No. 99-536

IN THE SUPREME COURT OF THE UNITED STATES

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,
Respondents

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

Filed February 7, 2000

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent Sanderson Plumbing Products, Inc. before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 320 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding the proof needed to support a claim of employment discrimination. Petitioner and his *amici* contend that casting doubt on the employer's articulated reason for its employment decision is sufficient to support a jury finding of discrimination. The Fifth Circuit ruled correctly that a determination of whether an unlawful discrimination motivated an employment decision is an "essential final step" for an appellate court reviewing such a verdict. Pet. App. 8a.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in a variety of cases before this Court and the United States Courts of Appeals. As part of this *amicus* activity, EEAC has briefed a number of other cases before

this Court involving the standard of proof in intentional discrimination cases, including *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Sanderson Plumbing Products, Inc. (Sanderson), which manufactures toilet seats and covers, employed Petitioner Roger Reeves as supervisor of the "regular line" in the "Hinge Room." Pet. App. 2a. Reeves' job included keeping records of the attendance and punctuality of the employees under his supervision. *Id.* Reeves reviewed the records for accuracy, then passed them on to Russell Caldwell, his supervisor, who sent them to Data Processing. *Id.*

In 1993, a study by the company's Department of Quality Control, which was run by Powe Chestnut, revealed productivity problems on Reeves' line. Reeves was placed on 90 days probation. *Id.* at 2a-3a.

In 1995, Caldwell told Chestnut, now Director of Manufacturing, that employee absenteeism and tardiness again were making it difficult for the Hinge Room to meet its production requirements. *Id.* at 3a. Since the attendance records showed nothing out of the ordinary, Chestnut

asked the current Manager of Quality Control, Lucille Reeves, to audit the Hinge Room's time sheets. *Id.* The audit exposed many mistakes and falsifications on the time sheets by Caldwell, Reeves, and Joe Oswalt, who supervised the "special line" in the Hinge Room. *Id.* The Vice President of Human Resources, Dana Jester, reviewed the records independently and corroborated the audit's findings. Based on this information, Chestnut, Jester and Tom Whitaker, Sanderson's Vice President of Operations, recommended to Sandra Sanderson, the company president and Chestnut's wife, that Caldwell and Reeves be fired. *Id.* Had Oswalt not voluntarily left the company several months earlier, the recommendation would have applied to him as well. *Id.* at n.2. Ms. Sanderson fired Caldwell and Reeves. At the time, Caldwell was 45 years of age; Reeves was 57; Oswalt was 35. *Id.* at 2a.

Reeves filed suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, claiming that Sanderson had discharged him because of his age. *Id.* at 3a. "Reeves based his claim on two age-related statements allegedly made by Chestnut several months before Reeves' dismissal, namely (1) that Reeves was so old that he 'must have come over on the Mayflower,' and (2) that he was 'too damn old to do the job.' " *Id.* at 3a-4a. The case was tried to a jury, which found in favor of Reeves, and further found that the discrimination was willful. Sanderson then renewed its prior motion for judgment as a matter of law, and moved for a new trial. The trial judge denied both motions, and Sanderson appealed. *Id.* at 4a.

On appeal, the Fifth Circuit reversed, holding that "Reeves did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA." *Id.* at 10a.

SUMMARY OF ARGUMENT

Under this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), a plaintiff who has established a prima facie case of discrimination, as that term is used in this context, cannot survive summary judgment or judgment as a matter of law merely by casting doubt on the employer's articulated reason for its action. Once the presumption of discrimination raised by the prima facie case has been rebutted by the employer's articulated reason, it is as if it never existed. A plaintiff can prevail only by proving the ultimate fact of discrimination. Where no reasonable jury could infer discrimination from the evidence presented, it is the trial court's duty to enter judgment for the defendant under Fed. R. Civ. P. 56 or 50, as appropriate. Any other outcome would be contrary to *Hicks*.

ARGUMENT

I. TO SURVIVE JUDGMENT AS A MATTER OF LAW, A DISCRIMINATION PLAINTIFF CANNOT MERELY CAST DOUBT ON THE EMPLOYER'S ARTICULATED BUSINESS REASON, BUT MUST SHOW THAT THE REASON WAS A PRETEXT FOR DISCRIMINATION

A. This Court's Precedent Requires a Plaintiff To Prove the Fact of Discrimination

Since this Court issued its decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), all twelve circuits have reviewed this Court's analysis and applied it to employment discrimination cases. Unfortunately, despite the optimistic prediction of this Court that there would not be confusion among the circuits, 509 U.S. at 512, there is a definite and distinct split of dramatic proportions.

The nub of the problem falls to one small word, "may," within one oft-cited passage:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*."

Id. at 511 (emphasis in original) (footnote omitted). Does "may" mean that a factfinder is completely free to find discrimination, even in absence of proof of the ultimate issue, if the plaintiff is able to cast some doubt on the employer's reason, as seven circuits have concluded?[2] Or,

[2] *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*) ("a plaintiff may survive summary judgment (or in this case judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action"); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation 'unworthy' of belief."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994) ("[i]f 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."); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment."); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("discriminatory animus *may be inferred* from the simple showing of pretext"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997) ("a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action."), *cert. denied*, 522 U.S. 1045 (1998); *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998).

as five circuits have determined is the proper standard, does "may" mean that in some *but not all* instances, a prima facie case together with the evidence of pretext submitted by a plaintiff is sufficient to permit a finding of discrimination without a requirement of additional proof?[3] In short, does the word "may" mean "always can", or "sometimes not"?

In concurring in the denial of rehearing *en banc* in *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995),

[3] *Woods v. Friction Materials*, 30 F.3d 255, 260 (1st Cir. 1994) ("claimant must prove *both* that the employer's articulated reason is false, and that discrimination was the actual reason for its employment action"); *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2d Cir. 1997) (*en banc*) ("[a] finding of pretext may advance the plaintiff's case, but a plaintiff cannot prevail without establishing intentional discrimination by a preponderance of the evidence."), *cert. denied*, 522 U.S. 1075 (1998); *Vaughan v. Metrahealth Cos.*, 145 F.3d 197, 202 (4th Cir. 1998) ("an employer is entitled to summary judgment unless the ADEA plaintiff has adduced sufficient evidence *both* that the reason was false, *and* that age discrimination was the real reason.") (internal quotations omitted); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*) ("a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory."); *Ryther v. Kare 11*, 108 F.3d 832, 837 (8th Cir. 1997) (*en banc*) ("evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.") (footnote omitted).

cert. dismissed, 516 U.S. 1155 (1996), Judge Williams of the District of Columbia Circuit, joined by Judges Silberman and Ginsburg, identified the problem the circuits are having:

> The word "may" is ambiguous. It might mean that the factfinder is completely free to find discrimination, in the sense that an appellate court could never reverse such a decision on the evidence. Alternatively, it might mean that in some cases the combination will be adequate to sustain a finding of discrimination, in others not, to be determined by a factfinder initially, and the appellate court on review, acording to the usual principles.

Barbour, 48 F.3d at 1281 (Williams, J., concurring in denial of rehearing). Judge Williams concurred in the denial of rehearing in *Barbour* because he believed the panel opinion to be adopting the "sometimes not" view, and thus that *en banc* review was unnecessary. *Id.* Regrettably, Judge Williams' perception was incorrect, as the District of Columbia later ruled *en banc* in *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1290 (1998). Quoting Judge Williams' *Barbour* opinion in her dissenting opinion in *Aka*, Judge Henderson, joined by Judges Silberman, Williams and Ginsburg, stated that "[g]iven the *Hicks* majority's repeated emphasis on the need to prove that an employer's proffered reason for an employment action is a *pretext for discrimination*, I can only conclude, as did Judge Williams, that the Court intended 'may' to bear the second meaning." *Aka*, 156 F.3d at 1308 (Henderson, J., dissenting).

Judge Henderson is correct. Not only *Hicks*, but the entire line of cases leading to *Hicks* emphasized continually the fundamental requirement that a discrimination plaintiff prove discrimination. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), itself, the Court

directed unequivocally that "on 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.*" *McDonnell Douglas*, 411 U.S. at 805 (emphasis added). Shortly thereafter, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court described the plaintiff's burden as requiring a showing that "race was a 'but for cause' " of his rejection. *Id.* at 282 n.10. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court directed that "[t]he plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext *for discrimination.*" *Id.* at 578 (emphasis added). Describing the effect of the *McDonnell Douglas* burden-shifting framework in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court pointed out 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.* at 253. And finally, the Court stated succinctly that despite the difficulty of proving discrimination, "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Against this background, *Hicks*, despite the much-misunderstood "may," unequivocally requires a finding of discrimination. "We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.*" 509 U.S. at 514 (emphasis in original). Merely disbelieving the employer's reason is not enough. "But nothing 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." *Id.* at 514-15. Rejecting the dissent's contention that discrediting the employer's reason will suffice, the Court stated "[s]urely a more reasonable reading [of *Burdine*] is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 517. "It is not enough, in other words, to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination. *Id.* at 519 (emphasis in original).

B. The *McDonnell Douglas* Framework Is But a Method of Presenting Proof

The elements of the *McDonnell Douglas* framework must be viewed as no more than they are—a means to an end rather than the end itself. The minimal proof necessary to complete successfully the first two volleys bear this out.

Unlike a prima facie case in other areas of law, a prima facie case of discrimination, as established by this Court in *McDonnell Douglas* and its progeny,[4] constitutes only the barest minimum proof necessary to eliminate the "most common nondiscriminatory reasons for the plaintiff's rejection." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). As the Court explained in *Burdine*:

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

[4] While these cases arose under Title VII, this Court previously has assumed, without deciding, that the burden of proof framework they established likewise is applicable to cases arising under the ADEA. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996).

Id. at 254 n.7 (citation omitted). A Title VII plaintiff may establish a prima facie case:

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

McDonnell Douglas at 802. The Court noted that the proof necessary to establish a prima facie case may be different in other cases, given variations in the facts. *Id.* at n.13. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 278-79 and n.6 (*McDonnell Douglas* proof requirement of membership in a racial minority was demonstrative only); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. at 311-12 (age discrimination plaintiff need not show that he "lost out" to someone outside the protected class "so long as he has lost out *because of his age.*"). Indeed, several courts of appeals have held that a race discrimination plaintiff who was terminated and replaced can establish a prima facie case even though the replacement employee is a member of the same protected class. *E.g., Perry v. Woodward*, No. 97-2343, 1999 U.S. App. LEXIS 33417, at *23-26 (10th Cir. December 20, 1999) (collecting cases).

Given that the plaintiff's burden at the outset is minimal, the employer's corresponding burden to respond is likewise slight. As this Court said in *McDonnell Douglas*,

once a plaintiff establishes a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. The employer need not prove the absence of a discriminatory motive. *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978). Indeed, the employer "need not persuade the court that it was *actually motivated* by the proffered reasons." *Burdine*, 450 U.S. at 254 (emphasis added).

Under this Court's consistent precedent, once the initial exchange of volleys has been completed, the presumption of discrimination "drops from the case," *Burdine*, 450 U.S. at 255 n.10, and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255. At this point, " 'the factfinder must then decide *not . . . whether that evidence* [of the employer's reason] *is credible*, but 'whether the rejection was discriminatory within the meaning of Title VII.' " *Hicks*, 509 U.S. at 519 (quoting *Aikens* at 714-15) (emphasis added).

With the presumption gone, what is left is the evidence itself. Evidence that initially established the prima facie case may retain some persuasive force after the employer has presented its explanation, but the persuasive force is now something less than a presumption and is not necessarily enough even to permit a reasonable inference of discrimination.

C. Merely Raising a Question About the Employer's Reason Is Insufficient to Prove Discrimination

Allowing a discrimination plaintiff to survive summary judgment or judgment as a matter of law merely by raising a question of fact concerning the employer's reason ignores the fundamental principle that it is the plaintiff's burden to prove discrimination. Raising an issue of fact about the employer's reason is substantially less than proving that the reason is unworthy of credence and a pretext for discrimination. For example, discrimination plaintiffs frequently contend that the employer's articulated reason is either inadequate or incorrect. In a typical termination case, the plaintiff almost always argues that the employer's reason did not constitute sufficient grounds for dismissal. She may cite to a history of good performance ratings, or argue that the employer gave her no notice that her performance or misconduct was a problem. Even if she is right, it does not create an inference that the employer's reason is false, let alone a pretext for discrimination. At best, it constitutes an intrusion into traditional management prerogatives, which the statutes do not countenance. *See Burdine*, 450 U.S. at 259 ("The statute was not intended to 'diminish traditional management prerogatives.' ") (citation omitted).

Equally common are cases in which the plaintiff challenges the factual underpinnings of the employer's reason. For example, an employee who is dismissed based on his employer's belief that he engaged in sexual harassment may contest the factual allegations underlying the employer's belief, seeking to force the employer to prove harassment to defend against his claim of age discrimination. *E.g., Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466 (11th Cir. 1991). But even if "the complaining employees interviewed [as part of the employer's investigation into the sexual harassment allegations] were lying through their teeth," *id.* at 1470, it would not demonstrate that the employer's reason was unworthy of credence, much less that it was a pretext for age discrimination. *Id. See also Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("In other words, arguing about the accuracy of the employer's assessment is a distraction . . . because the question is not whether the employer's reasons for a decision are '*right* but whether the

employer's description of its reasons is *honest*.'") (emphasis in original) (citations omitted).

Less common, but conceivable, are cases in which the employer has articulated a reason that, albeit possible, is not the real reason for its decision. Even this will not prove the ultimate fact of discrimination. *See Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997) (*en banc*) (noting that "discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. . . . [T]he fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff."). *See also Burdine*, 450 U.S. at 256-57 (noting that the Court of Appeals erred in "plac[ing] on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff") (footnote omitted).

Ultimately, it is the structure of the *McDonnell Douglas* framework that gives rise to the misconception that a plaintiff who can cast doubt on the employer's reason has proven something.[5] First, the term "prima facie" case as used in discrimination law is misleading at best. As the Second Circuit has observed, "the essential elements of this diminished, minimal prima facie case do not necessarily support a reasonable inference of illegal discrimination." *Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997). Second, the employer's burden, though likewise minimal, is to articulate some reason for its action, although it need not show convincingly that it was the true reason. With these two minimal burdens met, the presumption of discrimination created by the prima facie case "drops from the case" and the "factual inquiry proceeds to a new level of specificity"—whether or not discrimination actually occurred. *Burdine*, 450 U.S. at 255 and n.10. At this point, the evidence supporting the prima facie case, coupled with evidence of pretext, *still* may not prove discrimination. Ultimately, "the question is whether the whole of the evidence mustered by the plaintiff, regardless of whether it was initially presented to establish the prima facie case or to show pretext, suffices to allow a finding that the defendant intentionally discriminated against him." *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17, 26 (1st Cir. 1998).

[5] Indeed, the problems inherent in the *McDonnell Douglas* proof structure are significant enough that several commentators have urged that it be abandoned in favor of a less deceptively simple approach that more accurately reflects the actual burden of proof. *E.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 Brooklyn L. Rev. 703 (1995).

As the Court stated in *Hicks*:

> Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of [a legally protected characteristic]. That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of [discrimination] is correct. That remains a question for the factfinder to answer, subject *of course*, to appellate review . . . ."

Hicks, 509 U.S. at 523-24. We respectfully request the Court to clarify that, as the Fifth Circuit below correctly ruled, "a plaintiff must prove not only that the employer's

stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." Pet. App. 6a. In so doing, we urge the Court to reaffirm that a bare bones *McDonnell Douglas* prima facie case, coupled with some doubt as to the veracity or accuracy of the employer's reason, falls short of this requirement. Rather, a plaintiff must show, at the very least, that a similarly situated individual was treated more favorably and that the differential treatment was attributable to the plaintiff's protected characteristic, or present other, equally probative evidence that discrimination *actually motivated* the employer's decision. In so doing, the plaintiff "must produce evidence that clearly indicates a discriminatory attitude at the workplace and must illustrate a nexus between that negative attitude and the employment action." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999).[6]

II. TO ESTABLISH A PRIMA FACIE CASE, A PLAINTIFF BEARS THE BURDEN OF PROVING QUALIFICATIONS FOR THE JOB IN QUESTION

In clarifying the plaintiff's burden of proof, it would be helpful if the Court also would comment upon a key element of the prima facie case—the plaintiff's qualifications for the job. As noted above, *McDonnell Douglas* enumerated the generic factors that make up the plaintiff's prima facie case of discrimination. 411 U.S. at 802. While the specific requirements can vary from case to

[6] In this regard, as the Fifth Circuit correctly ruled in the instant case, stray remarks are not probative of discrimination. "[T]o prove discriminatory animus, the derogatory remark cannot be stray or isolated and '[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of [discrimination].'" *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999) (quoting *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 686 (7th Cir. 1991)).

case, *id.* at 802 n.13, the plaintiff must satisfy one basic element, no matter the context. The *McDonnell Douglas* prima facie case is aimed at eliminating "the most common non-discriminatory reasons for the plaintiff's rejection," *Burdine*, 450 U.S. at 254, one of these being the plaintiff's lack of qualifications for the job.

At the initial hiring stage, proof of qualification typically requires that the plaintiff show she had the skills, abilities, experience and training required by the employer of all applicants for the job. In termination cases, however, proof of qualification requires more. To show that she was qualified to *remain* employed, and to eliminate the most common nondiscriminatory reason for *termination*, the plaintiff must show that "at the time of the adverse employment action she was performing at a level that met her employer's legitimate job expectations." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999). *Accord Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 743 (7th Cir. 1999) (noting that as part of a prima facie case, plaintiff must show that "he was qualified for the job in question or was meeting his employer's legitimate performance expectations"); *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 929 (6th Cir. 1999) (requiring plaintiff to "show that she was performing at a level which met defendant's legitimate expectations").

This construction is supported by this Court's major decisions construing Title VII, which emphasize that simple membership in a protected group does not by itself establish a prima facie case, and that "qualification" for the position in question is crucial to surviving a motion for summary judgment or a motion to dismiss. For example, the *Griggs* decision stated:

> Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor,

> issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.* Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications rather than on the basis of race or color.

Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (emphasis in original). *Griggs* also stated that "[a]n employer may set his qualifications as high as he likes," *id.* at 434 n.11, and that selection procedures are not forbidden if they "are demonstrably a reasonable measure of job performance." *Id.* at 436.

Picking up on the qualifications theme, the *McDonnell Douglas* decision cited further language from *Griggs* emphasizing the importance of qualifications. "Congress did not intend by Title VII, however, to guarantee a job to every person *regardless of qualifications.* In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." 411 U.S. at 800 (emphasis added) (citing *Griggs*, 401 U.S. at 430-31).

Further, the Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), stated that the employer's decision to reject a person who belongs to a racial minority does not show that the rejeciton was racially based. Beyond that, the *McDonnell Douglas* decision "does demand that the alleged discriminatee *demonstrate* at least that his rejection did not result from one of the most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or *relative* lack of qualifications. . . ." *Teamsters*, 431 U.S. at 358 n.44 (emphasis added).

In *Burdine*, this Court reasserted the strong emphasis on qualifications. That decision stated that "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position *for which she was qualified.*" 450 U.S. at 253 (emphasis added). Similarly, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989), the Court set out at some length Congress' intent that the inquiry would "focus on the *qualifications* of the applicant or employee. The intent to drive employers to focus on *qualifications* rather than on race [etc.], is the theme of a good deal of the statute's legislative history." *Id.* (emphasis added). Thus, while a forbidden characteristic may not play a part in the employer's decision, "[a]ny other criterion or qualification for employment is not affected by this title." *Id.* at 244 (internal quotation omitted).

Although Respondent did not challenge Reeves' prima facie case on appeal, it is important for this Court to emphasize that the issue of qualification is part of the plaintiff's prima facie burden under the decisions of this Court.

III. MAKING EVIDENCE OF PRETEXT OR DISBELIEF OF AN EMPLOYER'S ARTICULATED REASON AN AUTOMATIC "BYE" PRECLUDING REVIEW OF A JURY VERDICT WOULD EVISCERATE RULE 50 AND NULLIFY THE GATEKEEPING FUNCTION OF THE TRIAL COURT AS WELL AS THE RESPONSIBILITY OF APPELLATE COURTS TO ENSURE THAT JUDGMENTS ARE BASED ON LEGALLY SUFFICIENT EVIDENCE

A. Since a Finding of Discrimination Is the Same as Any Other Question of Fact, It Is Reviewable by the Courts Under Applicable Standards

If the word "may" as used in *Hicks* created ambiguity for the circuits as to the effect of an issue of fact as to pretext, the small words "of course" resolve the issue of

Rule 50 and appellate review. Noting that the ultimate issue of discrimination is for the factfinder, this Court stated that such a finding was "subject, *of course*, to appellate review." *Hicks*, 509 U.S. at 524 (emphasis added).

Rather than authorizing the dismantling of Rules 56 and 50, this Court emphasized that trial courts and courts sitting in review should not treat discrimination cases any differently, either in factual determinations or in allocation of burdens and orders of proof. *Hicks*, 509 U.S. at 523-25. The trial court still has the power to determine whether the ultimate issue of discrimination has been proven and to rule on the evidence as a matter of law. *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17, 25 (1st Cir. 1998) (noting that "[t]he reasonableness of the jury making such inference [of discrimination] is subject to review under Fed. R. Civ. P. 50, just as any other finding of fact."); *Fisher v. Vassar College*, 114 F.3d 1332, 1333 (2d Cir. 1997) (holding that "in any event, a finding of discrimination, like any other determination of fact, is reviewable on appeal for clear error."). To hold otherwise would give the jury, as factfinder, unfettered discretion whenever evidence of disbelief has been adduced. Clearly, this is not the holding of *Hicks*, and this is even more apparent when the procedural context of *Hicks* is considered. In reversing the Eighth Circuit in *Hicks*, this Court did not order the Eighth Circuit to affirm the district court's findings, as it would have done if the factfinder always has the last word in evaluating pretext evidence. Instead, this Court simply reversed and remanded for proceedings consistent with the opinion.[7]

[7] Upon remand the District Court in *Hicks* entered judgment for the employer, St. Mary's Honor Center. The Eighth Circuit, in reviewing for clear error the District Court's finding of no racial discrimination, affirmed the lower court's decision. *Hicks v. St. Mary's Honor Ctr.*, 90 F.3d 285 (8th Cir. 1996).

The issue whether the employer is motivated by discrimination is reviewable like any other question of fact. After a bench trial, a trial court's finding of pretext-for-discrimination is reviewable for clear error. After a jury trial, the jury's general verdict is reviewable under the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50. And before trial, the issue may be considered on motion for summary judgment, which "mirrors" the standard used under Rule 50(a), "which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citation omitted). As this Court has stated time and again, trial courts and reviewing courts should not "treat discrimination differently from other ultimate questions of fact." *Hicks*, 509 U.S. at 524 (quoting *Aikens*, 460 U.S. at 716). That is precisely what Petitioner and the Government seek to do in this case.

B. This Court Must Preserve The Trial Courts' Duty To Winnow the "Chaff from the Wheat" to Ensure That Meritorious Claims Are Adjudicated While Unsubstantiated Ones Are Not

Petitioner and his *amici* would have every plaintiff who can meet the simple burden of a prima facie case and who can merely question the "rightness" of the employer's reason for any employment action be entitled to a trial by jury and to have a favorable jury verdict protected from judicial review. Such a rule would prevent trial judges from exercising their authority to determine whether the evidence presented is sufficient to allow a meritorious litigant to have his day in court. The standard they ad-

vocate would prevent the trial court from dismissing unsubstantiated claims that congest the system, and prevent deserving plaintiffs from having *their* day in court. Such a standard would harm, in particular, those individuals the civil rights acts were created to protect, while sheltering from the scrutiny of the trial court those disingenuous litigants who abuse the system and violate the law.

Section 102 of the Civil Rights Act of 1991, Pub. L. 102-166, Title I, § 102, 105 Stat. 1072 (codified as 42 U.S.C. § 1981a) made money damges available to Title VII plaintiffs for the first time, and thus created additional incentives for individuals to file suit. Since its passage, the number of employment discrimination suits filed annually has increased almost threefold from 8,297 in 1991 to 23,735 for the twelve month period ending September 30, 1998. *See* Reports of the Proceedings of the Judicial Conference of the United States, Administrative Office of the United States Courts (1991, 1998). Thus, while these various individuals may be seeking vindication of their rights in the workplace, the deluge of discrimination suits suggests that opportunism plays a role.

Who loses under the Petitioner's view, and who stands to gain? Under 42 U.S.C. § 2000e-5(f)(5), which governs litigation of Title VII cases, Congress directed that "[i]t shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." The rule Petitioner seeks effectively takes that priority away from those it was created to protect, by permitting every plaintiff who presents evidence of pretext or questions the employer's explanation to survive a motion for summary judgment. Thus, meritorious plaintiffs will have to wait in line with others who may simply be taking their chances for the pot of gold. Such a rule also would prevent innocent employers from

defending themselves without paying the high cost of trial or potentially paying "nuisance value" to meritless cases, so as to avoid the cost. On the other hand, the guilty may take comfort in the knowledge that justice will be delayed.

Allowing the barrage of employee cases to go to the jury will lessen the impact of each individual case, as insubstantial claims are mixed with meritorious ones. Thus, plaintiffs who may be entitled to a fair and prompt adjudication of their rights may become invisible to a jury because of the glut of cases that would proceed to trial.

CONCLUSION

Were mere disbelief or pretext, in conjunction with a prima facie case, sufficient to survive a motion for judgment, the decision of the jury would be final, even without proof of discrimination. This problem is exacerbated because, unlike a judge in a bench trial, juries do not have to make specific findings of fact and conclusions of law. Under such a rule, upon review of a jury verdict, a trial court could not grant a motion for judgment as a matter of law, if there were evidence of pretext, disbelief, or possibly mere disagreement about the employer's reason. Because the trial court could not query the jury about its determination to verify some finding of discrimination, pretext alone would mandate a "win" for the plaintiff. This Court specifically rejected this approach in *Hicks* and must do so again. Mere pretext or disbelief cannot suffice in all cases to support a finding of discrimination.

For the foregoing reasons, *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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