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Employment Discrimination: Recent Developments in the Supreme Court (Symposium: The Supreme Court and Local Government Law: The 1992-93 Term)

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EMPLOYMENT DISCRIMINATION: RECENT DEVELOPMENTS IN THE SUPREME COURT

Judge Leon D. Lazer:

Our final speaker is Professor Eileen Kaufman of Touro Law School. She has been recognized by New York State Court Judges for her expertise as a Pattern Jury Instruction Committee member and as a reporter for Volume II of the Pattern Jury Instructions. Furthermore, I would like to point out to all of you that the remarkable work she has done on defamation is admired throughout the judicial system. Professor Kaufman has a great deal of interest in the areas of both racial and gender employment discrimination, and she is a very appropriate person to discuss the cases that have come down this past Term dealing with those issues. She will also, as a bonus, give us a discussion of a very important punitive damages case that came down.[1] Professor Kaufman.

Professor Eileen Kaufman:

The two important employment discrimination cases from last Term are *Hazen Paper Company v. Biggins*[2] and *St. Mary's Honor Center v. Hicks*.[3] While *Hazen* is an age discrimination case[4] and *St. Mary's* is a Title VII case,[5] they can be viewed as

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1. *See* Martin A. Schwartz & Eileen Kaufman, *Punitive Damages in Section 1983 Cases -- Recent Developments*, 10 TOURO L. REV. 541 (1994). Professor Kaufman spoke briefly about recent Supreme Court developments in punitive damages at this symposium. However, Touro Law Review simultaneously published an article which she co-authored discussing the same issue. Therefore, her discussion of punitive damages at the symposium has been omitted.

2. 113 S. Ct. 1701 (1993).

3. 113 S. Ct. 2742 (1993).

4. *Hazen*, 113 S. Ct. at 1704 (holding that an employee who claimed he was fired because of his age to prevent his pension from vesting was not enough to violate the Age Discrimination in Employment Act (ADEA)).

companion cases which serve to explain what an employment discrimination plaintiff must now establish when attempting to prove disparate treatment by indirect evidence. By way of preview, suffice it to say that plaintiff's task has been made more difficult as a result of these decisions.

It would be useful to preface my discussion of these two cases with a very short explanation of how this variety of disparate treatment claim differs from other varieties of claims for proving employment discrimination. In every employment discrimination case, and I think last Term's decisions serve to reinforce this, the primary focus is whether the employer has treated the employee less favorably than others for a statutorily defined impermissible reason.[6] This can generally be established pursuant to two very different theories of employment discrimination: disparate treatment or disparate impact. The evidentiary methodology for

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5. *St. Mary's*, 113 S. Ct. at 2746 (plaintiff claiming that his rights were violated under Title VII because he was fired due to his race). Title VII, 42 U.S.C. §2000e-2(a) (1981), provides in pertinent part:

> It shall be unlawful employment practice for an employer
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> (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 . . . .

6. *See Hazen*, 113 S. Ct. at 1705 ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]." (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))); International Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) ("Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex."); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("The central focus of the injury in a[n] [employment discrimination] case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))); Phillips v. Martin Marietta Corp., 400 U.S. 542, 497-98 (1971) ("Section 703(a) of the Civil Rights Act of 1964 [Title VII] requires that persons of like qualifications be given employment opportunities irrespective of their sex.").

proving discrimination differs markedly depending upon which of those two theories of discrimination is utilized.

In a disparate treatment claim, the employer allegedly is treating an employee less favorably because of the employee's membership in a protected group.[7] These claims require the plaintiff to prove intentional discrimination by the employer.[8] That can be done either by direct evidence or, as is far more commonly done, by indirect or circumstantial evidence.[9]

The evidentiary framework for making out a prima facie case for disparate treatment depends upon whether it is a direct evidence case or an indirect evidence case. The direct evidence case is very straightforward.[10] Where the plaintiff has direct evidence of a discriminatory policy or discriminatory treatment, the burden shifts to the employer to justify its practice or policy.[11] The employer must justify its practice or policy by proving the basis for the exclusion is a bona fide occupational qualification (BFOQ).[12]

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7. *See Hazen*, 113 S. Ct. at 1706. ("In a disparate treatment case, liability depends on whether the protected trait . . . actually motivated the employers decision.").

8. *See* Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 988 (1988) ("[W]e have consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required . . . .").

9. *See Hazen*, 113 S. Ct. at 1710 ("Once a 'willful' violation has been shown, the employee need not additionally . . . provide direct evidence of the employer's motivation."); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) (plaintiff need not "submit direct evidence of discriminatory intent"); *Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

10. *See* Equal Employment Opportunity Comm'n v. Carolina Freight Carriers Corp., 1992 U.S. Dist. LEXIS 21454, at *9 (N.D. Fla. Dec. 1, 1992) ("The most straightforward way for a plaintiff to establish discrimination is by direct evidence that the employer acted with discriminatory motive.").

11. *See* Grant v. General Motors Corp., 908 F.2d 1303, 1306 (6th Cir. 1990) ("An employer seeking to justify overt discrimination bears the burden of establishing the BFOQ defense.").

12. *See* Carney v. Martin Luther Home, Inc., 824 F.2d 643, 645 (8th Cir. 1987) (agreeing with plaintiff's argument that "she submitted direct evidence of discrimination under Title VII and that the defendant failed to establish that such discrimination was justified as a bona fide occupational qualification

In disparate treatment cases based on indirect or circumstantial evidence, the nature and the order of proof are quite different. The formula for allocating the burdens and order of presentation of proof is based on the now familiar *McDonnell Douglas Corp. v. Green* formula.[13] Under *McDonnell Douglas*, a plaintiff makes out a prima facie case by proving four elements:

> (i) that [plaintiff] belongs to a racial minority; (ii) that [plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [plaintiff's] qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications.[14]

Once plaintiff makes out a prima facie case, the defendant must show evidence of a "legitimate, nondiscriminatory reason for the employee's rejection."[15] The employer's burden here is the burden of production.[16] The burden of persuasion remains at all times with the plaintiff in a disparate treatment case.[17] Once the defendant articulates a non-discriminatory reason for the employment decision, the plaintiff then has the burden of demonstrating, by a preponderance of the evidence, that the

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(BFOQ)"); Harriss v. Pan Am. World Airways, Inc., 649 F. 2d 670, 674 (9th Cir. 1981) ("The BFOQ defense is applicable to employment practices that purposefully discriminate on the basis of sex . . . .").

13. 411 U.S. 792 (1973) (holding that an employer must have legitimate and nondiscriminatory reasons for action against an employee).

14. *Id.* at 802.

15. *Id.*

16. *See* Equal Employment Opportunity Comm'n v. Flasher Co., Inc., 986 F.2d 1312, 1316 (10th Cir. 1992) (stating that "[o]nce the plaintiff has established a prima facie case, the burden of production shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection'").

17. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The Court stated that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

legitimate reasons offered by the employer were not its true reasons, but rather a pretext for discrimination.[18]

At least until last Term, the *McDonnell Douglas* formula had proved very useful in cases where plaintiff lacked direct evidence of an improper motive.[19] Under the formula, by proving those four objective facts, plaintiff creates a rebuttable presumption of unlawful discrimination thereby requiring the employer to explain itself.

A completely different way of proving employment discrimination is to rely on disparate impact theory. In sharp contrast to disparate treatment cases, the plaintiff in a disparate impact case is not required to prove discriminatory intent.[20] Rather, the claim is based on a facially neutral employment policy which adversely and disproportionately affects members of a protected group and which "cannot be justified by a business necessity."[21] A few years ago at this conference we discussed the evidentiary framework for analyzing a disparate impact case[22] and it is really not necessary for our current purposes to describe that framework in any detail.

With that backdrop in mind let us turn to last Term's cases, both of which involved disparate treatment by either indirect evidence or circumstantial evidence. *Hazen* is an age

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18. *McDonnell Douglas*, 411 U.S. at 804-05 ("[O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

19. *See* Johnson v. Injured Workers' Ins. Fund, 978 F.2d 1255 (4th Cir. 1992) (stating that "[t]he sequence of proof and burden shifting articulated in McDonnell Douglas Corp. v. Green applies"); Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518, 1528 (11th Cir. 1992) (stating that "McDonnell Douglas remains the model for disparate treatment cases . . . ."); Oxman v. WLS-TV, 846 F.2d 448, 452-53 (7th Cir. 1988) (using the *McDonnell Douglas* burden-shifting test for claims under the ADEA and Title VII).

20. *See Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive . . . is not required under a disparate-impact theory.").

21. *Id.* at 335 n.15.

22. *See Symposium: The Supreme Court and Local Government Law, The 1988-89 Term*, 6 TOURO L. REV. 1 (1989-90).

discrimination case.[23] This case was brought by Walter Biggins who was fired at age 62 after working for Hazen Paper Company for just less than ten years.[24] The pension plan of the paper company vested pensions at the tenth year anniversary of employment.[25] Biggins claimed that his firing violated the Employment Retirement Income Security Act of 1974 (ERISA)[26] and the Age Discrimination in Employment Act (ADEA).[27] He believed that he was fired to prevent his pension from vesting and that his age was inextricably linked with that decision.[28] The company's explanation for the firing was that it considered Biggins to be a disloyal employee because he began doing business with competitors of Hazen.[29] According to the employer, this presented a risk that confidential information would be disclosed to competitors of Hazen.[30] The jury rejected Hazen's explanation and concluded that the company had violated both ERISA and the ADEA, and further concluded that the ADEA violation was willful which under the ADEA results in liquidated damages.[31]

The Supreme Court's decision in *Hazen* addressed two important ADEA questions: the standard for finding willfulness under the ADEA[32] and the standard for establishing underlying liability in a disparate treatment case under the ADEA.[33] With

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23. *Hazen*, 113 S. Ct. at 1704; *see also supra* note 4.

24. *Id.*

25. *Id.*

26. 29 U.S.C. §1001(a) (1985).

27. Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 623(a) (1990). The statute provides in relevant part:

> (a) It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

Id.

28. *Hazen*, 113 S. Ct. at 1704.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1708-10.

33. *Id.* at 1705-08.

respect to evaluating willfulness under the ADEA, the Court applied the standard that it had adopted in 1985 in *Trans World Airlines v. Thurston*.[34] It stated that a violation is willful within the meaning of the liquidated damages provision of the ADEA if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [ADEA]."[35]

The *Hazen* holding clears up some confusion among the circuits and establishes that the *Thurston* definition applies whether the case involves a facially discriminatory policy as in *Thurston*, or an ad hoc adverse employment decision.[36] Essentially, the holding in *Hazen* tells us that the *Thurston* definition of willfulness applies in all disparate treatment cases, whether based on direct evidence or indirect evidence.[37]

The potentially more important issue addressed in *Hazen* is whether an employer violates the ADEA when the employer's decision is based on a factor other than age, such as pension status or seniority, a factor that is empirically correlated with age.[38] The Court concluded that an employer does not violate the ADEA when it acts on an age-correlated factor alone.[39] Without proof that age played a role and had a determinative influence on the outcome, there has been no violation of the ADEA.[40] Applied to *Hazen*, the mere fact that the employer terminated Biggins to prevent his pension from vesting, a factor empirically

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34. *Id.* at 1708-09; *see also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128-30 (1985). The Court held that TWA's facially discriminatory job-transfer policy was not a "willful" ADEA violation as TWA neither "knew [nor] showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.*

35. *Hazen*, 113 S. Ct. at 1710 (citing *Thurston*, 469 U.S. at 128. "[T]he Court of Appeals stated that a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. [W]e hold that this is an acceptable way to articulate a definition of 'willful.'" (citations omitted) *Thurston*, 469 U.S. at 128.

36. *Hazen*, 113 S. Ct. at 1708-10.

37. *Id.* at 1710.

38. *Id.* at 1705.

39. *Id.*

40. *Id.* at 1706.

correlated with his age, did not suffice to establish liability under the ADEA.[41]

While the Court made clear that reliance on an age-correlated factor does not suffice to establish a disparate treatment claim under the ADEA, the fact pattern in *Hazen* would seem to be the classic disparate impact case. The claim would be that the employer's practice of interfering with pension rights had a disproportionate effect on older workers and cannot be justified as a business necessity and thus violates the ADEA. However, the Court declined to decide that issue because the plaintiff, inexplicably, never raised or relied upon a disparate impact theory.[42] However, Justices Kennedy and Thomas, and Chief Justice Rehnquist in a concurring opinion, indicated a reluctance to apply a disparate impact theory to age discrimination cases.[43] To date, at least six circuits, including the Second Circuit, have concluded that disparate impact claims are encompassed within the ADEA.[44]

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41. *Id.* at 1707.

42. *Id.* at 1706.

43. *Id.* at 1710 (Kennedy, J., concurring).

44. *See* Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992) ("The disparate impact doctrine, developed under Title VII, is also applicable to cases under the ADEA."); Shutt v. Sandoz Crop Protection Corp., 934 F.2d 186, 188 (9th Cir. 1991) (The plaintiff sued under the ADEA and the "case was decided as a 'disparate impact' case . . . ."); Wooden v. Bd. of Educ. of Jefferson County, 931 F.2d 376, 379 (6th Cir. 1991) (Under the ADEA, "[d]isparate impact results from facially neutral employment practices which fall more harshly on one particular group and cannot be justified by business necessity."), *reh'g denied*, 1991 U.S. App. LEXIS 13677 (6th Cir. June 10, 1991); MacPherson v. University of Montevallo, 922 F.2d 766, 771 (11th Cir. 1991) ("Under disparate impact theory [under the ADEA], discrimination can be established by proving that a facially neutral employment practice, which is unjustified by a legitimate business goal of the employer, has a disproportionately adverse impact on the members of a protected group."); MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3d Cir. 1988) ("Title VII and ADEA liability can be found where facially neutral employment practices have a discriminatory effect or 'disparate impact' on protected groups, without proof that the employer adopted these practices with a discriminatory motive."), *cert. denied*, 493 U.S. 944 (1989); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) ("To establish a prima facie case of age discrimination under a disparate impact theory, a

One other question left unresolved by *Hazen* is whether age-motivation can be inferred from the fact that the employer had articulated a false or pretextual reason for its decision to discharge the plaintiff. Remember, the company had argued that it had fired Biggins for doing business with competitors when that was really not its reason.[45] Does the fact that the company lied when offering that reason necessarily mean that the plaintiff has made out a case of unlawful discrimination? While that issue was not resolved in *Hazen*, that was precisely the issue that was resolved in the second employment discrimination case of the Term, *St. Mary's*.

St. Mary's is a Title VII[46] case where a black employee alleged that he was demoted and fired from his supervisory position at St. Mary's, a halfway house, due to his race.[47] Using the *McDonnell Douglas* formula,[48] plaintiff had no trouble establishing a prima facie case of racial discrimination.[49] He was a member of a protected group because he was black.[50] He was qualified for the position of shift commander.[51] He was demoted from that position and ultimately discharged,[52] and the position remained open and was ultimately filled by someone else.[53] Having established the four elements of the prima facie case, a rebuttable presumption then arises which requires the defendant to come forward with a non-discriminatory explanation.[54] The burden on the defendant is to produce evidence that the

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plaintiff . . . need only demonstrate that a facially neutral employment practice actually operates to exclude from a job a disproportionate number of persons protected by the ADEA.").

45. *Hazen*, 113 S. Ct. at 1704.

46. *See supra* note 5.

47. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 (1993).

48. *See supra* note 13-18 and accompanying text.

49. *St. Mary's*, 113 S. Ct. at 2747.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

employment decision was based on a legitimate nondiscriminatory reason.[55]

In *St. Mary's*, the defendant in district court did articulate a non-discriminatory reason for demoting and discharging Hicks.[56] The employer stated that Mr. Hicks was demoted and fired because of certain institutional rule infractions.[57] However, the district court found these reasons were not the real reasons for plaintiff's demotion and firing because in large part other persons had very similar rule infractions and no action had been taken with respect to those individuals.[58] Additionally, there were far more serious rule violations committed by Hicks' coworkers that had been routinely ignored.[59] Nevertheless, the district court found that Mr. Hicks had failed to prove that defendant's actions were motivated by race because "although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."[60]

The Eighth Circuit disagreed with the district court, finding that once defendant's reason is shown to be false, the case should be treated as one where the defendant failed to put forth a legitimate reason, thus entitling plaintiff to a directed verdict as a matter of law.[61] The Circuit Court explained that "[i]n other words, defendants were in no better position than if they had

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55. *Id.*

56. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1250 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742, *on remand to*, 2 F.3d 265 (8th Cir. 1993).

57. *Id.* at 1250 ("The excessive accumulation of violations over a short period of time is a legitimate reason for increasing the severity of discipline with each violation committed.").

58. *Id.* at 1250-51 ("Plaintiff has carried his burden in proving that the reasons given for his demotion and termination were pretextual.").

59. *Id.* at 1251 ("Although plaintiff committed several violations of institutional rules, plaintiff was treated much more harshly than his coworkers who committed equally severe or more severe violations.").

60. *Id.* at 1252.

61. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992) ("Once plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law."), *rev'd*, 113 S. Ct. 2742 (1993), *on remand to*, 2 F.3d 265 (8th Cir. 1993).

remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race."[62]

The Supreme Court reversed, concluding that the fact finder's disbelief of the reason offered by the employer does not compel a finding of discrimination.[63] Even where the plaintiff has demonstrated that the defendant's explanation was a mere pretext, the plaintiff must nevertheless prove by a preponderance of the evidence that discrimination was the real reason.[64] In other words, it is no longer sufficient to prove that the reason was pretextual, rather plaintiff satisfies her burden only by showing that the reason was a pretext for discrimination.[65]

Justice Souter wrote a very sharply worded dissent and was joined by Justices White, Blackmun, and Stevens.[66] The dissent attacked the majority for upsetting what Souter described as "two decades of stable law" and for substituting an "unfair and unworkable" scheme of proof which, in effect, rewards employers who are prepared to lie in court.[67]

I tend to agree with the dissent's appraisal of the practical effect of this decision. Employment discrimination claimants who cannot prove their case by direct evidence are bound to have a much more difficult time as a result of this decision. Additionally, it seems to me that the decision undercuts the very reason why *McDonnell Douglas* was originally decided the way it was. The *McDonnell Douglas* formula was adopted in recognition

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62. *Id.*

63. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2751 (1993) ("[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.").

64. *Id.* at 2751-52 ("[T]he plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were . . . a pretext for discrimination.").

65. *Id.* at 2752, 2755-56.

66. *Id.* at 2756-66 (Souter, J., dissenting).

67. *Id.* at 2757, 2764 (Souter, J., dissenting).

that discrimination today is far more subtle than it used to be.[68] It recognized that plaintiffs will typically not be able to point to any smoking gun.[69] It is the unusual case where a plaintiff can produce a direct eyewitness account that evidences the employer's discriminatory motivation. The *McDonnell Douglas* alternative framework was designed to "sharpen the inquiry into the elusive factual question of intentional discrimination"[70] by allowing the plaintiff to prove four facts that would then shift the focus to the reason offered by the employer.[71] If a pretextual explanation does not warrant a directed verdict for the plaintiff, it is hard to see how the *McDonnell Douglas* presumption assists the employment discrimination plaintiff even when the employer produces a dishonest explanation. The plaintiff is then left to produce evidence of discrimination that the plaintiff, by definition in these cases, lacks.

Consider the current position of the plaintiff, Melvin Hicks, in the *St. Mary's* case. In a decision rendered after the Supreme Court's remand, the Eighth Circuit on August 16, 1993, remanded the case to the district court to apply the Supreme Court's newly clarified analytical scheme.[72] More specifically,

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68. *See* Ann C. McGinley, *Credulous Courts and The Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 214 (1993) ("As defendants become increasingly sophisticated about the law, . . . admissions occur very rarely. Plaintiffs therefore normally use [the *McDonnell Douglas*] circumstantial evidence [test] to prove their Title VII and ADEA cases.").

69. *See id.* at 217. The author stated:

> The Supreme Court recognized the inherent difficulty of proving discriminatory intent when it adopted the presumption created by *McDonnell Douglas* and its progeny. Plaintiffs in disparate treatment cases must prove that defendants acted with discriminatory intent, an 'elusive factual question' that is difficult to prove absent a 'smoking gun.' The presumption raised by the prima facie case therefore gives the plaintiff the opportunity to flesh out the facts. Most plaintiffs will not have access to evidence of motive or intent, should any exist.

Id.

70. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981).

71. *See supra* note 13-18 and accompanying text.

72. Hicks v. St. Mary's Honor Ctr., 2 F.3d 264, 266-67 (8th Cir. 1993).

the Circuit Court directed the trial court to "hold an evidentiary hearing in order to permit the parties to present additional evidence on the now-critical question of [whether the defendants were motivated by] personal animosity."[73] But, notice what has happened here. In the first go around, plaintiff was able to show that the reason offered by the employer was false.[74] However, the Supreme Court concluded that a finding by the Court that the defendant's testimony is false is insufficient to establish racial discrimination.[75] So now the plaintiff has to respond to, and I suppose disprove, a reason never offered by the employer but suggested by the Court. If the plaintiff is able to disprove this reason, if the plaintiff comes to court and at this new evidentiary hearing convinces the fact finder that the employer's decision was not motivated by personal animosities, will that be enough or will the cycle go on and on? Will the plaintiff have to rule out any conceivable reason that either the employer or the court could suggest? This begins to sound very similar to Professor Friedman's talk earlier today concerning equal protection.[76] Plaintiff must try to think of any possible reason that the employer could have had for the discharge and then disprove each one. That may sound like an extreme vision of how *St. Mary's* might play out, but one that I think is not all that terribly far-fetched.

I should hasten to add that my doom and gloom prediction was not born out in the *Hazen* remand. Just two weeks ago, the First Circuit rendered an opinion in *Hazen* after remand from the

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73. *Id.* at 267.

74. *St. Mary's*, 756 F. Supp. at 1252 ("[P]laintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by race.").

75. *St. Mary's*, 113 S. Ct. at 2756 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer . . . .").

76. *See* Leon Friedman, *Retroactivity, Equal Protection and Standing*, 10 TOURO L. REV. 503 (1994).

Supreme Court.[77] The First Circuit applied the approach in *St. Mary's* which clearly applies to ADEA cases as well as Title VII cases, and imposed liability again.[78] The First Circuit relied on the Supreme Court's statement that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."[79] On remand, the First Circuit concluded that plaintiff had introduced some indirect evidence: that the plaintiff was required to sign a confidentiality agreement that no one else was required to sign.[80] That finding, coupled with the finding of pretext, sufficed to establish unlawful discrimination.[81]

Ultimately, it is too soon to know how this will play out in the lower courts. A recent Northern District of New York decision, *Anderson v. S.U.N.Y. Health Science Center*,[82] ducked what the court considered the intricacies of interpreting the "slightly altered" standard of *St. Mary's* by finding that even under the old standard, plaintiff had failed to make out a prime facie case.[83] In an Eastern District of Pennsylvania decision, *Reiff v. Philadelphia County Court*,[84] we learn that "a plaintiff who offers reasonably sufficient evidence of pretext along with the elements of a prima facie case will survive a summary judgment

77. Biggins v. Hazen Paper Co., 1993 WL 406515 (1st Cir. Oct. 18, 1993).

78. *Id.* at *5. The court upheld liability under the ADEA, ERISA, wrongful discharge, and fraud, and reversed the finding of liability under breach of employment contract. *Id.*

79. *Id.* at *2.

80. *Id.* at *1. The person who replaced the plaintiff was given an agreement to sign, however it was substantially less onerous than the one the plaintiff was required to sign. *Id.*

81. *Id.* at *4.

82. 826 F. Supp. 625 (N.D.N.Y. 1993) The court held that a black former assistant affirmative action coordinator at S.U.N.Y. alleging race, gender and retaliatory discharge failed to meet the burden of proving any of the three. *Id.* at 631, 635.

83. *Id.* at 630-31.

84. 827 F. Supp. 319 (E.D. Pa. 1993).

motion."[85] I think that is an important ruling. But there is also a recent Fifth Circuit case, *Odom v. Frank*,[86] which applied the *St. Mary's* approach and concluded that although the defendant's actions could not pass the "smell test,"[87] the plaintiff had failed to demonstrate that defendant's reasons were a pretextual smoke screen for masking racial or age-based discrimination.[88]

As a result of last Term's decisions, the key to litigating disparate treatment cases is to recognize that it is no longer enough to prove pretext. The emphasis from the plaintiff's point of view must be to demonstrate that the reason was not just a pretext, but rather a pretext for discrimination. In the absence of direct evidence, it is not all that clear how plaintiff is to do that. The best that can be said is that the plaintiff should, in every possible way, try to raise doubts about the employer's actions in an effort to convince the trier of fact that given the employer's dishonesty, the employer was actually motivated by a discriminatory animus.

Let me end with a curious footnote that may be of interest to some of you. *St. Mary's* was just applied in a New York case in a totally different factual context, not a discrimination case at all, but a peremptory challenge *Batson*[89] case. In *People v. Howard*,[90] the Nassau County Court talked about the *St. Mary's* approach in figuring out motivation and applied it to conclude

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85. *Id.* at 324-25.

86. 3 F.3d 839 (5th Cir. 1993).

87. *Id.* at 850. The "smell test" is credited to the late Irwin Younger. He stated:

> [T]he most important item in the courtroom and all too seldom used is the judge's nose. Any trial judge will inevitably come to the conclusion on occasion that a certain case or claim or defense has a bad odor. Simply put, a matter smells. Some smell so bad they stink.

Morgan Fiduciary, Ltd. v. Citizens & S. Int'l Bank, 95 B.R. 232, 234 (S.D. Fla. 1988).

88. *Odom*, 3 F.3d at 850.

89. Batson v. Kentucky, 476 U.S. 79 (1986). In *Batson*, the Court held that under the Equal Protection Clause a prosecutor may not use a peremptory challenge against a potential juror if the challenge is based on a racial motive. *Id.* at 89.

90. 158 Misc. 2d 739, 601 N.Y.S.2d 548 (1993).

that a prosecutor's use of a peremptory challenge did not violate the Equal Protection Clause.[91] It is an interesting application of *St. Mary's*.

Thank you very much.

91. *Id.* at 747, 601 N.Y.S.2d at 553 ("It is clear to this Court that the two exercised peremptory challenges would have been and were properly interposed for racially neutral reasons, notwithstanding a *de minimus* allusion to race.").