Rebutted?}

The easiest issue to resolve is the first one—whether the evidence supporting the prima facie case retains any probative value once the presumption of discrimination has been rebutted. In \textit{Burdine}, the Court answered this question affirmatively:

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff’s initial evidence. \textit{Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant’s explanation is pretextual. Indeed, there may be some cases where the plaintiff’s initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant’s explanation.}  

The evidence supporting the plaintiff’s prima facie case, therefore, retains vitality even though the presumption itself has been eliminated.  

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193. \textit{Burdine}, 450 U.S. at 255 n.10 (emphasis added).  
194. In \textit{Lowe v. City of Monrovia}, 775 F.2d 998 (9th Cir. 1985), \textit{amended}, 784 F.2d 1407 (9th Cir. 1986), the court held: Once a \textit{prima facie} case is established either by the introduction of actual evidence or reliance on the \textit{McDonnell Douglas} presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the ‘elusive factual question of intentional discrimination.’ Moreover, when a plaintiff has established a \textit{prima facie} inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer’s articulated reason for its employment decision. \textit{Id.} at 1009 (citations omitted). When amended, the court further explained that: “The principles described above do not prevent the summary disposition of meritless suits but simply ensure that when a genuine issue of material fact exists a civil rights litigant will not be denied a trial on the merits.” \textit{Lowe}, 784 F.2d at 1407. \textit{See also} Graham v. F.B. Leopold Co., 779 F.2d 170, 172 n.3 (3d Cir. 1985) (plaintiff may be able to show pretext and avoid summary judgment even without any evidence other than the prima facie case); \textit{Wells v. Gottfredson Motor Co.}, 709 F.2d 493, 496 n.1 (8th Cir. 1983) (“When the defendant produces evidence of a legitimate, nondiscriminatory reason for its actions, that mandatory presumption drops from the case but the logical inference of discrimination arising from the prima facie evidence remains.”); \textit{Lewis v. AT&T Technologies}, 691 F. Supp. 915, 920 (D. Md. 1988) (Defendant’s articulated reason “does no more than pose a factual issue for the factfinder to resolve after having the opportunity to evaluate the credibility of the witnesses through first-hand observa-
This result is fully consistent with traditional evidentiary principles. Under the *Federal Rules of Evidence*, the evidence supporting a presumption retains probative value even after the presumption has been rebutted.195

In light of the express language in *Burdine*, it is erroneous for "pretext-plus" courts to suggest that destruction of the presumption somehow destroys all permissible inferences arising from the presumption.196 It is true that the inference of discrimination is no longer mandatory, but this does not mean that the evidence supporting the prima facie case cannot support a judgment in favor of the plaintiff. Indeed, coupled with the Court's endorsement of proving pretext "by showing that the employer's proffered explanation is unworthy of credence,"197 *Burdine* appears to

195. As one commentator explains:

Under Rule 301, the effect of rebutting evidence does not completely dissipate the presumption. Unless no reasonable jury could disbelieve the rebuttal, the presumption still suffices to carry the issue to the jury. However, the jury is no longer instructed that it may presume the existence of the presumed fact, but only that it may infer it.

WRIGHT ET AL., supra note 12, § 5122, at 572. See also GREGORY P. JOSEPH ET AL., EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES ch. 8, at 5 ("Even if the presumption does disappear following rebuttal, nothing in Article III [of the Federal Rules of Evidence] precludes the trier of fact from drawing logical inferences from the evidence.").

196. See Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) ("So long as the employer proffers such a reason, the inference raised by plaintiff's prima facie case vanishes. In the final round of shifting burdens, it is up to plaintiff, unassisted by the original presumption, to show that the employer's stated reason 'was but a pretext for age discrimination.'") (quoting Freeman v. Package Mach. Co., 865 F.2d 1331, 1336 (1st Cir. 1988)); Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 254 (1st Cir. 1986) (upon rebuttal, prima facie case dissolves, and "establishment of a prima facie case could not be considered the equivalent of an ultimate finding of discrimination"); White v. Vathally, 732 F.2d 1037, 1040 (1st Cir. 1984) (once presumption is rebutted, prima facie case alone will not compel judgment for plaintiff); Brooks v. Ashtabula County Welfare Dept., 717 F.2d 263, 267 (6th Cir. 1983) (by relying on prima facie case and admissions by defendant on cross-examination, district court "placed on the defendants the impermissibly heavy burden of persuasion and relieved the plaintiff of the burden of proof imposed by *Burdine*")], cert. denied, 466 U.S. 907 (1984); Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) ("Thus prima facie proof may entitle the plaintiff to a directed verdict if the defendant fails to meet his burden of production, but not otherwise."). But see Connell v. Bank of Boston, 924 F.2d 1169, 1181 (1st Cir. 1991) (Torres, J., concurring) ("[I]f the employee demonstrates that the proffered reason is pretextual, the prima facie case is reinstated and its inference of a discriminatory purpose may be considered along with any contrary evidence in determining whether the employer was motivated by an intent to discriminate.").

197. *Burdine*, 450 U.S. at 256.
support a finding of discrimination when plaintiff has nothing more than his prima facie case and the defendant's lie.

(2) *Is Proving "Pretext" the Same as Proving "Pretext for Discrimination"?*

The "pretext-plus" courts argue that evidence of the defendant's lie is not enough because proving "pretext" in this circumstantial way does not prove "pretext for discrimination." It is on this pivotal question that the remainder of the analysis rests. The next section demonstrates that "pretext" is in fact synonymous with "pretext for discrimination." The subsequent section then rebuts a number of the arguments advanced by the "pretext-plus" courts for holding otherwise.

a. The Analysis of the "Pretext-Only" Courts

According to the "pretext-only" courts, proving "pretext" under *Burdine* is the same as proving "pretext for discrimination." The "pretext-only" courts recognize that evidence showing the defendant's explanation is pretextual raises an inference that the defendant lied to conceal its discriminatory motive.\(^{198}\) As one court explained: "As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."\(^{199}\)

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\(^{198}\) See *Lanphear v. Prokop*, 703 F.2d 1311, 1317 (D.C. Cir. 1983) (If plaintiff shows employer's reason to be "specious, then in conjunction with his prima facie case [he] has carried his burden of proving discrimination by a preponderance of the evidence."); *Williams v. City of Montgomery*, 550 F. Supp. 662, 666 n.4 (M.D. Ala. 1982) ("The court is therefore of the opinion that this third reason was clearly a fabricated afterthought which, if anything, lends support to the conclusion that the other two proffered reasons were pretextual."). A similar approach appears to be applied under the National Labor Relations Act. See *NLRB v. Eastern Smelting & Ref. Corp.*, 598 F.2d 666, 670-71 (1st Cir. 1979) ("If an employer asserts an obviously weak or implausible good reason, or one manifestly unequally applied, this may support an inference that there was a bad reason."); cf. *NLRB v. Lakepark Indus.*, 919 F.2d 42, 45 (6th Cir. 1990) (affirming NLRB's finding that employer violated NLRA §§ 8(a)(1) and 8(a)(3) where employer offered "shifting reasons" for discharge and thus failed to establish a nondiscriminatory reason for the discharge). This was also the position taken by the Equal Employment Opportunity Commission and the Solicitor General in *Brieck*. See Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Respondent at 13-14, *Harbison-Walker Refractories v. Brieck*, 47 Fair Empl. Prac. Cas. (BNA) 1527 (3d Cir. 1987) (No. 87-271), *microformed on* U.S. Supreme Court Records and Briefs 1988/89 FO, Card 6 of 7 (Congressional Info. Serv.) (A showing of pretext "should, if anything, strengthen his case, since a defendant who offers an unbelievable response to an accusation of discrimination is likely to have something to hide—something that, in the context of an ADEA action, is likely to be improper animus."); *cert. dismissed as improvidently granted*, 488 U.S. 226 (1988).

\(^{199}\) *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1059 (8th Cir. 1988).
The logic behind this analysis may be best demonstrated in the case of *Tye v. Board of Education*.\(^{200}\) Plaintiff was a vocational guidance counselor for the local school system. As part of a work force reduction, the Board of Education did not renew her yearly contract. She claimed that the school board based its decision to dismiss her rather than her male coworker on sex.\(^{201}\) At trial, the school board introduced into evidence a stipulation articulating ten purportedly legitimate, nondiscriminatory reasons for the plaintiff's dismissal.\(^{202}\) Later in the case, however, when the school superintendent took the stand to defend his action in discharging the plaintiff, he testified that *none* of the reasons contained in the stipulation had motivated him in making the decision.\(^{203}\) Rather, he contended that he had no reason for his action.\(^{204}\) Plaintiff had no additional evidence of discrimination other than the superintendent's admission that he had lied about the reasons for discharging her.\(^{205}\) Finding that the superintendent had discharged plaintiff "without a thought process" because he had not been required by state law to give any reason for his decision,\(^{206}\) the district court entered judgment for the defendant.\(^{207}\)

Under the "pretext-plus" rule, the district court's judgment presumably would have been upheld as correct, because the plaintiff had no evidence of discrimination other than the evidence supporting her prima facie case and the defendant's lie. But the Court of Appeals for the Sixth Circuit reversed the district court's finding of no discrimination as clearly erroneous and held that plaintiff had proven discrimination as a matter of law.\(^{208}\) First, the court noted that the presumption of discrimination had been rebutted when the school board introduced its stipulated reasons into evidence, even though those reasons later proved false. "It is

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\(^{201}\) *Id.* at 316-17.
\(^{202}\) *Id.* at 318-19. The reasons given were: 1) statutory right not to renew limited contracts; 2) nonrenewal permitted by collective bargaining agreement; 3) declining enrollment; 4) fiscal cutbacks; 5) multiple certification of staff; 6) staff diversity; 7) employee demeanor and attitude; 8) employee interaction with other faculty; 9) program changes at the school; and 10) school superintendent's "subjective feelings and impressions." *Id.* at 318.
\(^{203}\) *Id.* at 319-20.
\(^{204}\) *Id.* at 319 n.2 ("[The superintendent] testified that he did not actually have a reason for recommending [plaintiff]'s nonrenewal in April 1982, and that the stipulated reasons were 'reconstructed' specifically for this litigation ... '").
\(^{205}\) *Id.* at 319-20 ("Since [the superintendent] had unilateral authority over recommendations for nonrenewal, it is obvious from his testimony that these stipulated reasons were in fact untrue.").
\(^{206}\) *Id.* at 320.
\(^{207}\) *Id.* at 316.
\(^{208}\) *Id.* at 320-21.
clear,” explained the court, “that Burdine allows the defendant to satisfy his intermediate burden by offering an untrue reason for the decision.”

Thus, the subsequent revelation that the reasons submitted by the defendant were untrue “could only support the plaintiff’s case on pretext, and could not negate the burden of production which the defendant met previously.”

Of what significance, then, was the fact that the defendant’s explanation was untrue? The Tye court noted that, under Burdine, a plaintiff may prove pretext by disproving the employer’s reasons. Here, the plaintiff had done so. The court of appeals found it “impossible” for the selecting official to have chosen one employee over the other “without any reason whatever.” By failing to make any attempt to distinguish between the two employees, and by giving “evasive and contradictory testimony regarding the choice,” the defendant exposed itself to a finding of pretext. The court of appeals held on this record that “[plaintiff] was indeed the victim of impermissible discrimination” and took the unusual step of reversing the district court’s finding that there had been no discrimination because it had a “‘definite and firm conviction that a mistake had been committed.’”

The Tye court reflects the more logical approach to analyzing “pretext” in the Burdine model. If the plaintiff can show that the defendant’s articulated reason is untrue, then the plaintiff has produced additional evidence that permits the trier of fact to draw an inference of discrimination. This evidence, when taken in conjunction with the evidence presented in support of the prima facie case, is sufficient to justify a verdict for the plaintiff.

Not only does such evidence suffice to merit a verdict for the plaintiff, but, as the Tye court held, such a finding is required as a matter of law, if the factfinder believes the plaintiff’s evidence. The factfinder in Tye had before it two explanations for the employer’s conduct: intentional discrimination and the employer’s own justification. Assume that

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209. Id. at 319.
210. Id.
211. Id. at 320 (“[The superintendent] did not flip a coin or draw lots—he made a choice. The comparison may have been subconscious and based on intangible factors, but it must have occurred.”), aff’d, 883 F.2d 1394 (8th Cir. 1989).
212. Id.
213. Id. (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).
214. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 718 (1983) (Blackmun, J., with Brennan, J., concurring) (“The McDonnell Douglas framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.”).
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the factfinder believes the evidence supporting the prima facie case, as well as the evidence showing the defendant's rationale is untrue. The only remaining explanation is intentional discrimination. Indeed, the only way for the factfinder to avoid this conclusion is to infer that some third explanation, unarticulated by either party, was the true reason for the employment action. As this Article will demonstrate shortly, such an inference would be inconsistent with the Burdine model.

b. The Analysis of the "Pretext-Plus" Courts

Before considering the possibility of inferring some third reason for the employment action, two claims by the "pretext-plus" courts must be addressed. The first is the claim that equating proof of pretext with proof of intentional discrimination somehow impermissibly shifts the burden of proof from plaintiffs to defendants. The second is the claim that permitting a plaintiff to prevail by undercutting an employer's credibility will result in wholesale judicial review of discretionary business judgment. As the next two subsections will show, neither of these contentions has any merit. The final subsection under this heading will then address the possibility of inferring an unarticulated, but nondiscriminatory, reason for the employer's decision.

(i) Shifting the Burden of Proof

Many "pretext-plus" courts contend that permitting the plaintiff to prevail by catching the defendant in a lie would effectively shift the burden of proof from plaintiffs to defendants. This analysis is typified by the late Judge Hunter's dissent in Chipollini:

The majority today shifts the burden of persuasion from the plaintiff to the defendant in clear derogation of controlling precedent. . . . [I]t is the plaintiff who must prove discrimination; the defendant is not required to prove the absence thereof. . . . Yet, by allowing [plaintiff] to overcome [defendant]'s motion for summary judgment without introducing any evidence pointing to age discrimination, the majority has effectively and impermissibly shifted the burden of persuasion from [plaintiff] to [defendant]. While the majority does not frankly admit that its decision today will provide such an unwarranted windfall to ADEA plaintiffs, a careful examination of the doctrine shows this to be the case.215

Under this analysis, holding a defendant liable for discrimination merely because the trial court did not believe its explanation for its employment action somehow transforms the defendant's burden of production into an

“almost impossible burden” of persuasion. According to the “pretext-plus” courts, this result is inconsistent both with Burdine’s express command that “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons” and the Court’s assertion in its later decision in United States Postal Board of Governors v. Aikens that the plaintiff retains the burden of proof at all times.

As an initial matter, this argument ignores the express language of Burdine that permits a plaintiff to prove pretext “indirectly by showing that the defendant’s proffered reason is unworthy of credence.” To the extent that the “pretext-plus” courts acknowledge this statement, however, they either ignore it or dismiss it as dicta by the Supreme Court that does not reflect a desire to “relieve the plaintiff of the burden of persuasion on the ultimate issue of discriminatory intent.” For these courts, Burdine’s method of indirect proof is only one part of the plaintiff’s dual burden of showing both pretext and discriminatory motive. In particular, many “pretext-plus” courts rely upon additional language in Burdine that states that plaintiff’s burden of proving pretext “merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination” to support a dual burden on plaintiffs.


219. Id. at 716.

220. Burdine, 450 U.S. at 256.


222. Burdine, 450 U.S. at 256.

223. See, e.g., White, 732 F.2d at 1042-43 (because plaintiff’s burden of proving proffered reason untrue merges with ultimate burden of proving intentional discrimination, merely proving pretext directly or indirectly does “not relieve the plaintiff of the burden of persuasion on the ultimate issue of discriminatory intent”); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (“The issue of the proper intent standard and that of pretext overlap because plaintiff’s burden of showing pretext ‘merges’ with the ultimate burden of demonstrat-
The claim that the "pretext-only" rule shifts the burden of proof finds no support in the *Burdine* opinion, nor is it correct as a matter of logic. As demonstrated above, *Burdine* anticipates that plaintiffs will be able to prove discrimination by discrediting the defendant's explanation, and the "pretext-plus" analysis fails on this point alone. Analytically, the "pretext-plus" courts refuse to distinguish between requiring a defendant to *prove* its legitimate nondiscriminatory reason, which is precluded by *Burdine*, and permitting a plaintiff to *disprove* it. The fact that the plaintiff has the burden of proof means that if the plaintiff cannot convince the factfinder that the defendant has lied, the plaintiff will lose. This is not the same as saying that if the defendant cannot convince the trier of fact that it has not lied, the plaintiff will win. The distinction is not one of semantics—it is the traditional difference between burdens of production and burdens of proof. In short, the notion that drawing some evidentiary conclusion when the plaintiff disproves the defendant's justification shifts the burden of proof "obscures the relatively straightforward duty of the trial court" to decide whether it believes plaintiff or defendant.

Reliance on the language in *Burdine* that indicates that the burden of proving pretext "merges" with the burden of proving discrimination is equally misplaced. It makes no sense for the "pretext-plus" courts to
assert that the Court intended this language to impose two separate burdens on plaintiffs. The phrase “merges with” in *Burdine* cannot reasonably be understood to mean “is separate from.” Rather, the term “merge” should be given its ordinary meaning: “To cause to be absorbed as to lose identity.” When read in this common sense way, *Burdine* furnishes even more support for reading “pretext” as synonymous with “pretext for discrimination.”

Furthermore, the “pretext-plus” notion that drawing an inference of discrimination from plaintiff’s rebuttal of defendant’s explanation somehow shifts the burden of proof is contrary to traditional evidentiary principles. The common evidentiary practice of drawing unfavorable inferences against a party who lies in court has never been construed to shift the burden of proof to that party. Similar is the well-known rule treating destruction of evidence while under the control of a party as creating an inference that the evidence would have been harmful to that party. An analogous inference is the inference that a missing witness in the control of a party would have testified unfavorably to that party.

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227. This is reflected in the so-called “Falsus in Uno Falsus in Omnibus” instruction. See 12 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.04, at 619 (3d ed. 1977) (“If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness’s testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.”).

228. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 291, at 228 (James H. Chadbourn rev., 1979) (“The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor . . . .”); see Coates v. Johnson & Johnson, 756 F.2d 524, 551 (7th Cir. 1985) (“The prevailing rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction.”); 1 SPENCER A. GARD, JONES ON EVIDENCE § 3:90, at 320 (6th ed. 1972) (“The willful destruction, suppression, alteration, or fabrication of documentary evidence properly gives rise to a presumption that the documents if produced would be injurious to the party who thus hindered the investigation of the facts.”). See generally JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE 31-64 (1989) (discussing inference).

229. Graves v. United States, 150 U.S. 118, 121 (1893) (“[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”). The traditional jury instruction appears in 2 DEVITT & BLACKMAR, supra note 227, § 72.16:

If a party fails to call a person who possesses knowledge about the facts in issue, and who is reasonably available to him, and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not.

*Id.* § 72.16; see also 3 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS
These inferences are based on logic and common sense; they clearly do not alter the traditional burdens of proof in civil cases. The same is true of drawing an inference of discriminatory intent from the fact that an employer lied to the court about its reasons for adverse action against the plaintiff.\textsuperscript{230}

Finally, simply because the employer might feel pressured to attempt to establish the truth of its reason does not justify insulating that reason from judicial scrutiny. In many civil cases, a defendant is likely to present its own version of the facts involved, whether or not as a technical matter it has the burden of proof on any issue in the lawsuit. Moreover, in \textit{Burdine}, the Supreme Court expressly anticipated that a defendant in a disparate treatment case would have a strong incentive to persuade the court that it had legitimate reasons for its actions.\textsuperscript{231} Rather than view this as an impermissible shift of the burden of proof, the Court instead relied upon this contention to support its imposition of the lesser burden of production, rather than persuasion, on defendants.\textsuperscript{232}

The "pretext-plus" courts are simply wrong to insist that a plaintiff's retention of the burden of proof requires production of additional evidence to prevail. Reliance by the plaintiff on proof that the defendant

\textsuperscript{230} In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), however, Justice White appeared to be less eager to infer discriminatory intent from the employer's lack of credibility, at least in mixed motive cases. He stated:

\textit{In a mixed motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action.}

\textsuperscript{231} See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) ("[A]lthough the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation.").

\textsuperscript{232} \textit{Id.} ("Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext.").
lied does not shift the burden of proof. Instead, the defendant properly
runs the risk that advancing a false version of the facts in an attempt to
prevent plaintiff from carrying the burden of persuasion will redound to
the plaintiff’s benefit, just as in any other civil suit.

(ii) Scrutinizing the Exercise of Business Judgment by Employers

A second commonly expressed justification for the “pretext-plus”
rationale has been the concern that permitting plaintiffs to prevail when
they successfully challenge defendants’ justifications will chill employers
from exercising business judgment about employees or potential employ-
ees. In fact, as has already been demonstrated, many “pretext-plus”
courts assert that evidence undercutting the defendant’s articulated justi-

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fication demonstrates only that the employer may have made an error in
assessing the qualifications or abilities of the plaintiff. A mistake is not
discrimination, say these courts, unless the error is shown to be a
“coverup for invidious discrimination.”

The “pretext-plus” courts are initially correct in asserting that a de-

233. See, e.g., White v. Vathally, 732 F.2d 1037, 1042 (1st Cir.) (“Our review does not
extend to the quality of business judgment reflected in this testimony, but only to the question
whether the testimony suffices to raise a genuine issue of fact as to defendants’ intent, or,
otherwise stated, whether it suffices to support a finding of no discriminatory intent.”) (citation
omitted), cert. denied, 469 U.S. 933 (1984); Clark v. Huntsville City Bd. of Educ., 717 F.2d
525, 528 (11th Cir. 1983) (error for district court to “find intentional discrimination by actions
inconsistent with a stated policy without a showing that defendants disregarded the policy for
discriminatory reasons rather than in a good faith effort to hire the best person available”).

Magnet Wire Co., 824 F.2d 557 (7th Cir.), cert. denied, 484 U.S. 977 (1987), also makes this
point, stating:

It is easy to confuse ‘pretext for discrimination’ with ‘pretext’ in the more common
sense (meaning any fabricated explanation for an action), and to confound even this
watery use of ‘pretext’ with a mistake or irregularity. . . . If you honestly explain the
reasons behind your decision, but the decision was ill-informed or ill-considered,
your explanation is not a pretext.

Id. at 559. Similarly, the court in Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) asserts
that:

The reasonableness of the employer’s reasons may of course be probative of whether
they are pretexts. The more idiosyncratic or questionable the employer’s reason, the
easier it will be to expose it as a pretext, if indeed it is one. The jury must understand
that its focus is to be on the employer’s motivation, however, and not on its business
judgment.

Id. at 1012 n.6. See also Nieves v. Metropolitan Dade County, 598 F. Supp. 955, 963 (S.D.
Fla. 1984) (“It is not the defendants’ obligation to prove that its assessment of the plaintiff’s
qualifications was correct, because mere mistakes in judgment do not constitute unlawful
discrimination.”).
"pretext-only" courts have said precisely the same thing. But the "pretext-plus" courts take this point one step further and assume that any evidence questioning the credibility of the defendant's reason serves only to prove mistake. By so doing, they ignore the very real possibility that the employer's "error" instead may be a deliberate coverup for discrimination. According to these courts, proving that the basis for the defendant's decision was erroneous or nonexistent simply cannot prove that the defendant discriminated against the plaintiff. As one court explained:

It is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move. Nor is it enough to show that the employer acted arbitrarily or with ill will. These facts, even if demonstrated, do not necessarily show that age was a motivating factor.

Because the "pretext-plus" courts refuse to acknowledge the possibility that the "mistake" actually may have been intentional, they frequently construe plaintiffs' challenges to employers' justifications as mere attacks on business judgment, and thus accord them little weight. In the first

235. For example, the court in Dister v. Continental Group, 859 F.2d 1108 (2d Cir. 1988) states that:

[It is not the function of a fact-finder to second-guess business decisions or to question a corporation's means to achieve a legitimate goal. . . . Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons. Thus, the reasons tendered need not be well-advised, but merely truthful.]

Id. at 1116 (citations omitted). See also Grabb v. Bendix Corp., 666 F. Supp. 1223, 1244 (N.D. Ind. 1986) ([It is not the court's duty to determine the validity of a defendant's employment decision as long as the decision was made in good faith, and, the company's reason is not a pretext if in the exercise of its business judgment it made a good faith evaluation].)

236. See Keyes, 853 F.2d at 1026 ("Neither the defendants' managerial judgment nor their recruiting acumen is on trial in this case."); Beard v. Whitley County REMC, 840 F.2d 405, 411-12 (7th Cir. 1988) (showing of error or poor business judgment insufficient to prove pretext); Loeb, 600 F.2d at 1014 ([T]he ultimate question is not whether defendants' decision to fire or discipline plaintiff reflected an objective factfinder's judgment of plaintiff's abilities, but whether it was unlawfully motivated.").


238. See Freeman v. Package Mach. Co., 865 F.2d 1331, 1341 (1st Cir. 1988) ([T]he claimant needed to show more than that his employer miscalculated in deciding that he had outlived his corporate usefulness: good-faith errors in an employer's business judgment are not the stuff of ADEA transgressions."); Reeder-Baker v. Lincoln Nat'l Corp., 834 F.2d 1373, 1380-81 (7th Cir. 1987) (Easterbrook, J., dissenting in part) (evidence that plaintiff's conduct was not disruptive may suggest that employer erred in firing her for disruption, not that employer discriminated against her); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) ("Although WLCY's decision to fire Nix, and its refusal to reconsider that decision, might seem unfair or even 'incredible' to outside observers, Nix cannot prevail in his Title VII action for he has not established discriminatory intent."); Gries v. Zimmer, Inc., 742 F. Supp. 1309, 1315 (W.D.N.C. 1990) ("The plaintiff, however, cannot show simply that the decision-maker made an unwise, incorrect, or unfair business decision.").
district court opinion in *Brieck v. Harbison-Walker Refractories*, for example, the court asserted that the plaintiff's challenge to the employer's claim that his replacement's credentials were superior to his own "edges into the area of judicial scrutiny of business decisions, which is not part of our function."¹⁹⁰

One example of how the "pretext-plus" rationale blurs the distinction between "mistake" and "intentional discrimination" is found in Judge Easterbrook's dissenting opinion in *Reeder-Baker v. Lincoln National Corp.*¹⁹¹ There, a black employee claimed that she had been fired in retaliation for filing a discrimination claim against her employer.¹⁹² The employer asserted that she had been fired because of an incident in which she allegedly had disrupted the workplace while complaining about discriminatory conduct.¹⁹³ The district court found that the plaintiff had not disrupted the workplace and that one of the defense witnesses had testified falsely about defendant's conduct.¹⁹⁴ The court thus held that the plaintiff had proven intentional discrimination.¹⁹⁵ The court of appeals affirmed, explaining: "[Defendant] was held liable because its proffered explanations for its treatment of [plaintiff] were found unworthy of credence, and because the district court chose to accept the resulting inference that the true, unstated explanations were unlawful ones."¹⁹⁶

In dissent, Judge Easterbrook claimed that the issue to be determined was not whether or not the plaintiff actually had disrupted the workforce, but whether the defendant would have fired a white worker who behaved in the same manner as the plaintiff.¹⁹⁷ By so doing, he implicitly rejected the district court's express factual finding that the

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¹⁹⁴. *Id.* at 649 & n.3 (plaintiff's conduct did not disrupt the working environment at any time; all of plaintiff's coworkers present on the day of her termination testified that she did not disrupt the workplace). The district court further noted that the employer's affirmative action coordinator had claimed during the administrative phase of plaintiff's claim that plaintiff's conduct had been so disruptive that two employees had complained about it. At trial, an investigator for the state antidiscrimination agency testified that both employees denied that they had ever complained. The affirmative action coordinator admitted at trial that the statements she made about those complaints were false. *Id.* at 651 n.9.

¹⁹⁷. *Id.* at 1380-81 (Easterbrook, J., dissenting in part) (it would be error if the district court had rested its decision on either of two possible theories: (1) that plaintiff did not actu-
plaintiff's behavior had not disrupted the workplace. As to the credibility of the employer's reason, Judge Easterbrook argued that even if the plaintiff had not in fact disrupted the work force, "an error of fact does not imply discrimination." 248 Moreover, he did not think that the other employees' testimony that the plaintiff was not disruptive undercut the defendant's case, because the employer "is not required to accept or even listen to line employees' judgment about how much commotion is too much." 249 According to the dissent, the district court erred in treating the employer's "error" as discrimination and in imposing its own views of what methods of disciplining employees are appropriate. 250 Judge Easterbrook's rationale, however, ignores any possibility that the employer used this incident as an excuse to fire the plaintiff, and that the employer deliberately exaggerated the extent of the plaintiff's conduct to lend further credence to its actions. That the district court found no actual disruption and that workers testified there had been no such disruption is evidence not only of "mistake," but also of intentional discrimination.

Under Judge Easterbrook's rationale, in the hypothetical discrimination case with which this Article began, even if the plaintiff successfully shows that he did not make excessive salary demands and that he was qualified for and willing to perform the job in question, this evidence would not suffice to raise an inference of discrimination. At best, the plaintiff would have shown that the accounting firm erroneously believed that the plaintiff wanted a higher salary than it was willing to pay. This factual error would not suggest that the firm discriminated against the plaintiff. Similarly, the firm's determination that the plaintiff was over-qualified for the entry level job may be erroneous—the plaintiff may well have had suitable qualifications. Under this theory, the "errors" in assessing the plaintiff's academic record and abilities are simply mistakes in judgment, and do not raise an inference that the firm was motivated by racial animus. 251

248. *Id.* at 1381.

249. *Id.* Indeed, Judge Easterbrook claimed: "Some of her co-workers testified that they were able to work through the hubbub, and the judge believed them." *Id.* at 1380. The characterization of the working environment as a "hubbub" appears nowhere in the district court's opinion, and it is inconsistent with the district court's express findings. See supra note 238.

250. *Reeder-Baker*, 834 F.2d at 1381 ("At all events, [defendant] is not liable under Title VII for [the supervisor's] failure to appreciate the full state of affairs.").

251. *See* Bienkowski *v.* American Airlines, 851 F.2d 1503, 1508 (5th Cir. 1988) ("Even if the trier of fact chose to believe an employee's assessment of his performance rather than the employer's, that choice alone would not lead to a conclusion that the employer's version is a
As this example illustrates, this theory about mistakes in business judgment cannot withstand closer scrutiny. The accounting firm’s "mistakes" could just as easily be excuses for discrimination against the black applicant. As the Supreme Court expressly stated in *Burdine*: "The fact that a court may think that the employer misjudged the qualifications of an applicant does not in itself expose him to . . . liability, [but] this may be probative of whether the employer’s reasons are pretexts for discrimination."252 Indeed, there is a significant difference between scrutinizing an employer’s justification to determine whether it was a good reason, and scrutinizing it to determine whether it was the true reason, which is precisely the purpose of the pretext stage.253 "Everyone can make a mistake," explained one court, "but if the mistake is large enough, we may begin to wonder whether it was a mistake at all."254

The "pretext-plus" rationale ignores the question at the heart of a discrimination case—whether the employer’s actions were mistaken or deliberate. To suggest that evidence undercutting the defendant’s justifi-
cation proves nothing more than "mistake" or merely challenges the em-
ployer's "business judgment" is to avoid the ultimate issue. As one court
explained:

It is undeniably true that the ADEA does not empower courts to
choose which business strategies should be implemented or which em-
ployees hired or fired. The ADEA does, however, require courts to
examine critically employer rationales based on business necessity
when they are presented as explanation for allegedly discriminatory
conduct.255

If a plaintiff challenges a defendant's rationale of poor job perform-
ance by introducing evidence that she was performing her job well, this
evidence is relevant not only to whether the employer made an error in
business judgment, but also to whether the defendant's justification is
believable in the first place. If the factfinder concludes that the plaintiff's
job performance was satisfactory despite the employer's claims to the
contrary, the factfinder then must make the additional determination as
to whether this discrepancy reflects an error by the employer or whether
instead it is evidence of intentional discrimination. Distinguishing be-
tween an honest mistake and willful misconduct is not a determination
limited to employment discrimination cases; intent is at the heart of
many civil and criminal cases.256 If the factfinder determines that the
employer was not mistaken, then the court may fairly infer that the de-
fendant lied about the true reasons for its action.257

255. MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 n.4 (8th Cir. 1988). Similarly, the
court in Graefenhain v. Pabst Brewing Co., 827 F.2d 13 (7th Cir. 1987), overruled on other
grounds by Coston v. Plitt Theatres, 860 F.2d 834, 836 (7th Cir. 1988) asserts:
Had [plaintiffs] simply contended that [defendant] used poor business judgment in
firing them, they would not have alleged a violation of the ADEA. However, [plain-
tiffs argue] that [defendant] merely used the reduction-in-force and dissatisfaction-
with-performance rationales as pretextual covers for age discrimination. In this con-
text, consideration of performance does not amount to second-guessing a mere busi-
ness judgment.

Id. at 21.

ample, states:
The law often obliges finders of fact to inquire into a person's state of mind. As Lord
Justice Bowen said in treating this problem in an action for misrepresentation nearly
a century ago: "The state of a man's mind is as much a fact as the state of his
digestion. It is true that it is very difficult to prove what the state of a man's mind at
a particular time is, but if it can be ascertained it is as much a fact as anything else."

Id. at 716-17 (quoting Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885)).

257. Moreover, the possibility that an occasional error may be made by a court or a jury is
insufficient justification for shielding defendant's articulated reasons from careful scrutiny. As
one court has explained: "[A]lthough the ADEA does not hand federal courts a roving com-
mmission to review business judgments, the ADEA does create a cause of action against business
actions that merge with age discrimination." Graefenhain, 827 F.2d at 21 n.8; see Hill v.
Seaboard Coast Line R.R., 885 F.2d 804, 811 (11th Cir. 1989) (defendant's explanation was
The "pretext-plus" courts err in deferring to an employer’s articulated justification even in the face of contrary evidence. It is one thing for courts to emphasize that a defendant who lacks the requisite intent may not be held liable for discrimination. It is another matter to prevent courts from drawing inferences about intent when the factual predicate for the defendant’s justification proves to be untrue or implausible. An inference of discrimination may fairly be drawn from a defendant’s lie, and the plaintiff is thus entitled to have the factfinder make this important credibility determination at trial.

(ii) Concealing an Unarticulated Nondiscriminatory Reason

Despite their protestations about “mistakes,” however, the “pretext-plus” courts ultimately do not believe that discrimination can fairly be inferred even if the defendant’s “mistake” later proves to be a lie. If the defendant’s reason is untrue, they conclude, some other nondiscriminatory reason might underlie the pretextual one, and it is unfair to employers to presume otherwise. Judge Hunter’s dissent in Chipollini vigorously advanced this commonly held position:

An employer’s proffered reason for terminating an employee may be pretextual without violating the ADEA or any other civil rights statute. An employer motivated by ill-will, nepotism, or unpublicized financial problems in his termination of an employee is just as likely to use a pretextual explanation for his action as is an employer motivated by statutorily-prohibited discrimination. Employers may even resort to pretext for benign reasons, such as the desire to spare the feelings of a loyal employee whose competence has declined. Under such circumstances, we have no power under the ADEA to provide redress.258

Under this theory, proving pretext ultimately proves nothing, because either discriminatory or nondiscriminatory reasons may lurk beneath the defendant’s pretextual reason. Thus, because the plaintiff has the burden of proof on this issue, the plaintiff must make some affirmative "plus" showing that the reason concealed by the defendant was a discriminatory one.259 In the absence of this showing, the “pretext-plus”

259. See Veatch v. Northwestern Memorial Hosp., 730 F. Supp. 809 (N.D. Ill. 1990) in which the court found:

Although the prima facie cases raise an inference of discrimination, the factfinder is not compelled to award victory to the plaintiff simply because the employer has not
courts believe it is unwarranted to infer that the concealed reason is discriminatory. This theory presents a nearly insurmountable burden for

been candid about the real reason for the firing.... Even if the employer lies about the real reasons for the firing, other reasons, not impermissible under federal law, might be suggested by the evidence.

Id. at 819. In Veatch, the hospital asserted that it discharged plaintiff for insubordination. Id. at 811. The court stated:

Although there is evidence that the employer's proffered reason is not the real reason for the firing, this is not a case where a showing of pretext necessarily eliminates all lawful explanations. Even if a factfinder did not believe that the alleged insubordination motivated the firing, the record as a whole suggests explanations other than sex discrimination. Financial pressure to reduce expenses in the hospital, the efforts of new management to assert their authority in a department staffed by long-time employees, an actual and irremediable loss of trust caused by a possibly mistaken but good-faith conclusion that plaintiff was insubordinate, or even discrimination based on age... are alternative explanations with support in the record.

Id. at 819. Of course, of these various explanations generated by the district court, the only one actually offered by the defendant in its own defense was the plaintiff's insubordination. Id. at 811, 815.

260. See Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir.) ("the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact."); cert. denied, 60 U.S.L.W. 3262 (U.S. Oct. 7 1991); Connell v. Bank of Boston, 924 F.2d 1169, 1180 (1st Cir.) (Torres, J., concurring) (employee does not always prevail by showing pretext "because the pretext may be cloaking a nondiscriminatory purpose that the employer wishes to conceal") (emphasis in original), cert. denied, 111 S. Ct. 2828 (1991); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 10 (1st Cir. 1990) (without "plus" evidence, "[a] factfinder would be left to guess at the reasons behind the pretext"); Freeman v. Package Mach. Co., 865 F.2d 1331, 1341 (1st Cir. 1988) (despite conflicting evidence on the level of plaintiff's job performance, "the most attenuated link in the chain in this case, without doubt, was whether plaintiff had proven that age—opposed, say, to... animosity, or envy... or a garden-variety mistake in corporate judgment as to [plaintiff]'s continued utility—was responsible for the ouster."); Keyes v. Secretary of the Navy, 853 F.2d 1016, 1027 (1st Cir. 1988) ("Plaintiff, who had the ultimate burden of proving the claim, did not offer a scintilla of evidence which tended to show that her color or her sex—as opposed, say, to some informal preferment of veterans or garden-varietycronyism—was a factor in the decisionmaking process"); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.) (employer may be "trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement"), cert. denied, 484 U.S. 977 (1987); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185 (11th Cir. 1984) ("Although we find some support for the district court's conclusion that the articulated reason for Nix's firing was not the true reason, we find no evidence sufficient to sustain the court's conclusion that the true reason was racial discrimination."); White v. Vathally, 732 F.2d 1037, 1042 (1st Cir.) (district court indicated that record would support finding that reason offered by defendant was not sole reason for selection, but the court could not find by a preponderance of the evidence that defendant's unarticulated reason was discriminatory animus), cert. denied, 469 U.S. 933 (1984); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1247 (D.C. Cir. 1984) (Scalia, J., dissenting) ("I fully acknowledge that the fact of discrimination suggests an intent to discriminate. But that intent may be based upon an infinite variety of factors [aside from race]."); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 243 (4th Cir. 1982) ("Without benefit of the presumption, age simply exists on this evidence as one of any number of possible reasons—including poor business judgment by the employer—for the demotion.") (citations omitted); Graham v. Renbrook Sch., 692 F. Supp. 102, 107 n.7 (D. Conn. 1988) ("[I]t would
plaintiffs, who must negate not only defendants' articulated reasons but also the secret reasons they failed to advance in court.

Judge Easterbrook articulated this theory in *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*.261 In this case, a female psychologist claimed that her employer had failed to promote her because of her sex.262 The employer asserted that it did not promote the plaintiff because her position did not meet the neutral requirements for upgrading psychologist positions.263 The district court "doubted" this explanation, but nevertheless found that the plaintiff had failed to prove sex discrimination.264 The court of appeals agreed and rejected the plaintiff's contention that merely proving pretext by casting doubt on the employer's explanation would be sufficient to prove her case.265 Such proof would be "strong evidence," explained Judge Easterbrook, but "[t]he judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision."266 He continued:

A public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that we were just following the rules. The trier of fact may find, however[,] that some less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—actually accounts for the decision. Title VII does not compel every employer to have a good reason for its

still be an illogical leap in an age discrimination case to infer a discriminatory motive simply because the employer's own explanation of its conduct is disbelieved."); Harris v. Marsh, 679 F. Supp. 1204, 1286 n.133 (E.D.N.C. 1987) (employer could be concealing some other offense, such as violation of collective bargaining agreement), aff'd in part and rev'd in part sub nom. Blue v. United States Dep't of the Army, 914 F.2d 525 (4th Cir. 1990), and cert. denied sub nom. Chambers v. United States Dep't of the Army, 111 S. Ct. 1580 (1991); Holly v. City of Naperville, 603 F. Supp. 220, 230-31 n.4 (N.D. Ill. 1985) ("While evidence of capable performance may prove that the employer's proffered reason is false, it does not directly follow that the employer is attempting to cover up discrimination. He may be covering up something else—e.g., nepotism or a simple ill will.").), aff'd mem., 861 F.2d 723 (7th Cir. 1988); Askin v. Firestone Tire & Rubber Co., 600 F. Supp. 751, 755 (E.D. Ky. 1985) ("[T]he 'pretext' must be a pretext for discrimination, not a pretext of some other ill-advised or unreasonable factor, such as a personality conflict or unreasonably high but evenly applied standards of performance."), aff'd mem., 785 F.2d 307 (6th Cir. 1986); BEARD, supra note 165, at 161 n.262 (The employer's true reason may be "merely another, possibly less easily articulated — but nonetheless nondiscriminatory motivation, and the court need not necessarily find that the employer was in fact motivated by intentional discrimination.").

261. 810 F.2d 146 (7th Cir.), cert. denied, 483 U.S. 1006 (1987).
262. Id. at 147.
263. Id. ("Civil service personnel audited her work, found that she was not supervising other psychologists, and concluded that she was not eligible for non-competitive promotion.").
264. Id.
265. Id. at 148.
266. Id.
deeds; it is not a civil service statute. Unless the employer acted for a reason prohibited by the statute, the plaintiff loses. 267

Thus, the district court was free to infer that the reason concealed by the defendant's justification was a legitimate, although unarticulated, reason, even though the court of appeals admitted that it "share[d] that court's doubt about the Department's conduct." 268

Under this rationale, in the hypothetical case, proving that the accounting firm's failure to hire the plaintiff was based on neither his academic credentials nor his salary demands would not prove intentional discrimination. The firm instead could be concealing another reason for failing to hire the plaintiff, such as nepotism or a sudden downturn in the firm's economic fortunes. 269 Under the "pretext-plus" theory, the court may not assume that the reason underlying these false reasons is discriminatory absent some additional proof of discrimination. 270 In fact, these
courts do not penalize the defendant for failing to introduce its secret reason in court. As one court claimed: "It is doubtful that Congress intended that Title VII require employers to produce, at the risk of a full-fledged trial and civil liability, their true reasons for firing employees when those true reasons have nothing to do with race or sex discrimination."\textsuperscript{271}

What the "pretext-plus" courts seek to do, in effect, is to infer a secret but nondiscriminatory reason for the defendant's conduct once the plaintiff has successfully rebutted the defendant's articulated reason. This inference is unwarranted under Supreme Court precedent, and it flies in the face of common sense. Under \textit{Burdine}, the whole purpose of having the defendant articulate a legitimate, nondiscriminatory reason is to "sharpen the inquiry into the elusive factual question of intentional discrimination."\textsuperscript{272} The Court specifically stated that the reason must be established through the introduction of admissible evidence, and "[a]n articulation not admitted into evidence will not suffice."\textsuperscript{273} It makes no sense for "pretext-plus" courts to require a plaintiff to disprove a reason never offered into evidence by the defendant in the first place.\textsuperscript{274} Under no circumstance should an employer be permitted to prevail in a discrimination case by relying on a reason never proffered in court.\textsuperscript{275}

\begin{footnotesize}
\begin{enumerate}
\item[271.] \textit{Veatch}, 730 F. Supp. at 819.
\item[272.] Texas Dep't of Community Affairs v. \textit{Burdine}, 450 U.S. 248, 255 n.8 (1981); see \textit{Lanphear} v. Prokop, 703 F.2d 1311, 1316 (D.C. Cir. 1983) (district court erroneously substituted its own theory of defendant's possible justification for firing plaintiff, thus ignoring \textit{Burdine}'s purpose of providing plaintiff with a full and fair opportunity to respond to defendant's articulated reason: "That purpose is defeated if defendant is allowed to present a moving target or, as in this case, conceal the target altogether."); \textit{Miller}, 687 F.2d at 138-39 (magistrate decided that defendant's reason was implausible but substituted its own theory, so case must be remanded for trial on alternate theory).
\item[273.] \textit{Burdine}, 450 U.S. at 255 n.9.
\item[274.] See \textit{Lanphear}, 703 F.2d at 1317 ("It should not be necessary to add that the defendant cannot meet its burden by means of a justification articulated for the first time in the district court's opinion."); \textit{Miller}, 687 F.2d at 139-40 (Churchill, J., dissenting) (once lower court found defendant's reason pretextual, court of appeals should not have remanded case for additional hearing on alternative reason offered by lower court but never advanced by defendant).
\item[275.] See \textit{Price Waterhouse} v. \textit{Hopkins}, 490 U.S. 228, 252 (1989) (plurality opinion) ("An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."); \textit{Sullivan}, supra note 146, at 1117 n.42 ("Even if the 'true' reason is not illegal, but only embarrassing, it seems odd to allow the defendant to escape liability on a basis not asserted by it."); \textit{Szteinbok}, supra note 189, at 1130-31 ("The legislative policy against discrimination takes precedence over the defendant's interest in keeping its motives from the public eye. . . . A spurious explanation subverts the purpose of the litigation and encumbers the court's analysis.").
\end{enumerate}
\end{footnotesize}
Second, the Supreme Court has stated that once all legitimate reasons have been eliminated for an employer's conduct, it is fair to assume that the only remaining reason is discrimination.\textsuperscript{276} It is on this principle that the entire \textit{Burdine} analysis is based. Therefore, when the only legitimate reason offered by the defendant turns out to be untrue, it is entirely consistent with Supreme Court precedent to presume that "it is more likely than not the employer, who we generally assume acts only with \textit{some} reason, based his decision on an impermissible consideration such as race."\textsuperscript{277}

Third, there is no rational reason for giving a defendant who has lied about the reasons for its actions a presumption that its lie does not conceal illegal conduct.\textsuperscript{278} In no other area of the law would a lying defendant be accorded such solicitude. Ordinarily lack of credibility may be considered as adverse evidence.\textsuperscript{279} There is no principled reason why the same result should not obtain here. To presume that a defendant who offered a false reason for its actions in court did so for a benign reason is illogical. Such a presumption can only stem from an unwarranted view on the part of many judges that employers in employment discrimination cases are so often victimized by disgruntled plaintiffs that the law must bend over backwards to protect them, a perception that simply has no basis in either law or fact.

Having demonstrated the fallacy of the "secret reason" theory, it is nevertheless necessary to address one final contention: that defendants resist asserting certain unseemly justifications, even if true, because of their belief that the factfinder will react negatively to them, and that therefore the defendant's lie may conceal a nondiscriminatory reason. This fear may be realistic. Some courts and commentators have appeared willing to impose liability on employers if their articulated reason

\textsuperscript{276} Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("A prima facie case under \textit{McDonnell Douglas} raises an inference of discrimination, only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.").

\textsuperscript{277} Id.; see also Ibrahim v. New York State Dep't of Health, 904 F.2d 161, 168 (2d Cir. 1990) (district court concluded that defendant's reasons for denying promotion were false but that real reason was "cronyism"); court of appeals reversed because defendant had never advanced such a reason, and falsity of the reasons advanced "pointed to discrimination based on national origin which was not negated").

\textsuperscript{278} Cf. Price Waterhouse v. Hopkins, 490 U.S. at 271 (O'Connor, J., concurring in judgment) ("I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII."); Sullivan, supra note 146, at 1116-17 n.42 ("Indeed, one could argue that such a reason is especially unlikely to be true precisely because the employer, whose interest is to assert it, has not put it into evidence.").

\textsuperscript{279} See supra notes 227-30 and accompanying text.
is "arbitrary" or is not "business-related," regardless of whether or not it proves to be the true reason for the employment action. For example, in *Valdez v. Church's Fried Chicken*,\(^2\)\(^8\)\(^0\) the District Court for the Western District of Texas asserted:

An employer cannot come forward with any reason justifying the job discharge, but must instead come forward with only legitimate reasons. To illustrate the proposition rather starkly, it would seem highly inappropriate to grant judgment for a defendant who came forward and argued that the plaintiff was discharged because the defendant accepted a monetary bribe from an enemy of the plaintiff. When the real reason for discharge is so patently illegitimate, it is proper for the courts to resurrect the presumption that unlawful discrimination motivated the job action.\(^2\)\(^8\)\(^1\)

In the opinion, however, the court does not explain how discharging a plaintiff because of a bribe violates Title VII. Indeed, if the defendant claimed bribery as its reason, and the plaintiff failed to disprove it, it is difficult to understand why judgment should not be awarded to the employer. Nevertheless, courts and commentators have argued that the defendant's reason must be "lawful" or "rational" before it can rebut the plaintiff's presumption of discrimination.\(^2\)\(^8\)\(^2\) In light of such attitudes, it


\(^{281}\) Id. at 634 ("To allow a Title VII defendant to satisfy its rebuttal burden by offering an illegitimate reason for the job action and shifting the burden back to the plaintiff would be inconsistent with the evidentiary burdens established by the Supreme Court."); see Harris v. Marsh, 679 F. Supp. 1204, 1285 (E.D.N.C. 1987) ("[F]or the employer's reason to be deemed sufficient to overcome the presumption against him, it must have a rational connection with the business goal of securing a competent and trustworthy work force."); aff'd in part and rev'd in part sub nom. Blue v. United States Dep't of the Army, 914 F.2d 525 (4th Cir. 1990), and cert. denied sub nom. Chambers v. United States Dep't of the Army, 111 S. Ct. 1580 (1991).

\(^{282}\) See Brown v. Tennessee, 693 F.2d 600, 605 (6th Cir. 1982) (refusal to take polygraph is legitimate nondiscriminatory reason, "at least when polygraph testing is a lawful method for determining employment-related questions"); *Valdez*, 683 F. Supp. at 634 ("If illegitimate reasons such as nepotism or irrational personal dislike unrelated to job performance were deemed sufficient to rebut the plaintiff's case, the plaintiff would face an impossible task in demonstrating pretext."); Grabb v. Bendix Corp., 666 F. Supp. 1223, 1244 (N.D. Ind. 1986) ("it is not the court's duty to determine the validity of a defendant's employment decision as long as the decision was made in good faith"); Hannah A. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C. L. REV. 419, 437 (1982) ("For the employer's reason to be deemed sufficient to overcome the presumption against him in a disparate treatment case, then, it must have a connection with the business goal of securing a competent and trustworthy work force."). See generally Terry Collingsworth, *ERISA Section 510—A Further Limitation on Arbitrary Discharges*, 10 INDUS. REL. L.J. 319, 338-40 (1988) (articulated reason must be good reason, not merely any reason justified under "employment at will" doctrine); Joan Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024, 1054-55 n.200 (1987) ("While employers need the flexibility to make employment decisions, it is not burdensome to require
is at least conceptually possible that defendants at times advance pretextual reasons to conceal reasons that are somehow "illegitimate," but are actually nondiscriminatory.

The short answer to this question is that defendants are expected to be truthful in court regardless of the adverse consequences. But there are also theoretical problems with limiting a defendant's articulated justification to reasons that are somehow business-related. Therefore, a more practical solution than simply admonishing defendants not to lie is needed. The appropriate response is for courts to acknowledge that, under Burdine, a defendant is not liable for intentional discrimination if it truly acted for a nondiscriminatory, but arguably unseemly, reason. Thus, in the hypothetical case, if the hiring partner asserts that he did not hire the plaintiff because he had been instructed to hire instead an important client's son, and if the plaintiff cannot show that this is untrue, then the defendant prevails. As the final Part of this Article shows, this rule would remedy one of the principal concerns of the "pretext-plus" courts and ensure more consistent application of Burdine.

the employer to articulate a job-related reason for a decision. . . . If the employer cannot articulate such a reason, then this failure should create an inference that a discriminatory reason exists.

As one commentator asserted:

If an employer actually makes a decision based on the fact that the applicant is left-handed, or green-eyed, or is a Democrat, regardless of the irrationality of that reason, the employer will not be engaging in discrimination proscribed by the statute. . . . The issue, however, is not whether arbitrary factors are proscribed by the Act. . . . In the face of a prima facie case creating an inference of race, sex, or national origin discrimination, a defendant is obligated to articulate legitimate reasons from which proper motivation can be inferred. Some reasons (such as left-handedness or green-eyedness) are so weak that they will not allow a reasonable inference to be drawn that these reasons, rather than the statutorily prescribed [sic] reasons already inferred, actually motivated the employer.

Mack A. Player, Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis, 36 MERCER L. REV. 855, 877-78 (1985).

283. See, e.g., Visser v. Packer Eng'g Assoc., 924 F.2d 655, 657 (7th Cir. 1991) (If plaintiff was fired for personal disloyalty rather than for business reasons, "[i]t does not show . . . that [plaintiff] was fired because of his age. It tends if anything to show the opposite, because if [plaintiff] was fired because of his disloyalty . . . the natural though not inevitable inference is that he was not fired because of his age."); Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983) ("Even had the reasons articulated here been frivolous or capricious, had they been the genuine causes of these discharges they would have defeated liability under the ADEA."); cert. denied, 467 U.S. 1215 (1984); Harris, 679 F. Supp. at 1285-86 n.130 ("Although most employment decisions based on nepotism or friendship still encompass some rational relationship to bona fide business concerns, a situation may occur where that is not the case, yet the situation was clearly not racially motivated.").
III. Acknowledging the Probative Value of the "Illegitimate" Nondiscriminatory Reason

The federal courts should recognize that an "illegitimate" nondiscriminatory reason offered by an employer suffices to rebut the plaintiff's prima facie case. The benefits of such a rule are obvious. First, it eliminates a principal theoretical justification for the "pretext-plus" rule, because if the defendant's articulated reason proves to be untrue, then there is no basis for assuming that the lie concealed some other nondiscriminatory reason. If the defendant truly has a nondiscriminatory reason, then the defendant must advance it or risk the consequences. Thus, this rule will also foster truth-telling in employment discrimination cases. A defendant will be insulated from liability only if its true nondiscriminatory reason for taking adverse action against the plaintiff is openly advanced in court.

Second, this rule is entirely consistent with Supreme Court precedent. Although many courts and commentators have argued that a "legitimate" reason must be a "rational business reason," there is no analytical justification for this assertion.\textsuperscript{284} In \textit{Furnco Construction Corp.}, the Supreme Court distinguished between employers who act in a "totally arbitrary manner, without any underlying reasons," and employers who act with "some reason."\textsuperscript{285} Once the plaintiff eliminates all "legitimate" reasons, then the Court has held that it is likely that the employer based its action on "an impermissible consideration such as race."\textsuperscript{286} In order to infer an illegitimate basis, the Court must have presumed that all nondiscriminatory reasons, whether or not they accomplished some business purpose, have been eliminated.\textsuperscript{287} Otherwise, there would be no reason to infer that the employer acted with discriminatory intent. An unsavory reason may merit closer scrutiny, such as the

\textsuperscript{284} See Sullivan, \textit{supra} note 146, at 1158-59 (even if employer claims it refused to hire plaintiff because plaintiff was a Capricorn, such a reason would be a legitimate, nondiscriminatory reason since, "[n]o matter how silly this reason, it is not one of those prohibited by Title VII. Accordingly, it would suffice to carry the defendant's burden of production.").


\textsuperscript{286} Id.

\textsuperscript{287} See Johnson v. University of Wisconsin-Milwaukee, 783 F.2d 59, 63-64 (7th Cir. 1986) (plaintiff's claim that defendant's reason was pretextual and that she was fired in retaliation for her son's filing of a lawsuit against employer did not prove discrimination; if that was the real reason, "[w]hile defendant would not be deserving of praise, this 'bad' reason proffered by defendant would still constitute a nondiscriminatory reason that satisfies defendant's burden under the indirect method of proof in an age discrimination case"); cf. NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 669 (1st Cir. 1979) ("established principle that an employer legally may discharge for any cause, whatever others may think of its adequacy, so long as his motivation is not interference with rights protected under the [NLRA]").
scrutiny courts routinely apply to purely subjective reasons,\textsuperscript{288} but articulating such a reason does not necessarily imply that it is either untrue or discriminatory.\textsuperscript{289} Similarly, in *Burdine*, the Court noted:

> We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates *lawful reasons* for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.\textsuperscript{290}

The Court's equation of the term "lawful" with the phrase "not . . . motivated by discriminatory animus" provides further support for this rule.

It has been argued that permitting an employer to rebut a plaintiff's presumption of discrimination with an "illegitimate" reason would allow the employer to dream up any reason in order to prevail, because "[i]t will be a rare defendant who cannot dredge up some reason for acting as it did."\textsuperscript{291} This contention, however, ignores the whole purpose of the pretext stage under *Burdine*. If the defendant generates an unseemly or arbitrary reason for its employment action that has no relation to any legitimate business objective, it should be easier, not more difficult, to prove that it is pretextual. A claim that the plaintiff was not hired because he was a vegetarian or a Capricorn, for example, should be at least

\textsuperscript{288} See Conner v. Fort Gordon Bus Co., 761 F.2d 1495, 1499 (11th Cir. 1985) ("[A] defendant relying on a purely subjective reason for discharge will face a heavier burden of production than it otherwise would.").

\textsuperscript{289} Cf. Williams v. Apfels Coffee Co., 792 F.2d 1482, 1486-87 (9th Cir. 1986) (defendant claimed that selections were based on merit, but fact that several of those hired over plaintiff were relatives of defendant's other employees casts doubt on defendant's credibility). But see Player, *supra* note 283, at 877 ("As rational beings, employers more often than not will use reasons that have some legitimate relationship to bona fide business concerns. It, therefore, cannot be inferred with any strength that an employer was motivated by a proffered reason that is bizarre, irrational, or wholly arbitrary.").

\textsuperscript{290} Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981) (emphasis added); see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire."); cf. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1984) ("This is not to say, of course, that proof of a justification which is reasonably related to the achievement of some legitimate goal necessarily ends the inquiry.").

\textsuperscript{291} For example, one commentator contends:

If the reason is not scrutinized to determine whether it has sufficient rationality to carry an inference of legal motivation, the delicate balance will be tipped dramatically in favor of the defendants. The plaintiff will be prematurely deprived of the inference of illegal discrimination drawn from his prima facie case.

Player, *supra* note 282, at 866; see also Valdez v. Church's Fried Chicken, 683 F. Supp. 596, 634 (W.D. Tex. 1988) ("plaintiff would face an impossible task in demonstrating pretext").
as easy to rebut as a claim that he was not hired because he did not perform well during an interview.\footnote{292} Moreover, a reason that appears to be specious on its face ought to be subject to greater scrutiny, not less, by the finder of fact, just as more traditional "subjective" reasons are.\footnote{293} Once the plaintiff successfully rebuts the reason, then the plaintiff has proven pretext and thereby proven intentional discrimination.

Another argument raised against this rule has been that defendants may offer a justification that violates another law and thereby attempt to insulate themselves from liability, or that their fear of admitting liability for violating another law may encourage fabrication of a business reason.\footnote{294} For example, a defendant may have discharged the plaintiff in violation of a state "whistleblower" statute, but instead stand accused of age discrimination. Nevertheless, if the defendant asserts: "I didn't fire the plaintiff because of his age; I fired him because he squealed on me to the state authorities," the defendant plainly has met its burden under \textit{Burdine}. Moreover, if the plaintiff cannot prove that the employer's reason is untrue, then the plaintiff has not proven age discrimination and should not prevail. That the employer's admission may incur liability in a subsequent lawsuit is a fair consequence of the employer's illegal conduct.

In contrast, if the employer instead falsely asserts: "I fired the plaintiff because he was incompetent," the employer has set the stage for a possible finding of age discrimination should the plaintiff succeed in proving that reason to be untrue. Nevertheless, the theoretical risk that a defendant will be punished for discrimination rather than for its actual illegal conduct does not justify requiring only "lawful" reasons to be offered by defendants, as some "pretext-only" courts might suggest, nor does it justify permitting defendants to lie their way out of their conduct and then to be presumed innocent, as "pretext-plus" courts might suggest.

\footnote{292}{See Sullivan, supra note 146, at 1159 (if employer claims as legitimate nondiscriminatory reason that plaintiff is a Capricorn, "[t]he trier of fact could believe that the most likely explanation for those facts was an intent to exclude [plaintiff]; the defendant's explanation, while theoretically offering an alternative explanation, may not be believed because it is so far off the 'Richter scale' of everyday conduct.").}

\footnote{293}{See supra note 288.}

\footnote{294}{See Player, supra note 282, at 870-71 (Permitting an employer to offer a justification that violates another statute "patently undercuts public policy. . . . Other labor laws] constitute a body of law that should be interpreted as an interrelated whole, securing for employees a broad charter of employment protections."); Vogel, supra note 282, at 1055 n.206 ("Obviously, the employer is not likely to articulate a reason which will make it liable under other discrimination laws.").}
To hold defendants liable for discrimination if they acted adversely to plaintiffs for "bad" but nondiscriminatory reasons would effectively abrogate the "employment at will" doctrine. Although this traditional doctrine has fallen into some disfavor in recent years, it nevertheless would be inappropriate to transform federal antidiscrimination statutes into statutes requiring discharge only "for cause." Imposing this additional burden on employers would achieve a result that Congress never intended.

In short, the term "legitimate nondiscriminatory reason" should be construed to mean "genuine nondiscriminatory reason," and thus it should include any nondiscriminatory reason upon which the employer in fact relied. Such a definition would focus the pretext stage squarely on the credibility of the defendant's reason, which is precisely what the Supreme Court intended in Burdine. In the hypothetical case, evidence that the hiring partner engaged in nepotism would be "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory ani-

295. Cf. Vogel, supra note 282, at 1054-55 n.200 ("If the employer must articulate a job-related reason, then § 510 will further erode the employment-at-will doctrine which allows employers to fire people for any reason or no reason at all.").


297. See 1 Charles A. Sullivan et al., EMPLOYMENT DISCRIMINATION § 5.4.4, at 261 (2d ed. 1988) ("On its face, the term 'legitimate, nondiscriminatory reason' might seem to limit the employer to reasons validly related to job performance. As long as the reason is not itself discriminatory, however, any reason will suffice—even if it does not seem 'legitimately' related to the job."); see also Gray v. University of Ark., 883 F.2d 1394, 1402 (8th Cir. 1989) ("[S]ome of the reasons given . . . appeared to be less than weighty, if not almost laughable," but were not found to be unworthy of credence.); Gaballah v. Johnson, 629 F.2d 1191, 1201 n.14 (7th Cir. 1980) (preselection of candidates for promotion in violation of agency rules does not indicate discrimination and remains a nondiscriminatory reason); Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("The employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act on or approve."); Lombard v. School Dist., 463 F. Supp. 566, 571 (W.D. Pa. 1978) ("Stating that a man was selected over a woman for a job because the man had more friends in high places constitutes a 'non-discriminatory reason' for the unequal treatment sufficient to avoid liability under Title VII . . . .").

298. As explained by one commentator:

The real limit on what will be accepted as a legitimate nondiscriminatory reason is credibility. The further removed the reason is from job performance or legitimate needs of business, the less likely it is that a factfinder will accept the reason as the real basis for the allegedly discriminatory treatment. For example, an employer who asserts that she never hires vegetarians might convince a factfinder that the plaintiff was in fact a vegetarian, but the factfinder would tend to doubt that the plaintiff's vegetarianism was the actual reason for defendant's failure to hire him.

Sullivan et al., supra note 297, § 5.4.4 at 261.
mus. But such reasons ordinarily should be accepted in an employer's defense until the plaintiff proves them to be untrue.

Once the courts have acknowledged that a defendant may advance a truthful but "illegitimate" reason in rebuttal of a discrimination claim, then it logically follows that a plaintiff who successfully demonstrates that the defendant's justification is untrue is entitled to judgment in his favor as a matter of law. If the court has to choose between the reasons offered by the parties—the claim of discrimination raised by the plaintiff, and the claim of some other nondiscriminatory reason raised by the defendant—once the plaintiff disproves the defendant's reason, the court has no other choice but to accept the reason offered by the plaintiff. Because the court no longer would be permitted to speculate that some secret reason not articulated by either party motivated the employment decision, the court would be required, as a matter of law, to find that the plaintiff had proven discrimination by disproving the defendant's articulated reason by a preponderance of the evidence.

IV. Conclusion

As this review of the "pretext-plus" rule indicates, plaintiffs in "pretext-plus" jurisdictions are unfairly harmed by a rule that has no basis in legal doctrine. Not only does the rule itself unduly handicap employees

299. This would not foreclose an argument by a plaintiff at the pretext stage that an employer's nepotism constituted racial discrimination because, for example, the employer preferred to hire relatives and all the employer's relatives were white. See Roberts v. Gadsden Memorial Hosp., 835 F.2d 793, 798-99 (11th Cir. 1988) (defendant's articulated reason was that plaintiff had never been considered for job for which he was qualified, and record suggested that promotions were based on nepotism and cronyism: "[These] informal methods necessarily and intentionally favored those who moved within [the selecting official's] social circles—i.e., white people. This 'method' of promotion patently failed to afford a black man the equal treatment which Title VII demands.") (citations omitted); Lewis v. University of Pittsburgh, 725 F.2d 910, 927-28 (3d Cir. 1983) (Adams, J., dissenting) ("[N]epotism is... a nonobjective consideration in hiring or promotional decisions that has the effect of locking in the racial and ethnic status quo. If a workforce is racially segregated and hiring is based on kinship to the workforce in place, the pattern of segregation will not be altered.").), cert. denied, 469 U.S. 892 (1984).

300. This is not to suggest that any reason offered by the employer will satisfy the burden of production. "Reasons" that purport to offer no real justification for the action will not suffice. Asserting, for example, that the reason for an employment decision was that the employer had no reason, as the defendant ultimately asserted in Tye, would not meet the burden. See supra notes 200-214 and accompanying text; Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 96 (6th Cir. 1982) (defendant's proffered reason as to why plaintiff was not hired was that none of the foremen with authority to hire had selected him: "[This] reason does not tell the court or the plaintiff whether the employment decision was in fact based upon [plaintiff]'s prior work record or whether the decision in fact was based upon impermissible racial considerations.").
by requiring "plus" evidence, but application of the rule to reject most of the common forms of "plus" evidence that plaintiffs produce further hampers plaintiffs' ability to pursue claims of employment discrimination. In many ways, the "pretext-plus" rule treats employment discrimination cases as if they were some uniquely disfavored type of lawsuit that may not be proven circumstantially.

It may not be surprising that legal doctrines have evolved in recent years to disadvantage civil rights plaintiffs. Employment discrimination law became increasingly controversial during the Reagan years, and the Supreme Court's activist stance in reversing prior precedent in this area has provoked both widespread comment and various attempts at legislative response, most recently the Civil Rights Act of 1991. The battle over proving pretext in disparate treatment cases, however, is far less visible than the current controversies over "quotas" and affirmative action that have garnered most of the attention of scholars and the public. Nevertheless, it is in this arena that the effort to achieve a workplace free of unlawful discrimination will be won or lost.

What ultimately underlies the controversy over the "pretext-plus" rule is a battle over policy, not law. The dominant judicial view in the early years of employment discrimination litigation—that illegal discrimination is presumed to be prevalent and that plaintiffs must be given ample opportunity to prove their cases—has given way in the current conservative climate to a notion that illegal discrimination is a thing of the past and that plaintiffs more frequently wield discrimination claims as a shield against all adverse employment actions. In acting upon these beliefs, however, the "pretext-plus" courts have ignored precedent and have imposed their own views of what employment discrimination means in today's society. It may be ironic that conservative courts have taken such an activist role in rewriting the law in this area. Nevertheless, it is time for a more principled approach to be applied to disparate treatment cases.