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Does Pretext Plus Age Equal the Sum of the Judgement?

Susan Childers North
University of Richmond

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COMMENT

DOES PRETEXT PLUS AGE EQUAL THE SUM OF THE JUDGMENT?

I. INTRODUCTION

In deciding cases under the Age Discrimination in Employment Act (ADEA), several circuit courts of appeals have interpreted the tripartite test set forth in McDonnell Douglas v. Green to mean that a plaintiff could prevail in proving individual disparate treatment by proving a prima facie case and that the employer’s proffered reasons were a pretext. The Third, Seventh and Eighth Circuits concluded that a showing that a proffered justification is pretextual is equivalent to a finding that the employer intentionally discriminated. In other words, “the plaintiff is entitled to judgment as a matter of law when, in the third stage of the McDonnell Douglas test, the plaintiff has persuaded the factfinder that the defendant’s proffered, legitimate, nondiscriminatory reason for the challenged adverse action was not the true reason.” This approach is known as “pretext-only.” On the other hand, the First Circuit and the Fourth Circuit adopted what is known as the “pretext-plus”

2. 411 U.S. 792 (1973). For a further explanation of the McDonnell Douglas test see infra notes 24-26 and accompanying text.
approach. Applying this standard, the plaintiff cannot prevail unless he proves both that the employer's proffered reason was false and that the real reason was age discrimination. The plaintiff is required not only to persuade the trier of fact that the employer's proffered reasons for the employment decision were false, but also to provide some additional evidence of discriminatory animus to persuade the trier of fact that the true reason was age discrimination.

In 1993, the Supreme Court's opinion in *St. Mary's Honor Center v. Hicks* ostensibly resolved the aforementioned split among the circuit courts. This Comment will examine whether *Hicks* resolved the "pretext-only" versus "pretext-plus" controversy as it relates specifically to the ADEA. Part II reviews the background of the ADEA. Part III briefly reviews the *Hicks* decisions—in the district court, the Eighth Circuit, and the United States Supreme Court—including a comparison of the Supreme Court's majority and dissenting opinions. Part IV examines decisions by a number of federal circuit courts that are representative of the three approaches the *Hicks* decision has generated. Part V analyzes the three approaches, and finally, Part VI concludes that the third approach, the modified test, combining the "pretext-plus" and "pretext-only" standards, is the most appropriate.

II. BACKGROUND

On January 23, 1967, President Johnson delivered a special message to Congress in which he proposed that Congress enact a law prohibiting arbitrary and unjust discrimination in employment because of age. He stated:

Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age

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6. See Rappaport, supra note 4, at 137-38.
8. See 113 CONG. REC. 1089 (1967).
45 and over who are unemployed. Today more than three quarters of a billion dollars in unemployment insurance is paid each year to workers who are 45 and over. They comprise 27 percent of all unemployed, and 40 percent of the long term unemployed. In economic terms, this is a serious and senseless loss to a nation on the move.9

On December 15, 1967, President Johnson signed into law the Age Discrimination in Employment Act of 1967.10 The ADEA proscribes age discrimination in employment of persons at least forty years of age.11 The most notable section makes it unlawful for an employer "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."12 In enacting the statute, Congress declared that "older workers [found] themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;"13 that "the setting of arbitrary age limits regardless of potential for job performance [had] become a common practice;"14 that among older workers there was a "high incidence of unemployment;"15 and that discrimination because of age "burden[ed] commerce and the free flow of goods in commerce."16

Since the enactment of the ADEA, the United States Supreme Court has interpreted the ADEA by borrowing, in many respects, from other federal employment laws.17 The procedural principles of Title VII of the Civil Rights Act of 1964,18 for ex-

12. Id. § 623(a)(1).
13. Id. § 621(a)(1).
14. Id. § 621(a)(2).
15. Id. § 621(a)(3).
16. Id. § 621(a)(4).
ample, have guided the interpretation of the ADEA. The Supreme Court in McDonnell Douglas v. Green established a tripartite test articulating the allocation of burdens and standards of proof for individuals alleging disparate treatment under Title VII. 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, sex, or national origin." The test announced by the McDonnell Douglas Court allowed a plaintiff to prove intentional discrimination through circumstantial evidence. Therefore, the test is not applicable when the plaintiff can prove discrimination directly. The three-part test requires a plaintiff-employee to present a prima facie case that he or she was a victim of intentional discrimination. Once the employee has successfully established a prima facie case, the employer must then demonstrate that a legitimate, non-discriminatory reason existed for the adverse job action. Next, the employee is allowed to demonstrate that the employer's proffered reason is a pretext for intentional discrimination.

The Court subsequently refined the nature of the respective burdens on the employee and employer in Texas Department of Community Affairs v. Burdine. The Court in Burdine emphasized that the burden, which shifted to the employer after the

19. See O'Meara, supra note 17, at 8-9.
21. See id. at 802.
24. See id. at 802. A typical prima facie case involving age discrimination is: (1) that the plaintiff was within the protected age group; (2) that the plaintiff was qualified for the position; (3) the plaintiff was discharged; or demoted and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination. This fourth requirement usually involves being replaced by a younger person. In O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996), however, the Supreme Court held that the younger replacement does not have to be outside of the protected class, so long as the plaintiff has lost out because of his age. A typical prima facie case involving a reduction-in-force age discrimination case is: (1) that the plaintiff belonged to the protected age group; (2) that the plaintiff was qualified to assume another position had it been available at the time the plaintiff was discharged; (3) the plaintiff was discharged; and (4) that the discharge occurred under circumstances suggesting that age was a factor.
26. See id. at 804.
employee had established a prima facie case, was a burden of producing evidence in support of legitimate, nondiscriminatory reasons for discharge. The burden of persuasion never shifts; the employer's burden is only a burden of production, not persuasion. These two United States Supreme Court cases set the standard for proving intentional discrimination in employment cases and have been relied upon by courts for over a decade.

At one time, the applicability of the *McDonnell Douglas* formula to the ADEA was widely disputed. Many writers thought that Title VII standards should not be applied to ADEA cases because the Supreme Court had previously distinguished age discrimination from race discrimination under an equal protection analysis of the U.S. Constitution. The Supreme Court has implied, however, that the *McDonnell Douglas* framework is applicable under the ADEA. Further, in *O'Connor v. Consolidated Coin Caterers Corp.*, the parties did not dispute the application of the *McDonnell Douglas* analysis. In that case, the Court assumed that some variant of the basic evidentiary framework of *McDonnell Douglas* applied to ADEA cases. The Court did not decide this point, but it did not disparage the notion, despite the opportunity to do so.

III. *St. Mary's Honor Center v. Hicks*36

A. Factual and Procedural History

St. Mary's Honor Center was a halfway house operated by the Missouri Department of Corrections and Human Resourc-
es. St. Mary's hired Melvin Hicks, an African-American male, as a correctional officer in August 1978, and promoted him to shift commander in February 1980. In 1984, St. Mary's underwent extensive supervisory changes. Hicks "had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions." St. Mary's subsequently suspended, demoted, and finally discharged Hicks.

Hicks brought an action in the United States District Court for the Eastern District of Missouri against St. Mary's, alleging that his termination and prior demotion were racially motivated and violated Title VII. Hicks established a prima facie case of racial discrimination, but St. Mary's rebutted the presumption of race discrimination by articulating two nondiscriminatory reasons for Hicks' discharge. Hicks then proved that the reasons given for his demotion and termination were pretextual. The district court nevertheless granted judgment for St. Mary's. The court concluded that Hicks had proved the employer's reasons were false, but he failed to satisfy his ultimate burden of proving that race was the determining factor in the decision. The court wrote "[i]t is clear that John Powell had placed plaintiff on the express track to termination . . . . It is not clear, however, that plaintiff's race was the motivation for the harsh discipline." The court opined that the real rea-

37. See id. at 504.
38. See id.
39. See id.
40. See id. at 505.
41. See id.
43. See id. at 1249. Hicks proved his prima facie case by showing (1) he was black; (2) he was qualified for the position as shift commander; (3) he was demoted from his position as shift commander and was ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man. See id. at 1249-50.
44. See id. at 1250. St. Mary's articulated two nondiscriminatory reasons for its actions: (1) the severity of; and (2) the accumulation of rules violations committed by respondent. See id.
45. See id. at 1251.
46. See id. at 1251-52.
47. Id. at 1251.
Hicks appealed to the Eighth Circuit, which overruled the district court and aligned itself with the "pretext-only" approach. The court stated that "[o]nce 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." The court also held that "[b]ecause all of defendants' proffered reasons were discredited, defendants . . . were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race." The court noted that in the past, the Eighth Circuit had determined that the plaintiff had met his burden of proof at the pretext stage when he proved by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons were not the true reasons for the adverse employment action; no additional proof of discrimination was required.

B. The Supreme Court Opinion

1. The Majority Opinion

The Court granted St. Mary's Honor Center's petition for certiorari to determine whether a judgment for the plaintiff was mandated, in a suit against an employer alleging intentional discrimination, when the trier of fact had rejected the employer's asserted reasons for its actions. Justice Scalia, writing for the majority, disagreed with the Eighth Circuit's
approval of the "pretext-only" approach. In doing so, Justice Scalia first analogized the presumption of unlawful discrimination that arises after the plaintiff establishes a prima facie case to other presumptions described in Rule 301 of the Federal Rules of Evidence. In other words, the presumption shifts the burden of production to the defendant, but the plaintiff retains the ultimate burden of persuasion that the defendant intentionally discriminated against him. Justice Scalia noted that Hicks did not challenge the finding that St. Mary's sustained its burden of production. He also stated that "[i]f the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted." Furthermore, "[t]he presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." The remaining question is whether the plaintiff has proven "that the defendant intentionally discriminated against [him] because of his race." The majority stated:

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."

55. See id. at 506.
56. See Hicks, 509 U.S. at 506.
57. See id. at 507.
58. Id. (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).
59. Hicks, 509 U.S. at 510-11 (citing Burdine, 480 U.S. at 255).
60. Id. at 511 (alteration in original) (quoting Burdine, 450 U.S. at 253).
61. Id. (emphasis added) (alteration in original) (quoting Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 493 (8th Cir. 1992), rev'd, 509 U.S. 502 (1993)).
The Supreme Court therefore concluded that the circuit court erred in holding that rejection of the defendant's proffered reason compelled judgment for the plaintiff, because this "disregard[ed] the fundamental principle of Rule 301 that a presumption does not shift the burden of proof."  

The Court then analyzed the language of *Burdine* to support its interpretation of the requisites necessary to prove discrimination.  The Court first addressed the language in *Burdine* describing the third step of the *McDonnell Douglas* test: "[t]hird, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." The Court in *Hicks* interpreted this to mean that "a reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." As a result, the majority believed that when the *Burdine* Court referred to "pretext," it used this term to refer to "pretext for discrimination."

The majority also understood that the new factual inquiry following the defendant's burden of production, as described by the *Burdine* Court, would turn not to generalized factors used to establish a prima facie case, but to specific proofs and rebuttals of discriminatory motivation. Further, the Court cited *Burdine* as stating: "[p]lacing [the] burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." The majority understood this sentence to mean that the purpose of the burden of production is to address the form, not the substance, of the defendant's burden of production. In other words, requiring the defendant to "clearly set forth" its reasons for its actions

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62. See id.
63. See id. at 515-20.
64. Id. at 515 (quoting *Burdine*, 450 U.S. at 253).
65. Id. at 515 (emphasis added).
66. Id. at 516 & n.6.
67. See id.
68. Id. (alteration in original).
69. See id.
provides the plaintiff with a "full and fair" opportunity to re-
but these reasons.\textsuperscript{70} According to the majority, the evidentiary
framework in the burden shifting scheme of \textit{McDonnell Douglas}
was more a procedural device, and was not designed to pin the
defendant down to a substantive position: "[t]he formula is
intended only as a tool to be used in the evidentiary inquiry
into whether discrimination occurred. The \textit{McDonnell Douglas}
scheme does not alter the way in which evidence is presented
at trial, and thus simply offers a framework for grouping and
selecting various facts."\textsuperscript{71}

Next, the majority referred to the \textit{Burdine} language guaran-
teeing the plaintiff the opportunity to demonstrate that the
reasons given by the defendant were not the true reasons for
the employment decision. It concluded that "[t]his burden now
merges with the ultimate burden of persuading the court that
she has been the victim of intentional discrimination."\textsuperscript{72} The
majority stated that this language meant that "proving the
employer's reasons false bec[ame] part of . . . the greater en-
terprise of proving that the real reason was intentional discrim-
ination."\textsuperscript{73}

In addition, the majority dismissed as dicta the language in
\textit{Burdine} permitting a plaintiff to succeed in proving intentional
discrimination indirectly by showing that the employer's reasons
were unworthy of credence.\textsuperscript{74} The majority in \textit{Hicks} opined
that this "dictum contradicts or renders inexplicable numerous
other statements, both in \textit{Burdine} itself and in our later
caselaw . . . ."\textsuperscript{75}

The majority admitted one difficulty in its interpretation of
\textit{Burdine}, but deemed it to be eliminated by its previous decision
in \textit{Aikens}.\textsuperscript{76} The Court, referring to its opinion in \textit{Aikens}, stat-

\begin{itemize}
  \item \textsuperscript{70} Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255
  (1981)).
  \item \textsuperscript{71} O'Meara, supra note 17, at 98-99 (citing Kimberly K. Fayssoux, Note, \textit{The
  Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for
  Change}, 73 VA. L. REV. 601, 627 (1987)).
  \item \textsuperscript{72} Hicks, 509 U.S. at 516 (quoting \textit{Burdine}, 450 at 256).
  \item \textsuperscript{73} Id. at 517.
  \item \textsuperscript{74} See id.
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711
  (1983).
\end{itemize}
ed that “the ultimate question [is] discrimination vel non.” In other words, after the defendant has responded to plaintiff’s prima facie case, the question is not “whether defendant’s response is credible, but ‘whether the defendant intentionally discriminated against the plaintiff.” Finally, the majority reaffirmed what Aikens established earlier:

[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern ‘the basic allocation of burdens and order of presentation of proof,’ in deciding this ultimate question.

The majority in Hicks, therefore, held that the trier of fact’s rejection of an employer’s asserted reasons for its employment actions does not entitle a plaintiff to judgment as a matter of law.

2. The Dissenting Opinion

Justice Souter wrote the dissenting opinion, contending that the majority had abandoned, after two decades of stable law, the practical framework established in McDonnell Douglas and Burdine. Since there was seldom ‘eyewitness’ testimony regarding the employer’s mental processes, the McDonnell Douglas framework allowed the use of circumstantial evidence to prove intentional discrimination. Justice Souter disagreed with the majority’s view that the only function served by the

77. Hicks, 509 U.S. at 518 (alteration in original) (quoting Aikens, 460 U.S. at 714).
78. Id. at 519 (quoting Aikens, 460 U.S. at 715).
79. Id. at 524 (quoting Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981); Aikens, 460 U.S. at 716).
80. Id. at 502.
81. Id. at 525-43. (Souter, J., dissenting) (Justice Souter was joined by Justices White, Blackmun, and Stevens).
82. See id. at 525 (Souter, J., dissenting).
83. See id. at 526 (Souter, J., dissenting) (citing Aikens, 460 U.S. at 716).
articulation of legitimate, nondiscriminatory reasons by the defendants was to rebut the presumption of discrimination.\textsuperscript{84} He wrote that the burden of production on the defendant gave the employer the "right to choose the scope of the factual issues to be resolved by the factfinder."\textsuperscript{85} Permitting the employer to do this was meaningless unless the employer and the plaintiff were bound to what the employer declared.\textsuperscript{86}

The dissent attacked the majority's attempt to reconcile 
\textit{Burdine} with its decision in \textit{Hicks}. The majority's effort to replace the word "pretext" with "pretext for discrimination" in the \textit{Burdine} decision was one such example.\textsuperscript{87} Justice Souter stated that he seriously doubted that such a change in diction would have altered the meaning of the passages where "pretext" occurred.\textsuperscript{88} Further, according to the dissent, the majority's repudiation of the passage in \textit{Burdine} changed \textit{Burdine}'s explicit language of "either . . . or" into a "both . . . and."\textsuperscript{89} The language in \textit{Burdine} that Justice Souter was referring to specifically stated that a plaintiff may prove discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."\textsuperscript{90} The corresponding passage in the majority's opinion stated that "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown \textit{both} that the reason was false, \textit{and} that discrimination was the real reason."\textsuperscript{91} Justice Souter stated that the majority's "both . . . and" language was

\textsuperscript{84. See id. at 529 (Souter, J., dissenting).}
\textsuperscript{85. Id. (Souter, J., dissenting).}
\textsuperscript{86. See id. (Souter, J., dissenting). Justice Souter also noted that it does not make sense for the employer to give reasons that are clear and specific if the factfinder is later permitted to rely on reasons not clearly given or not given at all so that the factfinder can rule in favor of the employer. See id.}
\textsuperscript{87. See id. at 530 n.5 (Souter, J., dissenting).}
\textsuperscript{88. See id. (Souter, J., dissenting). Justice Souter also stated that even if the majority was correct in saying that there is a difference, then the \textit{McDonnell Douglas} Court must have been "sloppy" in summarizing its own opinion. However, he contended that the \textit{McDonnell Douglas} Court's diction was consistent, not sloppy. See id.}
\textsuperscript{89. See id. at 531 n.7 (Souter, J., dissenting).}
\textsuperscript{90. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (emphasis added).}
\textsuperscript{91. \textit{Hicks}, 509 U.S. at 515 (emphasis added).}
directly at odds with the specific requirements actually set out in Burdine.\textsuperscript{92}

The dissent also emphasized that Burdine provided that a plaintiff may succeed by indirectly showing that the employer's reasons were unworthy of credence simply because "employers who discriminate [were] not likely to announce their discriminatory motive."\textsuperscript{93} Contrary to this, the majority would require the plaintiff to disprove not only the employer's stated reasons, but also "all possible nondiscriminatory reasons that a factfinder might find lurking in the record."\textsuperscript{94} This was simply too amorphous a requirement for the dissent.

A key passage in the dissenting opinion described the majority's conflicting signals regarding the scope of its holding in the case. Justice Souter noted the majority's language in one passage, where it said that although proving the defendant's reasons were false would not entitle plaintiff to judgment as a matter of law, such evidence, without more would permit the trier of fact to infer discrimination.\textsuperscript{95} This supported the proposition that the Court rejected the "pretext-plus" approach. On the other hand, the Court's opinion also supported the "pretext-plus" approach by providing that the plaintiff must show "both that defendant's reasons were false and that discrimination was the real reason."\textsuperscript{96} Justice Souter predicted that this "pretext-plus" result would "turn Burdine on its head," and would increase summary judgment for the employer when the plaintiff proved a prima facie case and proved the employer's reasons were unworthy of credence.\textsuperscript{97}

Finally, Justice Souter considered the majority's reliance on Aikens and Congress' role in approving the McDonnell Douglas framework. Specifically, the dissent stated that Aikens flatly barred the majority's conclusion that the factfinder could choose

\textsuperscript{92} See id. at 531 n.7 (Souter, J., dissenting).
\textsuperscript{93} Id. at 534 (Souter, J., dissenting).
\textsuperscript{94} Id. at 535 (Souter, J., dissenting).
\textsuperscript{95} See id. (Souter, J., dissenting).
\textsuperscript{96} Id. (Souter, J., dissenting) (emphasis added).
a third explanation, never offered by the employer, in ruling against the plaintiff. Moreover, the dissent noted that Congress had long been aware of the Court's interpretation of the McDonnell Douglas evidentiary framework, and had taken no action to indicate that the Court was mistaken in McDonnell Douglas and Burdine. The dissent concluded that the majority's decision was unfair and impractical, and predicted that the majority's decision would produce some remarkable results.

**IV. Hicks Circuit Court Progeny**

Since the Hicks decision, the debate has continued, focusing on whether the "pretext" or the "pretext-plus" position is correct. Language in the Supreme Court's opinion supports at least two different approaches. Some critics believe that Hicks significantly altered the litigation in age and other discrimination claims. The various circuit courts of appeals continue to be divided on the interpretation of Hicks in age discrimination cases.

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98. See Hicks, 509 U.S. at 542 (Souter, J., dissenting). Justice Souter also stated that the sentence in Aikens directing the district court to "decide which party's explanation of the employer's motivation it believes," creates more problems for the majority because it requires the factfinder to choose only between the employer's explanation and the plaintiff's explanation, not a third explanation. Id. (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

99. See Hicks, 509 U.S. at 542 (Souter, J., dissenting).

100. See id. at 538 (Souter, J., dissenting). "The majority's scheme therefore leads to the perverse result that employers who fail to discover nondiscriminatory reasons for their own decisions to hire and fire employees not only will benefit from lying, but must lie, to defend successfully against a disparate-treatment action." Id. at 539-40 (Souter, J., dissenting).

101. See discussion infra Parts IV.A-B.

102. See William C. Kendel, Age Discrimination Recent Decisions by Appellate Courts Under the Age Discrimination in Employment Act through Mid-1996, in 3 25th ANNUAL INSTITUTE ON EMPLOYMENT LAW 7, 118 (1996). ("The most significant Supreme Court decision affecting the ADEA practitioner came in a Title VII case, St. Mary's Honor Center v. Hicks . . . "); see also Rappaport, supra note 4, at 157 ("The Hicks Court has significantly altered the litigation of employment discrimination claims.").
A. "Pretext-Plus" Circuits

The First Circuit Court of Appeals subscribed to the more stringent "pretext-plus" approach in deciding ADEA cases even before the Hicks decision. Likewise, after the Hicks decision the court affirmed its position in Udo v. Tomes. Udo, a physician, alleging that the Department of Health had laid him off in violation of the ADEA, was required to show: (1) that the employer's articulated reason for laying him off was pretextual; and (2) that the true reason was discriminatory. The First Circuit further circumscribed the ambiguous "pretext-only" language in Hicks by construing it to mean "while the plaintiff may rely on the same evidence to prove both pretext and discrimination, the evidence must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by discriminatory animus." The First Circuit has obviously decided its cases utilizing the "pretext-plus" language in Hicks to the exclusion of the "pretext-only" language also in Hicks.

The Second Circuit's approach concerning pretext has vacillated over the years, but that court seems to adhere to the "pretext-plus" position. In Gallo v. Prudential Services, the Second Circuit accepted Hicks as requiring ADEA plaintiffs to prove the two-step inquiry that the defendant's reason was false, and that discrimination was the real reason. Gallo was fired at age fifty because of an alleged reduction-in-force; she was not rehired despite her qualifications and the availabil-

104. 54 F.3d 9 (1st Cir. 1995).
105. See id. at 12.
106. Id. at 13.
107. See Taggart v. Time, Inc., 924 F.2d 43, 46 (2d Cir. 1991) ("[P]laintiff, upon whom the ultimate burden of persuasion rests, must show that the proffered reasons were the defendant's true reasons and that age was the fact that resulted in the employer's decision not to hire him."). But cf. Bay v. Times Mirror Magazines, Inc., 938 F.2d 113, 116 (2d Cir. 1991) (describing the plaintiff's burden at the pretext stage as meeting merely a one-step test, to show that the "employers's proffered explanation is unworthy of credence.").
108. 22 F.3d 1219 (2d Cir. 1994).
109. See id. at 1225.
The court held that "Gallo must demonstrate that the reduction-in-force at least in her individual case was a pretext for intentional age discrimination," and she must be permitted to show that the "employer's asserted reasons for discharging her were a pretext and that the real reason was her age." The court, however, muddied this seemingly clear interpretation of "pretext-plus" language when it stated that Gallo could prove pretext by relying on her prima facie evidence, without any additional evidence to show that the employer's reasons for her discharge were false. The Second Circuit is still grappling with the distinction between "pretext-only" and "pretext-plus," because language supporting the use of both tests was relied upon by the court.

In a later decision by the Second Circuit, the court used somewhat clearer "pretext-plus" language. In this case, however, the court never applied this approach to the facts because the district court awarded summary judgment to the employer. The plaintiff never had an opportunity to prove that the true reason he was discharged was his age. Therefore, the Second Circuit will likely spawn a variety of decisions regarding what the plaintiff will be required to prove due to the split decisions within the circuit.

The Fourth Circuit, like the First Circuit, has traditionally subscribed to the "pretext-plus" rule. Even the Fourth Circuit, however, retreated somewhat from the "pretext-plus" lan-

110. See id. at 1222-23.
111. Id. at 1226.
112. Id.
113. See id.
114. See Sutera v. Schering Corp., 73 F.3d 13, 17 (2d Cir. 1995) (stating that the plaintiff has the opportunity to demonstrate "that the proffered reason was not the true reason for the employment decision," but was in fact a pretext for discrimination.).
115. See id. at 18. Courts have applied variants of the "pretext-only" and "pretext-plus" positions to the issue of summary judgment. The Second Circuit explicitly stated, for example, that to survive summary judgment, "the plaintiff must establish a genuine issue of material fact . . . as to whether the employer's reason for discharging her is false and as to whether it is more likely that a discriminatory reason motivated the employer to make an adverse employment decision." Gallo, 22 F.3d at 1225 (emphasis added).
language used in Hicks in Henson v. Liggett Group, Inc. The court stated that after a plaintiff establishes a prima facie case, and after the defendant comes forward with nondiscriminatory reasons for its actions, "[t]he plaintiff must then bear the 'ultimate burden of persuasion' and show by a preponderance of the evidence that the defendant's explanations are pretextual or otherwise unworthy of credence." This use of the word "or" between "pretextual" and "unworthy of credence" is indicative of the one-step, "pretext-only" standard. The two-step, "pretext-plus" model requires that two matters be proved: pretext and age discrimination. Later in the decision, the court cited the Hicks decision for the proposition that the factfinder must believe the plaintiff's explanation of intentional discrimination and disbelieve the employer.

To support the Fourth Circuit's use of the "pretext-plus" approach, despite the more permissive language used in part of the opinion, the court noted that it declined to follow the Ninth Circuit's more lenient approach regarding summary judgment, in light of the Supreme Court's precedent in Hicks. In keeping with this statement, the Fourth Circuit affirmed summary judgment for the employer in Henson because Henson failed in her attempt to prove, through verbal discussions that took place at the employer's business and through statistical evidence, that the employer's reasons were unworthy of credence and that the employer intentionally discriminated against her because of her age.

In addition to the First Circuit, which clearly adopts the "pretext-plus" standard, and the Second and Fourth Circuits, which seem to adopt the "pretext-plus" approach, the Eighth Circuit has ruled more in favor of the two-step model. In Krenick v. County of Le Sueur, an ADEA plaintiff was required to establish evidence that the defendant's proffered reason was pretextual and that intentional age discrimination was

117. 61 F.3d 270 (4th Cir. 1995).
118. Id. at 275.
119. See id. at 276.
120. See id. at 274 n.3.
121. See id. at 275-77.
122. 47 F.3d 953 (8th Cir. 1995).
the true reason for the defendant's actions.\textsuperscript{123} Once again, as clear as this language seems to be, the court curiously continued that if the factfinder disbelieved the defendant's reason, and the reason was accompanied by a suspicion of mendacity, then this, together with a prima facie case, could suffice to show discrimination.\textsuperscript{124} The Eighth Circuit, like the Fourth Circuit, nevertheless reinforced its "pretext-plus" approach by affirming summary judgment for the defendant because the plaintiff failed to prove the two steps required in "pretext-plus."\textsuperscript{125}

The Eighth Circuit has subsequently decided at least two other cases, \textit{Ryther v. Kare} \textsuperscript{126} and \textit{Roxas v. Presentation College},\textsuperscript{127} using similar conflicting language. In \textit{Ryther}, the plaintiff was able to prevail on his age discrimination claim. The court explained that the jury was permitted to find for the plaintiff, even though the legal presumption of the prima facie case was eliminated after the defendant had met its burden of production.\textsuperscript{128} The elements of the prima facie case used in conjunction with pretextual evidence and disbelief of defendant's reasons could be enough for plaintiff to prevail.\textsuperscript{129} The two-step model was bolstered by the statement "[t]his is not to say that, for the plaintiff to succeed, simply proving pretext is enough,"\textsuperscript{130} indicating that the Eighth Circuit has continued to adopt the "pretext-plus" standard.

Two months later, in \textit{Roxas}, the court described the plaintiff's burden, after the employer had proffered its nondiscriminatory reasons, as one "burden [which] will not be met by simply showing that the reason advanced by the employer was false; rather, Roxas must demonstrate that a discriminatory animus lies behind the defendants' neutral explanations."\textsuperscript{131}

\textsuperscript{123. See id. at 959.} \\
\textsuperscript{124. See id.} \\
\textsuperscript{125. See id. at 961.} \\
\textsuperscript{126. 84 F.3d 1074 (8th Cir. 1996).} \\
\textsuperscript{127. 90 F.3d 310 (8th Cir. 1996).} \\
\textsuperscript{128. See \textit{Ryther}, 84 F.3d at 1079-80.} \\
\textsuperscript{129. See id. at 1078 n.4.} \\
\textsuperscript{130. Id.} \\
\textsuperscript{131. \textit{Roxas}, 90 F.3d at 316 (citing Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 777 (8th Cir. 1995)).}
The Ninth Circuit decided two unpublished cases recently which indicate it ascribes to the two-step model of showing pretext. In *Bergan*, the court found that the plaintiff had established a prima facie case, but was not able to show that his employer's reason for firing him was a pretext, and that age discrimination was the true reason for his termination. The court stated that the mere fact that he had established a prima facie case alone was not sufficient to permit a rational factfinder to conclude that the employer's explanation was pretextual. After reviewing Bergan's arguments allegedly rebutting the employer's proffered nondiscriminatory reasons, the court held that Bergan had failed to show the employer's reasons were false and that age discrimination existed. The Ninth Circuit affirmed the district court's award of summary judgment. Two months later, in *Neal*, the Ninth Circuit again affirmed summary judgment for the employer because the plaintiff was unable to raise a triable issue of fact that age discrimination was the "real reason" for his termination.

Employers litigating in circuit courts of appeal that recognize the "pretex-plus" standard often circumvent the fear that a plaintiff's case will be heard by a jury because the two-step approach often results in the plaintiff's case being dismissed at the summary judgment stage. Because age is a relative characteristic—that is, everyone becomes older—age discrimination plaintiffs are said to draw great sympathy from jurors. This is caused in part by the general respect accorded the elderly in American society. An additional factor... is the older average age of jurors.... In excess of 70 percent of all jurors are forty years of age or older. Because of this, employers are cognizant of the fact that once an age discrimina-

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133. See id. at *1.
134. See id.
135. See id. at *2.
136. See id. at *1.
138. See id. at *1.
139. See O'MEARA, supra note 17, at 109.
140. Id.
tion plaintiff overcomes a motion for summary judgment, his chances of prevailing in front of a jury greatly increase.

B. "Pretext-Only" Circuits

The Third Circuit has long been a leading proponent of the "pretext-only" approach in ADEA cases. Since the Hicks decision, the Third Circuit has continued, for the most part, to utilize the one-step model of "pretext-only." The Third Circuit did take a step in the other direction when it decided Seman v. Coplay Cement Co. In that case, the court explained that Hicks explicitly rejected its "pretext-only" test for discrimination and made clear that henceforth plaintiffs would have to prove that the employer's nondiscriminatory reasons were pretextual and that age was the real reason for the adverse action. Specifically, the court stated that "[p]roof of one without the other will not suffice.”

Later, in Waldron v. SL Industries, Inc., the Third Circuit reverted to a "pretext-only" construction of Hicks, but only at the summary judgment stage, by stating that "[c]ontrary to the district's court's prediction... we joined those of our sister circuits who have read Hicks to require at summary judgment 'pretext-only.'" Stabilizing this position, the Third Circuit articulated in Brewer v. Quaker State Oil Refining Corp., that if the plaintiff had sufficient evidence to discredit the defendant's proffered reason, then no additional evidence was needed beyond the prima facie case to avoid at least summary judgment.

The Third Circuit is an example of a court requiring one standard for summary judgment and another for trial. Its adoption of the "pretext-only" standard for summary judgment is...
more in line with the *Hicks* decision than the Fourth Circuit's approach. The Fourth Circuit has used a "pretext-plus" standard for summary judgment, imposing a heavier burden on the plaintiff. Arguably this is inconsistent with the *Hicks* decision, as *Hicks* was not a summary judgment case; *Hicks* was fully tried.

The *Hicks* decision has had an irresolute impact on ADEA cases in the Fifth Circuit, but it appears that the court is leaning toward a "pretext-only" standard. In *Bodenheimer v. PPG Industries, Inc.*, the Fifth Circuit noted that prior to *Hicks*, confusion had reigned among the circuits regarding whether a plaintiff could prove employment discrimination simply by showing that the defendant's reasons were not credible. The court went on to say that *Hicks* had resolved this issue by concluding that "the plaintiff must prove . . . that the employer's reasons were not the true reason for the employment decision and that unlawful discrimination was." *Hicks* remains a source of difficulty, however, because three years later in *Rhodes v. Guiberson Oil Tools*, the Fifth Circuit retreated somewhat from its earlier position by using "pretext-only" language in its opinion. Later that year, *Rhodes* was cited in *Woodhouse v. Magnolia Hospital* for the proposition that a prima facie case, together with evidence supporting the rejec-

149. See discussion supra Part IV.A.
150. See discussion supra Part IV.A.
152. 5 F.3d 955 (5th Cir. 1993).
153. See id. at 957.
154. Id. (emphasis added).
155. 75 F.3d 989 (5th Cir. 1996).
156. The court used the familiar language from the *Hicks* opinion:
   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 . . . ."
157. 92 F.3d 248 (5th Cir. 1996).
tion of the employer's reasons, "will often, perhaps usually, permit a finding of discrimination without additional evidence."\(^{158}\)

Employers litigating in circuit courts of appeal that follow the "pretext-only" approach may feel that hiring older workers results in more litigation. "A Conference Board survey of large employers asked for reasons for refusing to hire older applicants. Among the reasons was the '[r]isk of an age discrimination suit if employee [sic] does not work out and has to be terminated."\(^{159}\) This attitude and the fact that juries are sympathetic to age discrimination plaintiffs make the use of the "pretext-only" approach even more controversial.

C. Modified Test Circuits

Some circuit courts have interpreted the *Hicks* decision as requiring neither "pretext-plus" nor "pretext-only." Instead, courts like the Sixth Circuit believe that *Hicks* only clarified that the effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination, established by the prima facie case, from a mandatory one which the jury must draw, to a permissive one the jury may draw, if the jury finds the employer's reasons "unworthy" of belief.\(^{160}\) In *Manzer*, the court stated that "the Supreme Court rejected the 'pretext only' position and held that a mere finding that the reasons given by the employer 'were not the real reasons' for firing plaintiff and did not *compel* judgment for plaintiff."\(^{161}\)

The *Manzer* court contemporaneously found that the Supreme Court, in *Hicks*, also rejected the "pretext-plus" position.\(^{162}\)

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158. Id. at 255-56 (quoting Rhodes, 75 F.3d at 994).
159. O'Meara, supra note 17, at 3 (alteration in original).
161. Id. (citing Hicks, 509 U.S. at 510-11).
162. See id. The Court, however, also rejected the "pretext-plus" position, stating:

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 . . . "[n]o additional proof of discrimination is required."

\(\text{Id.}\)
The Manzer court characterized the Sixth Circuit as traditionally being a “pretext-plus” proponent before Hicks. After Hicks, the Sixth Circuit, through its opinion in Manzer, adopted a modified test based upon Hicks and Burdine. This test emphasized that once the employer proffered its reasons for engaging in the adverse action, the plaintiff had to produce sufficient evidence from which the jury could reasonably reject the employer’s explanation. The court found that every circuit to address the impact of Hicks on the submissibility of employment discrimination cases had reached the same conclusion. As a result, the mere elements of a prima facie case are not sufficient, because allowing the plaintiff to meet her burden simply through the prima facie case would render illusory the entire burden of proof requirement set forth in McDonnell Douglas and its successors. The court ultimately decided that since Manzer did not produce any evidence, beyond that which established his prima facie case, indicating that age played any part in his termination. Therefore, the district court did not err in granting the employer’s motion for a directed verdict at the close of all the evidence.

The Seventh Circuit has also adopted a modified “pretext-plus” test. In Anderson v. Baxter Healthcare Corp., the court opined that there were three possible constructions of pretext. The Seventh Circuit stated that if the employer offered a pretext as its justification, then it followed a version of the “pretext-plus” rule, permitting the trier of fact to infer that the

163. See id. at 1082.
164. See id. at 1083.
165. See id. at 1083 n.3 (citing Anderson v. Baxter Healthcare Corp., 13 F.3d 1129, 1124 (7th Cir. 1994); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1994); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993)).
166. See id. at 1084.
167. See id. at 1085.
168. See id.
169. 13 F.3d 1120 (7th Cir. 1994).
170. See id. at 1122. The court described one version of the “pretext-plus” rule which states that if the plaintiff can successfully show that the reasons proffered by the employer for her discharge are factually false, then she is automatically entitled to judgment. Another version of the “pretext-plus” rule states that if the employer offers a pretext for why it discharged plaintiff, then the factfinder is permitted, not compelled, to infer that the real reason was age. Finally, the “pretext-plus” rule states that a plaintiff must show both that the employer’s reasons are false and direct evidence that the employer’s real reason was discriminatory. See id.
real reason for the employer's actions was age discrimina-

1 In Anderson, the court held that Hicks allowed the plaintiff to prevail, not automatically as a matter of law, but through submission of her case to the ultimate factfinder, if the plaintiff proved a prima facie case and showed that the employer's proffered reasons for her discharge were false.172

The Anderson court also cited Hicks as saying that the ultimate burden was still on the plaintiff to prove that she was intentionally discriminated against.173 The Court stated that the plaintiff might be well advised to present additional evidence of discrimination.174 It noted that McDonnell Douglas and Hicks spoke about the burden the plaintiff bore at trial and that for summary judgment purposes, the non-moving party had a lesser burden than the one imposed at trial.175 The Seventh Circuit's modified standard is thus: a plaintiff can defeat a motion for summary judgment by proving that the employer's proffered reasons for its actions were false. The plaintiff, however, has the ultimate burden of proving intentional age discrimination in order to prevail at trial, which may require additional evidence beyond the prima facie case and proof of pretext.

In two recent cases since Anderson, this standard was followed. In Weisbrot v. Medical College of Wisconsin,176 the court reiterated the language used in Anderson. When an employer articulates nondiscriminatory reasons for its actions, the plaintiff has the burden of showing that the employer's reasons are false, and the plaintiff also retains the ultimate burden of persuading the trier of fact that the employer intentionally engaged in age discrimination.177 The court in Weisbrot, however, affirmed summary judgment because Weisbrot could not show pretext.178 The court did not reach the "pretext-plus" issue. Similarly, in Fuka v. Thomson Consumer Electronics,179

171. See id. at 1122-23.
172. See id.
173. See id.
174. See id. at 1124.
175. See id.
176. 79 F.3d 677 (7th Cir. 1996).
177. See id. at 681.
178. See id. at 685.
179. 82 F.3d 1397 (7th Cir. 1996).
the court stated that summary judgment would be improper if the plaintiff offered evidence which could support an inference of age discrimination; no other evidence was needed. The court ultimately affirmed summary judgment for the defendant, again, because Fuka was unable to show that the employer's reasons for her discharge were false.

Finally, the Eleventh Circuit recently spoke in *Isenbergh* about the confusion created by *Hicks*. In determining whether *Isenbergh* proved the employer's reason false and the existence of age discrimination, the court noted that there was some conflict in the case law from the Eleventh Circuit. The issue was whether the plaintiff could carry her burden of proof just by showing that the employer's reasons for the employment decision were pretextual. The Eleventh Circuit explained that the *Hicks* decision did not decide cases involving Rule 50 or Rule 56 of the Federal Rules of Civil Procedure, so the Supreme Court's analysis did not apply to those types of cases. Nevertheless, there was a conflict in the law about "whether *Hicks* always preclude[d] judgments as a matter of law for employers whenever there [was] a plausible basis on

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180. See id. at 1404.
181. See id. at 1406.
183. See id. at 441.
184. See id.
185. Federal Rule of Procedure 50 concerns judgment as a matter of law in actions tried by juries. It states in relevant part:
   If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party . . . .
   **FED. R. CIV. P. 50(a)(1).**
186. See *Isenbergh*, 97 F.3d at 441. Federal Rule of Civil Procedure 56 concerns summary judgment. It states in relevant part:
   The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .
   **Fed. R. Civ. P. 56(c).**
which to disbelieve the employer's proffered reasons for the
employment decision in question.\footnote{187}

The \textit{Isenbergh} court noted that \textit{Howard}, a previous decision
in the Eleventh Circuit, concluded that under \textit{Hicks}, "the fact
finder's rejection of defendant's proffered reasons is sufficient
circumstantial evidence upon which to base a judgment for the
plaintiff."\footnote{188} The \textit{Isenbergh} court thought \textit{Howard} was wrong,
however, in applying \textit{Hicks} analysis to those types of cases
which were not before the Supreme Court in \textit{Hicks}.\footnote{189} Instead,
the \textit{Isenbergh} court thought \textit{Hicks} supported another conclusion:
when the evidentiary record in a case could support a jury's
disbelief of the employer's explanation, the court could "some-
times" refuse to grant a motion for judgment as a matter of law
to the employer, but not "every time."\footnote{190}

Contrary to the decision in \textit{Howard}, the Eleventh Circuit, in
\textit{NationsBank}, accepted the plaintiff's contention that the
defendant's proffered reasons were false, but affirmed a directed
verdict for the defendant.\footnote{191} The court explained that,
although the plaintiff had raised a suspicion of mendacity, it was
not sufficient to show that age motivated the defendant's termi-
nation decision.\footnote{192} The court explained that once the defen-
dant had met its burden of production, the sole inquiry would
be whether the plaintiff successfully carried the burden of per-
suading the trier of fact that the defendant engaged in inten-
tional age discrimination.\footnote{193} Deciding whether the plaintiff
proved the defendant's reasons were false would be probative,
but not dispositive.\footnote{194} The \textit{Isenbergh} court found \textit{NationsBank}
to be the more correct statement of the law.\footnote{195}
After noting the ostensible conflict within the circuit, the court went on to dismiss Howard as controlling, because Isenbergh failed to create an issue of fact about the validity of the employer’s reason. In other words, the court did not have to decide what impact the Hicks decision would have on this case, because the plaintiff could not prove pretext. It affirmed the district court’s award of summary judgment for the defendant.

Based on the decision in Isenbergh, the Eleventh Circuit appears to have adopted a modified version of the “pretext-plus” and “pretext-only” standards in ADEA cases. Isenbergh suggests the possibility that a plaintiff will not overcome a motion for summary judgment or survive a motion for judgment as a matter of law by proving the employer’s stated reasons to be false. At the same time, a plaintiff may defeat one or both of these motions if, in proving the defendant’s reasons false, the evidence reveals suspicions of mendacity sufficient to infer intentional discrimination.

D. O’Connor v. Consolidated Coin Caterers

O’Connor is the United States Supreme Court’s most recent decision involving age discrimination. The narrow question in this case was whether a plaintiff alleging that he was discharged because of his age must show that he was replaced by someone outside the protected group of individuals age forty and over. In answering this question in the negative, the Court did not address the issue of whether a “pretext-plus” or “pretext-only” standard would be applied had the plaintiff been able to establish by a preponderance of the evidence a prima facie case. It merely cited Hicks for the proposition that once a

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196. The court described the conflict as ostensible because Howard was a summary judgment (Rule 56) case and NationsBank was a judgment as a matter of law (Rule 50) case. The court said that “the words of the NationsBank opinion might be inconsistent with the words of the Howard opinion, yet the two decisions might not be conflicting.” Isenbergh, 97 F.3d at 443 n.4.
197. See Isenbergh, 97 F.3d at 443.
198. See id. at 441.
199. See id.
201. See id. at 1309.
prima facie case has been supported by a preponderance of the evidence and the employer remains silent, the court then must enter judgment for the plaintiff.\textsuperscript{202} If the employer remains silent instead of articulating legitimate, nondiscriminatory reasons for its actions, however, the "pretext-plus" or "pretext-only" controversy would not arise.

The circuit court and district court opinions similarly do not address which standard would be applied. However, \textit{O'Connor} is a Fourth Circuit case and that circuit has traditionally adhered to the "pretext-plus" position.\textsuperscript{203} In any event, both the district court and the Fourth Circuit determined that O'Connor had not established a prima facie case. Therefore, the employer was awarded summary judgment. Beyond the elements necessary to establish a prima facie case, no analysis was performed.\textsuperscript{204}

\section{E. The EEOC's Interpretation}

The EEOC has interpreted \textit{Hicks} to mean that, although the plaintiff is not required to produce additional evidence of intent to discriminate where the employer's explanation for its actions is found not to be credible, it does, as a practical matter, permit a fact finder to require such affirmative evidence.\textsuperscript{205} This is contrary to the EEOC's position prior to \textit{Hicks}.

The EEOC's previous position presumed that there was discrimination when the employer's explanation was not credible.\textsuperscript{206} The EEOC has directed its investigators to assume that if the evidence shows the respondent's articulated reasons are untrue, the employer is trying to cover up discrimination; hence, a finding of "cause" is appropriate.\textsuperscript{207} This guidance has remained in effect after \textit{Hicks}. According to the EEOC, even though \textit{Hicks} clearly holds that showing that an employer's articulated reason is untrue does not compel a finding of liabil-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{202} See \textit{id.} (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 & n.3 (1993)).
\item \textsuperscript{203} See discussion supra Part IV.A.
\item \textsuperscript{204} See \textit{O'Connor}, 116 S. Ct. at 1308-10.
\item \textsuperscript{205} See \textit{Enforcement Guidance on St. Mary's Honor Center v. Hicks}, Employer EEO Respons. (EEOC) Tab E, 5 n.6 (Apr. 12, 1994).
\item \textsuperscript{206} See \textit{id.}
\item \textsuperscript{207} See \textit{id.} at 6.
\end{itemize}
\end{footnotesize}
ty, it is also clear that such a finding is permitted.\textsuperscript{208} In addition, even before Hicks, EEOC investigators would issue a finding of "no cause" when the evidence clearly showed that the respondent's articulated reasons for its action were untrue and that a nondiscriminatory reason not articulated by the respondent was the true motive.\textsuperscript{209} This principle has remained the same.

V. ANALYSIS

The Hicks decision poses more questions than it answers. Two of the open issues indirectly accentuated by the Hicks decision include: (1) whether a different test should be applied at different time intervals in the litigation, such as defendant's motion for summary judgment and defendant's motion for judgment as a matter of law; and (2) whether the Supreme Court was intentionally vague in Hicks in order to permit a future court to make fact-specific determinations based upon the specific language in Hicks that bolsters its conclusion. Depending upon how a court applies Hicks, it could dismiss a plaintiff's suit at summary judgment using the "pretext-plus" language, or it could use the "pretext-only" language in Hicks to permit the plaintiff to proceed through trial and let the jury infer discrimination. The only clear ruling of the Court was that showing the defendant's proffered reasons to be pretextual does not compel judgment for the plaintiff as a matter of law.\textsuperscript{210}

As the above analysis reveals, a number of circuit court decisions have adopted at least three tests in interpreting the Hicks decision.\textsuperscript{211} Some circuits have adopted the "pretext-plus" or "pretext-only" test and, in doing so, have ignored the language in Hicks supporting the other test.\textsuperscript{212} Other circuit courts have combined "pretext plus" and "pretext only" language in their opinions, resulting in an uncertain standard to be used by future courts.\textsuperscript{213} The use of Hicks in this way has and will re-

\textsuperscript{208} See id.
\textsuperscript{209} See id. at 7.
\textsuperscript{210} See Hicks, 509 U.S. at 511.
\textsuperscript{211} See discussion supra Part IV.
\textsuperscript{212} See discussion supra Part IV.A-B.
\textsuperscript{213} See supra notes 113-15 and accompanying text.
result in inconsistent and unpredictable results. Other circuits have begun to adopt a modified test.\textsuperscript{214} The Sixth, Seventh and Eleventh Circuits have rejected the “pretext-plus” or “pretext-only” tests. These courts use the “pretext-plus” and “pretext-only” language, but in permissive rather than mandatory terms.\textsuperscript{215}

There are problems associated with adopting exclusively one test or the other. The problem with requiring proof of “pretext plus” is that some courts have applied the two-step method at an early stage in the proceedings. The Fourth Circuit, for example, has required plaintiffs at the summary judgment stage to demonstrate that the employer’s proffered reasons were a pretext and that the real reason for the adverse action was age.\textsuperscript{216} This can result in the premature dismissal of the plaintiff’s case. \textit{Hicks} was fully tried and arguably does not apply to summary judgment cases.\textsuperscript{217} Plaintiffs may be unable to overcome motions for summary judgment facing the “pretext-plus” standard because they are not given a fair opportunity to develop their case, through discovery\textsuperscript{218} or through cross-examination of witnesses, for example.

The “pretext only” approach is also problematic, because a prima facie case is often easily established, and because a plaintiff could prove the employer’s reasons to be false without pointing to any age-based reason. A plaintiff must ultimately convince the trier of fact that age was a motivating factor in the employer’s decision.

The Supreme Court in \textit{Hicks} correctly adopted a hybrid of the “pretext only” and “pretext plus” approaches. The Supreme Court answered in the negative the narrow question before it of whether the plaintiff was entitled to judgment as a matter of law after proving the employer’s reasons false.\textsuperscript{219} The Supreme Court proceeded to explain what the plaintiff was required to prove to prevail. The plaintiff could prevail in two ways: (1) by

\textsuperscript{214} See discussion \textit{supra} Part IV.C.
\textsuperscript{215} See \textit{id}.
\textsuperscript{216} See \textit{supra} notes 121-22 and accompanying text.
\textsuperscript{217} See \textit{Hicks}, 509 U.S. 502.
\textsuperscript{218} A defendant could move the court for summary judgment after it files its responsive pleadings and before discovery is commenced much less completed.
\textsuperscript{219} See \textit{Hicks}, 509 U.S. at 511.
establishing a prima facie case and proving pretext involving aggravated facts; or (2) by proving pretext and that age was the real reason for the employer's adverse action. The Supreme Court maintained that the language in its decision was not conflicting, as the dissent argued, because it was not adopting one single test.

This hybrid, or modified test, allows courts to exercise flexibility in evaluating the specific facts on a case by case basis. The Court was suspicious of employers who asserted unbelievable, nondiscriminatory reasons to justify their actions. That is why it incorporated in its opinion the language that the factfinder's disbelief combined with a suspicion of mendacity and a prima facie case could suffice to show intentional discrimination. On the other hand, the Court was also wary of the plaintiff with a weak prima facie case and a shallow attack on the employer's nondiscriminatory reason; hence, the reason for the language that a plaintiff must prove both pretext and discrimination.

The modified test removes artificial barriers to the truth-seeking process because it does not necessarily require the proof of "pretext-plus" at the summary judgment stage. It also does not allow unwarranted judgments for plaintiffs simply because the plaintiff was able to show only that the employer's reasons were false. This modified test utilizes the McDonnell Douglas tripartite test as a framework through which evidence is logically presented, not as a substantive test to determine whether the plaintiff will prevail.

Finally, Hicks did not resolve the "pretext-plus" versus "pretext-only" controversy as evidenced by the multiple tests generated by the post-Hicks decisions outlined above. What Hicks did do was establish a modified test which reasonably serves the interests of both plaintiffs and defendants. The Sixth, Seventh, and Eleventh Circuits appropriately emphasize that the plaintiff has the ultimate burden of persuading the trier of fact

220. See id. at 506.
221. See id. at 516-17.
222. See id. at 519.
223. See id. at 515.
224. See discussion supra Part IV.
that age was a motivating factor in the employer's decision.\textsuperscript{225} Probative factors which will assist the trier of fact in inferring discrimination include: whether the plaintiff can prove pretext, whether sufficient suspicion of mendacity exists, and whether there is any direct evidence proving age discrimination.

VI. CONCLUSION

The *Hicks* decision has generated at least three approaches: "pretext-plus," "pretext-only," and the modified test. In determining which approach best reflects the intent Congress had when enacting the ADEA, it is clear that the modified test is the most appropriate. In enacting the ADEA, Congress sought, *inter alia*, to remove the setting of arbitrary age limits in employment. This would be difficult to achieve if courts stringently used the "pretext-plus" standard. This standard would surround the jury box with artificial barriers which plaintiffs are unlikely to overcome. Strictly adhering to the "pretext-only" standard, however, would discourage employers from hiring older workers out of the fear of a lawsuit should the employer rightfully terminate an older worker. Finally, the modified test combines elements of both the "pretext-plus" and "pretext-only" standards. Under this approach, more meritorious claims may proceed to the jury, while more frivolous suits will be dismissed. This should serve as a model for other circuit courts to follow.

*Susan Childers North*

\textsuperscript{225} See discussion *supra* Part IV.C.