St. Mary's Honor Center v. Hicks: Interpretation of Title VII Takes a Wrong Turn

Teresa C. Postle
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Rights and Discrimination Commons, Evidence Commons, and the Labor and Employment Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol96/iss1/10
I. INTRODUCTION ........................................ 218
II. STATEMENT OF THE CASE ............................ 220
III. BACKGROUND OF THE LAW ...................... 224
   A. The McDonnell Douglas Analysis .............. 224
IV. THE DECISION ......................................... 228
   A. The Majority Opinion ............................ 229
      1. The Majority’s Focus on the Plaintiff’s
         Burden of Proving Discriminatory Intent ..... 230
      2. The Majority’s Review of the Relevant
         Precedent ................................... 231
      3. A Hypothetical Eliciting the Majority’s
         Concerns .................................... 233
   B. The Dissenting Opinion ......................... 234
      1. The Dissent’s Focus on the Plaintiff’s
         Burden of Proving Discriminatory Intent ..... 235
      2. The Dissent’s Review of the Relative
         Precedent ................................... 236
      3. Two Interpretations of the Holding .......... 237
      4. Negative Consequences of the Holding ..... 238
V. ANALYSIS OF THE CASE ............................... 240
   A. The Plaintiff’s Burden of Persuasion is Fulfilled
      by Discrediting the Defendant’s Reasons .... 240
   B. Narrowing the Factual Inquiry to the Question
      of Pretext .................................... 242
   C. The Majority’s Hypothetical .................... 243
   D. The Proper Interpretation of the Majority’s
      Holding ....................................... 245
   E. A Proposal For West Virginia .................. 246
VI. CONCLUSION ........................................... 247
I. INTRODUCTION

Although Congress passed Title VII of the Civil Rights Act¹ almost thirty years ago, the struggle to eradicate discrimination in the workplace continues. This battle is being waged in our court system. Title VII litigation is problematic by its nature because it is usually limited to circumstantial evidence.² Discrimination is often subtle and therefore difficult to prove. This is because discriminatory motive, as with any motive, is particularly elusive. The plaintiff's case, then, may consist of nothing more than circumstantial evidence, requiring the fact finder to make inferences about discriminatory intent.³

In interpreting Title VII, the Supreme Court must rely on Congressional intent. In this respect, the Court has concluded that Congress intended to assure equality of employment opportunities and to eliminate discriminatory employment practices which have harmed minority citizens.⁴ While this general purpose is rather uncomplicated, instituting rules that govern the application of Title VII has proven to be a difficult task.⁵ Proof of this difficulty is demonstrated by the conflict between the legislative and judicial branches in explaining the Act.⁶

Consequently, the Court continues to define and explain the evidentiary framework of Title VII litigation. This Comment discusses St. Mary's Honor Center v. Hicks.⁷ In Hicks, a divided Court⁸ held that

³. See id. at 716-17.
⁵. For example, the 1991 Amendment to the Civil Rights Act expressly lists that one of its purposes is to overturn Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), regarding plaintiff's level of proof in the rebuttal stage of a disproportionate impact claim. 42 U.S.C. § 1981 note (Supp. III 1991); see also JOEL WM. FRIEDMAN AND GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 248 (1993).
⁶. See supra note 5.
⁸. Id. (Scalia, J., delivered the opinion of the Court, joined by Rehnquist, C.J.,
if an employer’s articulated reasons for the adverse employment decision are disbelieved by the fact finder, such a finding, standing alone, does not compel judgment for the plaintiff. This Comment ultimately argues that *Hicks* changed the established evidentiary framework as first developed in *McDonnell Douglas Corp. v. Green*.

Section two of this Comment provides the factual and procedural posture of the case. In short, the plaintiff established a prima facie case and discredited the defendant’s reasons, but was ultimately defeated. The issue addressed by the Supreme Court in *Hicks* is whether, by discrediting the defendant’s explanation for the employment action, the plaintiff was entitled to judgment as a matter of law. The Eighth Circuit held that such a finding did compel judgment for the plaintiff as a matter of law. The Supreme Court reversed this holding by a majority of one vote.

Section three examines the background that led to the issue raised in *Hicks*. Section four explains the reasoning of the majority and the dissent, both of which claim to rely on established precedent. Section five of this Comment presents a critical analysis of the opinion by discussing the consequences that will follow from this holding. Most importantly, this holding enlarges the scope of the relevant issues at trial. Furthermore, section five concludes with the position that this case represents a change in the evidentiary framework as first established in *McDonnell Douglas Corp. v. Green*. Because of this change, the majority opinion is contrary to the general purpose of Title VII, which is to deter “unlawful harassment and intentional discrimina-

---

9. *Id.* at 2749.
12. *Hicks*, 113 S. Ct. at 2746.
15. *Id.* at 2746.
16. *Id.* at 2742.
17. See *id.* at 2763 (Souter, J. dissenting).
tion in the workplace.” Accordingly, this Comment will propose Congressional action to restore the law in accordance with the spirit of Title VII.

Finally, the West Virginia Human Rights Act and Title VII both have as one of several purposes the elimination of discrimination in the workplace. West Virginia has even adopted the McDonnell Douglas analysis for cases filed under The West Virginia Human Rights Act. Nonetheless, this Comment maintains that the Supreme Court of Appeals of West Virginia, when faced with the Hicks issue, should adopt the position of the Equal Employment Opportunity Commission (EEOC), as set forth in Justice Souter’s dissent in Hicks.

II. STATEMENT OF THE CASE

This is a case alleging racial discrimination in the workplace. Melvin Hicks, an African-American, worked for St. Mary’s Honor Center as a correctional officer and later as a shift commander. He enjoyed a satisfactory employment record from 1978 until 1984. In fact, the plaintiff was promoted to a supervisory position in 1980. In 1983, Steve Long became the superintendent of St. Mary’s Honor Center and John Powell became the plaintiff’s immediate supervisor. After this changeover, the plaintiff began experiencing problems at work. In March of 1984, a series of events occurred involving mis-

25. Id. at 2746.
27. Id. at 488.
28. Id. at 489.
29. Id.
conduct by the plaintiff's subordinates. Consequently, a disciplinary review board, of which John Powell was a member, demoted the plaintiff. His subordinates, however, were not disciplined in any way.

After hearing the news of his demotion, the plaintiff requested and was granted the day off. As the plaintiff was leaving, Mr. Powell followed him and ordered him to turn over his shift commander manual. This prompted a heated verbal exchange between the plaintiff and Mr. Powell. As a result, Mr. Powell sought disciplinary action alleging that Mr. Hicks had threatened him. A disciplinary board recommended a three day suspension, but Mr. Long recommended that Hicks be discharged. Mr. Long testified that the plaintiff's discharge recommendation was based on the plaintiff's accumulation and severity of institutional violations. Pursuant to Mr. Powell's recommendation, Mr. Long discharged the plaintiff on June 7, 1984.

During this same period from January through June of 1984, the plaintiff reported institutional violations by other employees on several occasions. His reports, however, were generally ignored by supervisors. All of the employees who were the subjects of these ignored reports were white.

As a result of these facts, Melvin Hicks filed a complaint in the Eastern District of Missouri alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The named

30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
38. Id.
39. Id.
40. Id. at 490.
41. Id.
42. Id.
defendant’s were St. Mary’s Honor Center and Steve Long. The plaintiff also filed an equal protection claim against Mr. Long under 42 U.S.C. § 1983.

After a bench trial on the merits, the district court entered judgment in favor of the defendants. The district court held that the plaintiff had established a prima facie case of discrimination. The district court also held that the defendant met the burden of production by articulating a legitimate reason for the discharge. This legitimate reason was the accumulation and severity of institutional violations by the plaintiff. In this regard, however, the district court also found that the “[p]laintiff [had] carried his burden in proving that the reasons given for his demotion and termination were pretextual.” In other words, the district court did not believe the employer’s explanation. Nonetheless, the district court entered judgment for the defendants on the ground that the plaintiff had failed to meet his ultimate burden of proving discrimination. The basis of this conclusion was (1) that two blacks sat on the disciplinary review board, (2) that the plaintiff’s black subordinates who committed the violations were not disciplined and (3) that the employer retained a constant number of black employees. The district court found that this evidence precluded a finding of intentional discrimination. Instead, the district court assumed that the defendant’s actions were “personally motivated.”

On the plaintiff’s behalf, the EEOC participated in the appeal to the Eighth Circuit as amici curiae. The plaintiff and the EEOC ar-

44. Hicks, 756 F. Supp. 1245.
45. Id.
46. Id. at 1244-45.
47. Id. at 1249.
48. Id. at 1250.
49. Id.
50. Id. at 1251.
51. Id.
52. Id. at 1252.
54. Id.
56. Id. at 488.
gued that the plaintiff had sustained his burden of proof by discrediting the defendant's proffered reasons, and that judgment for the plaintiff was therefore compelled. The Eighth Circuit agreed and concluded that the district court erred in assuming that the defendant's actions were somehow personally motivated. This assumption was wrong, according to the Eighth Circuit, because the defendant simply never articulated that personal motivation was the reason for the employment action. Thus, the Eighth Circuit reversed the district court's judgment, ordered judgment to be entered for the plaintiff, and remanded the case for further findings on the remaining issues, including damages.

The Supreme Court then granted certiorari to resolve a split in the circuits over whether judgment should be automatically entered in the plaintiff's favor when the plaintiff discredits the defendant's explanation for the employment action. Again the EEOC intervened as amici curiae supporting the view that when the trier of fact rejects the

57. *Id.*
58. *Id.* at 492.
59. *Id.*
60. *Id.* at 493.
employer's proffered reasons, judgment for the plaintiff is mandated. The EEOC was joined by the Solicitor General, also as amici curiae. Ultimately, the Supreme Court held that a finding that the defendant's proffered reasons are untrue does not compel judgment for the plaintiff as a matter of law. Accordingly, the Supreme Court remanded the case to the Eighth circuit. In turn, the Eighth Circuit remanded the case to the district court, where it is currently pending.

III. BACKGROUND OF THE LAW

The relevant portion of Title VII provides that "[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual... because of such individual's race, color, religion, sex, or national origin..." The Supreme Court teaches that Title VII requires the removal of artificial and arbitrary barriers that discriminate on the basis of racial or other illegal classifications. In achieving this goal, the Supreme Court has articulated an evidentiary framework to govern Title VII disparate treatment cases.

A. The McDonnell Douglas Analysis

More than twenty years ago, the Supreme Court first laid down an evidentiary framework for allocating the burden of proof in Title VII cases. In McDonnell Douglas Corp., the plaintiff was a black civil rights activist who, upon being discharged, illegally protested against

62. Hicks, 113 S. Ct. at 2765 (Souter, J., dissenting).
63. Id.
64. Id. at 2749.
65. Id. at 2756.
69. Id. at 792.
70. Id. at 802.
The plaintiff helped stage a "stall-in" on the road near the defendant's business during a shift change. This resulted in traffic problems and the plaintiff was fined for obstructing traffic. Several weeks after the protest, the defendant publicly advertised for mechanics, the plaintiff's trade. The plaintiff re-applied for employment but was turned down because of his illegal protest activity against the defendant. Plaintiff subsequently filed suit alleging racial discrimination. These facts ultimately resulted in the Supreme Court setting forth an evidentiary framework for Title VII litigation.

First, the plaintiff must prove his prima facie case of discrimination by a preponderance of the evidence. The plaintiff's prima facie case may be met by showing four elements:

(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.

The prima facie case thereby serves to eliminate the most common, legitimate reasons for an adverse employment decision.

The elements of the prima facie case will vary as Title VII factual situations vary. For example, the first element might be that plaintiffs must show that they are a member of a protected class under Title VII. The second element could be stated more generally to say that plaintiffs must demonstrate that they suffered an adverse employ-

---

71. Id. at 794-95.
72. Id. at 795.
73. Id. at 796.
74. Id.
75. Id. at 792.
76. In remanding to the district court, the Eighth Circuit had attempted to formulate standards to govern Title VII claims. Nonetheless, the Supreme Court set forth its own analysis. See id. at 797, 802.
77. Id. at 802.
78. Id.
81. See id.
ment decision. Thus, the McDonnell Douglas standard is a flexible one that accounts for varying factual situations such as hiring, discharging, and promoting employees.

Next, once the plaintiff establishes a prima facie case of discrimination, a presumption is created in favor of the employee. Consequently, the burden of production shifts to the defendant to articulate some legitimate, non-discriminatory reason for the adverse employment decision. If the employer remains silent in light of this presumption, the court must enter judgment for the plaintiff. If the employer responds with an explanation, it must be legally sufficient to justify a judgment for the employer.

Finally, assuming the defendant meets this burden of coming forward with an explanation, the plaintiff must react. That is, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons articulated by the defendant were not the true reasons, but rather were a pretext for discrimination.

Stages two and three of the McDonnell Douglas analysis were clarified in Texas Department of Community Affairs v. Burdine. The plaintiff in Burdine alleged that she was denied a promotion and was discharged because of her sex. The District Court for the Western District of Texas held for the defendant, finding that the defendant had rebutted the plaintiff's allegation of gender discrimination. The Fifth Circuit reversed, holding that the defendant bears the burden of prov-

---

82. See id.
83. Id. at 802 n.13; see also Burdine, 450 U.S. 248 (applying McDonnell Douglas analysis to a lost promotion); Hicks, 756 F. Supp. 1244 (applying McDonnell Douglas analysis to a discharge).
84. Burdine, 450 U.S. at 254.
86. Burdine, 450 U.S. at 254.
87. Id. at 255.
90. Id.
91. Id. at 251.
ing by a preponderance of the evidence the existence of a non-discriminatory reason for the employment action.\textsuperscript{92}

In response to this decision, the Supreme Court reversed and explained that the burden of persuasion never shifts to the defendant.\textsuperscript{93} Instead, the defendant’s burden is to clearly set forth the reason for its employment decision.\textsuperscript{94} If the defendant meets this burden, “the factual inquiry proceeds to a new level of specificity.”\textsuperscript{95} Placing the burden of production on the defendant at this stage serves two purposes. First, it provides the defendant with an opportunity to meet the plaintiff’s prima facie case and rebut the presumption it creates.\textsuperscript{96} Second, it forces the defendant to frame the factual issue with clarity so the plaintiff has a fair opportunity to prove pretext.\textsuperscript{97}

The Court further explained that the plaintiff may meet the ultimate burden of persuasion in one of two ways.\textsuperscript{98} First, the plaintiff can introduce direct evidence to persuade the court that a discriminatory reason more likely than not motivated the employer.\textsuperscript{99} Second, the plaintiff can meet the burden of persuasion indirectly by showing that the employer’s reason is unworthy of credence.\textsuperscript{100}

Soon after \textit{Burdine}, the Court again visited the issue of how the plaintiff meets the burden of proving discrimination. In \textit{United States Postal Service Board of Governors v. Aikens}, the issue on appeal was whether the plaintiff had established a prima facie case through indirect evidence.\textsuperscript{101} The Supreme Court admonished the district court for requiring the plaintiff to submit direct evidence of discriminatory intent.\textsuperscript{102} The Court also stated that, after a case has been fully tried

\begin{footnotesize}
\textsuperscript{92} \textit{Id.} at 252.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 255.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 255-56.
\textsuperscript{98} \textit{Id.} at 256.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} 460 U.S. 711, 717 (1983).
\textsuperscript{102} \textit{Id.}
\end{footnotesize}
on the merits, the focus should be on the ultimate question of intentional discrimination and not on the plaintiff's prima facie case.\textsuperscript{103}

In elaborating on the plaintiff's ultimate burden of persuasion, the Court repeated verbatim language from \textit{Burdine} which allows the plaintiff to indirectly prove discrimination by proving pretext.\textsuperscript{104} The Court then stated that, after the plaintiff attempts to prove pretext, "the district court must decide which party's explanation of the employer's motivation it believes."\textsuperscript{105}

Most notably, Justice Blackmun, with whom Justice Brennan joined, concurred in \textit{Aikens} solely for the purpose of pointing out exactly what the dissent holds in \textit{Hicks}.\textsuperscript{106} Justice Blackmun states, unequivocally, that \textit{McDonnell Douglas} requires that a plaintiff prevail upon demonstrating that the defendant's reasons are unworthy of credence.\textsuperscript{107}

\textbf{IV. THE DECISION}

The \textit{Hicks} Court did not decide the case at hand on the merits. Instead, the Court expounded a general proposition of law.\textsuperscript{108} Simply stated, \textit{Hicks} is about the effect that the plaintiff's proof of pretext has on the outcome of a Title VII action. Pretext is a statement that fails to describe the actual reason for the employment decision.\textsuperscript{109} In short, a pretext is a falsity. In \textit{Hicks}, the majority finds that pretext must always mean pretext for discrimination.\textsuperscript{110} Thus, the decisive question for the majority is not whether the plaintiff has discredited the employer's reasons, but whether the true reason was discriminat-
Discrediting the employer's reason may help to prove discriminatory intent. But, even if the defendant's reasons are false, the fact finder can still conclude that the plaintiff failed to meet the ultimate burden of persuasion. In contrast, the dissent argues that when the plaintiff has discredited the employer's reason, the plaintiff has automatically proven discriminatory intent by a preponderance of the evidence.

A. The Majority Opinion

The majority opinion, authored by Justice Scalia, commanded a total of five votes. The Court concluded that even if the plaintiff proves by a preponderance of the evidence that the defendant's explanation is unworthy of credence, the plaintiff is still not entitled to judgement as a matter of law. In so holding, the Court rejected the Eighth Circuit's reasoning that, because the defendant's reasons were discredited, the defendant was in no better position than if he had remained silent. On the contrary, the *Hicks* majority held that such defendants are in a better position than they would have been by remaining silent. In other words, the majority held that the defendant's proffered reason for the employment action, although discredited, served to meet the presumption of discrimination arising from the plaintiff's prima facie case.

111. *Id.* at 2749.
112. *Id.*
113. *See id.*
114. *Id.* at 2763 (Souter, J. dissenting).
116. *Id.* at 2749.
117. *Id.* at 2748. Under the *McDonnell Douglas* analysis, if the defendant remains silent in light of the plaintiff's prima facie case, the defendant loses. *See* discussion supra part III.
118. *Id.*
119. *Id.*
1. The Majority’s Focus on the Plaintiff’s Burden of Proving Discriminatory Intent

The issue in Hicks centered around the question of how and when the plaintiff’s burden of persuasion is met. The majority found that the Eighth Circuit’s holding ignored the Court’s repeated admonition that the plaintiff bears the ultimate burden of persuasion. Furthermore, the majority warns that the Eighth Circuit’s holding disregarded the teaching of Rule 301, which provides that a presumption does not shift the burden of proof. In so concluding, the majority relied on two major points.

First, the Court stressed the fact that the plaintiff bears the ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination. The Court was concerned that compelling judgment for the plaintiff who discredited the defendant’s reasons may avoid the question of whether the plaintiff really proved intentional discrimination. While proof that the defendant lied may be sufficient to sustain a judgment for the plaintiff, there must actually be such a finding of discrimination. Simply put, in order for the plaintiff to prevail, the fact finder must conclude that the defendant intentionally discriminated against the plaintiff. Proof of the defendant’s lie may or may not support a finding of discrimination.

Second, the Court emphasized that the defendant only has the burden of production with regard to articulating a legitimate non-dis-

---

120. Id. at 2749.
121. Fed. R. Evid. 301.
123. Burdine, 450 U.S. at 253.
125. Hicks, 113 S. Ct. at 2749 n.4.
126. See id.
criminatory reason.\textsuperscript{127} As set forth in Rule 301 of the Federal Rules of Evidence:

\begin{quote}

a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.\textsuperscript{128}
\end{quote}

Consequently, merely coming forward with any legitimate reason suffices to meet the defendant's burden.\textsuperscript{129} The employer has no burden to persuade the trier of fact that the proffered reason is in fact the true reason.\textsuperscript{130} Accordingly, the Court concluded that judgment for the plaintiff is not automatically compelled when the fact finder does not believe the employer's articulated reasons.\textsuperscript{131}

2. Review of the Relevant Precedent

The Court "begrudgingly"\textsuperscript{132} turned to a review of the Supreme Court precedent.\textsuperscript{133} The Court began with \textit{Texas Department of Community Affairs v. Burdine}.\textsuperscript{134} The majority explained that, while some statements in \textit{Burdine} could support the dissent's position, "all but one of them bear a meaning consistent with our interpretation, and the one exception is simply incompatible with other language in the case."\textsuperscript{135}

The passage to which the Court referred stated that the plaintiff may succeed in meeting the burden of persuasion "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered

\begin{footnotes}

\textsuperscript{127} \textit{Hicks}, 113 S. Ct. at 2749.
\textsuperscript{128} \textit{FED. R. EVID.} 301.
\textsuperscript{129} Texas Dept. of Community Affairs v. Burdine 450 U.S. 248, 254 (1981).
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Hicks}, 113 S. Ct. at 2749.
\textsuperscript{132} Such language is an indication that the majority did not think it was important to reach a conclusion based on the precedent. \textit{Id.} at 2751.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} 450 U.S. 248 (1981).
\textsuperscript{135} \textit{Hicks}, 113 S. Ct. at 2751.
\end{footnotes}
The explanation is unworthy of credence."\textsuperscript{136} The majority agreed with the dissent that these words indicate that, if the employer’s explanation is a falsity, judgment for the plaintiff is compelled.\textsuperscript{137} As previously mentioned, however, the Court dismissed this passage as incompatible with other language in the case.\textsuperscript{138}

Furthermore, the Court characterized Burdine’s references to the plaintiff’s burden of proving simply “pretext” to be reasonably understood to mean “pretext for discrimination.”\textsuperscript{139} As indicated, the employer’s explanation is a pretext if it is not the true reason for the employment decision.\textsuperscript{140} According to the majority, the Burdine Court did not intend to say that by proving pretext, the plaintiff has automatically proven discrimination.\textsuperscript{141} Instead, the Hicks majority interpreted Burdine’s reference to “pretext” as a shorthand way of referring to “pretext for discrimination.”\textsuperscript{142} In addition, the Court in Hicks urged that a reason cannot be shown to be a pretext for discrimination, unless it is shown not only that the reason was false, but also that the real reason was illegal discrimination.\textsuperscript{143}

The next focal point of Burdine held that when the defendant employer has satisfied the burden of production by rebutting the inference of discrimination raised by the plaintiff’s prima facie case, “the factual inquiry proceeds to a new level of specificity.”\textsuperscript{144} This means that the factual issue is framed with clarity so that the plaintiff will have a fair opportunity to show that the employer’s reasons were a pretext for discrimination.\textsuperscript{145} The majority rejected the notion that this statement by the Burdine Court referred simply to the question of whether the defendant’s reasons are true or false.\textsuperscript{146} Instead, the ma-
The majority interpreted the terms "new level of specificity" to refer to the specific proofs of discriminatory motivation as introduced by the parties.\textsuperscript{147} For the majority, narrowing the factual issue to "pretext" means focusing on discriminatory motivation.\textsuperscript{148}

According to the majority, whatever doubt on this issue that may have been created by \textit{Burdine} was eliminated by \textit{United States Postal Service Board of Governors v. Aikens}.\textsuperscript{149} There, the Court held that "the ultimate question [is] discrimination \textit{vel non}."\textsuperscript{150} The \textit{Aikens} Court meant that, after a case has been fully tried on the merits, the question is one of intentional discrimination.\textsuperscript{151} The question is not, as the parties had framed it on appeal, whether the plaintiff made out a prima facie case.\textsuperscript{152} Thus, the \textit{Hicks} majority interpreted this to mean that the plaintiff prevails only if the fact finder makes an actual finding of discrimination.\textsuperscript{153}

3. A Hypothetical Eliciting the Majority's Concerns

The majority reasons by example.\textsuperscript{154} The following is the hypothetical set out by the Court:

Assume that 40\% of a business' work force are members of a particular minority group, a group which comprises only 10\% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired.\textsuperscript{155}

\textsuperscript{147. Id.}
\textsuperscript{148. Id.}
\textsuperscript{149. Id. at 2753 (discussing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983)).}
\textsuperscript{150. Id. at 2753 (quoting Aikens, 460 U.S. at 714). But see Aikens, 460 U.S. at 717 (Blackmun, J. concurring).}
\textsuperscript{151. Aikens, 460 U.S. at 717.}
\textsuperscript{152. Id. at 713-14.}
\textsuperscript{153. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2753 (1993).}
\textsuperscript{154. Hicks, 113 S. Ct. at 2750-51.}
\textsuperscript{155. Id.}
At trial, the company would have to try to elicit the reason for refusing to hire the plaintiff from the discharged hiring officer, who is presumably now hostile to the employer. Thus, Justice Scalia argued that under the dissent’s analysis in Hicks, if the employer offers a reason that the fact finder does not believe, the fact finder must nonetheless assess damages against the company even under a belief that the company was not guilty of racial discrimination. Accordingly, the positive facts tending to disprove discrimination would be deemed irrelevant because, by discrediting the defendant’s reasons, the plaintiff would win automatically.

The Court denies that this is the law that the Supreme Court has created. Title VII does not assess damages against an employer who cannot prove a legitimate reason for an adverse employment action, nor does Title VII serve as a cause of action for perjury. Rather, Title VII holds those employers liable when a plaintiff proves that the employer discriminated against the employee in one of the fashions proscribed by Title VII.

B. The Dissenting Opinion

The dissenting opinion, authored by Justice Souter, agrees with the majority that the mandatory presumption which initially arose from the plaintiff’s prima facie case is not resurrected when the plaintiff proves that the employer’s reasons are pretextual. Instead, the dissent saw the issue as whether or not the defendant’s explanation serves to narrow the factual inquiry to the question of pretext.

156. Id. at 2751.
157. Id.
158. Id.
159. Id.
160. Id. at 2756.
161. Id. at 2754.
162. Id. at 2756.
163. Id. (Souter, J., dissenting, joined by White, J., Blackmun, J. and Stevens, J.)
164. Id. at 2759 n.2.
165. Id.
tice Souter accused the majority of reinterpreting precedent, misreading *Burdine* and ignoring the central purpose of the *McDonnell Douglas* framework.\(^{166}\) This central purpose is “progressively to sharpen the inquiry into the elusive factual question of intentional discrimin-

ation.”\(^{167}\) The result of the Court’s opinion is that, by failing to narrow the factual inquiry merely to the question of pretext, a fact finder is now permitted to choose any reason, articulated or not, to find against the plaintiff.\(^{168}\)

1. The Dissent’s Focus on the Plaintiff’s Burden of Proving Discriminatory Intent

The dissent agreed that the plaintiff, at all times, retains the burden of persuading the trier of fact that he was the victim of intentional discrimination.\(^{169}\) Nonetheless, the employer’s burden of production serves an important function. This burden requires the employer “to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”\(^{170}\) Justice Souter argued that the plaintiff’s burden of persuasion is satisfied when the plaintiff discredits the defendant’s proffered reasons for the adverse employment action.\(^{171}\) The basis for this conclusion is that “common experience” tells that it is “more likely than not” that, if employers lie, they are actually covering up the illegal discrimination alleged by the plaintiff.\(^{172}\)

However, under the majority’s scheme, even if the plaintiff proves that the defendant’s reasons are untrue, the fact finder may choose an unarticulated reason for plaintiff’s termination and find for the defendant.\(^{173}\) Thus, the majority “transforms the employer’s burden of pro-

\(^{166}\) Id. at 2761.
\(^{167}\) Id. (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 255 n.8).
\(^{168}\) Id. at 2761 n.10 (1993) (Souter, J. dissenting).
\(^{169}\) Id. at 2760.
\(^{170}\) Id. (quoting *Burdine*, 450 U.S. 255-56).
\(^{171}\) Id. at 2760-61.
\(^{172}\) See id. at 2763 (quoting Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978)).
\(^{173}\) See *Hicks*, 113 S. Ct. 2742 (1993).
duction from a device used to provide notice and promote fairness into a misleading and potentially useless ritual.”174 Furthermore, the dissent argued against the absurdity of requiring the employer’s reason to be “clear and reasonably specific,” if the fact finder can nonetheless rely on a reason not clearly articulated to rule in favor of the defendant.175

2. The Dissent’s Review of the Relevant Precedent

The dissent also focused on the language from Burdine, explaining that the plaintiff may succeed in meeting his ultimate burden of persuasion “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.”176 The dissent relied on this to argue that the plaintiff prevails by demonstrating that the employer’s reasons were false. This interpretation is not in dispute because the majority admitted that “[t]he words bear no other meaning but that the falsity of the employer’s explanation is alone enough to compel judgment for the plaintiff.”177

Furthermore, the dissent interpreted Burdine’s reference to “a new level of specificity” to refer to the specific factual inquiry regarding the credibility of the defendant’s proffered reasons.178 Thus, that the plaintiff can prevail by showing that the employer’s explanation is not credible indicates that the case has been narrowed to the question of pretext.179

175. Id. at 2759 (quoting Burdine, 450 U.S. at 258).
176. Id. at 2765 (quoting Aikens, 460 U.S. at 716 where Blackmun, J., joined by Brennan, J., concurred to say that the majority opinion in Aikens “reaffirms the framework established by McDonnell Douglas Corp. v. Green” which, according to Blackmun, is exactly the same proposition that the Hicks dissent now asserts); see also Price-Waterhouse v. Hopkins, 490 U.S. 228, 287-89 (Kennedy, J. dissenting) (discussing the same issue and relying on Justice Blackmun’s concurrence in Aikens).
177. Id. at 2752.
178. Id. at 2759 (Souter, J., dissenting).
179. Id. at 2760.
The dissent also pointed out that the *Aikens* Court quotes the above language from *Burdine* and then directs the district court to "decide which party's explanation of the employer's motivation it believes." Thus, by requiring the fact finder to choose either the plaintiff's or the defendant's explanation, *Aikens* flatly bars the Court's conclusion that the fact finder can choose a third explanation, never offered by the defendant, and rule against the plaintiff.  

3. Two Interpretations of the Holding

Justice Souter accused the majority of giving "conflicting signals about the scope of its holding in this case." Essentially, these two holdings can be characterized as (1) that a lie by the employer is sufficient to hold for the plaintiff, although not compelling or (2) that the plaintiff, in order to prevail, must do more than merely discredit the defendant's reasons for the employment action.

With regard to the first interpretation, the Court stated that, while judgment for the plaintiff is not compelled, such evidence "will permit the trier of fact to infer the ultimate fact of intentional discrimination." As Justice Souter pointed out, that same view may be inferred from the Court's decision to remand this case, keeping the plaintiff's chance of prevailing alive, even though he has done nothing more than show that the defendant's reasons are unworthy of credence.

The second possible reading of the Court's opinion, however, bothered the dissent. Justice Souter feared a more severe conclusion that proof of the defendant's lie will not be adequate to sustain a judgment for the plaintiff. The Court stated that the plaintiff must show "both that the reason was false, and that discrimination was the real

---

180. *Id.* at 2765 (quoting United States Postal Service Bd. of Governors v. Aikens, 460 U.S. at 716).
181. *Id.*
182. *Id.* at 2762.
183. *Id.*
184. *Id.* at 2749.
185. *Id.* at 2762 (Souter, J. dissenting).
Moreover, the Court explicitly states that "[i]t is not enough . . . to dis believe the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination."186 The dissent argues strongly against such a pretext-plus rule. Justice Souter claimed that such a rule would "turn Burdine on its head" and would often result in summary judgment for employers where employees have no direct evidence beyond proving a prima facie case and discrediting the defendant’s reasons.188

4. Negative Consequences of the Holding

The dissent was dismayed about the consequences that this decision will have on both actual and potential Title VII litigants. The majority’s scheme places a heavy burden of proof on the plaintiff by requiring the plaintiff to prove more than just pretext in order to ensure success. If employees decide not to sue because of this onerous burden of proof they would face under the majority’s scheme, the Congressional purpose of eliminating discrimination would be frustrated because victims would remain silent and endure the discrimination.189 If employees decide to press ahead nonetheless, “the result will likely be wasted time, effort, and money for all concerned.”190

Moreover, the Court did not say that the trial court may limit the introduction of evidence at trial. On the contrary, the scope of admissible evidence at trial is not at all limited by the employer’s stated reasons. However, even if the trial court may limit the introduction of evidence to the employer’s “vaguely” articulated reason, the careful plaintiff will be forced to anticipate all possible reasons that may justify the defendant’s adverse employment decision.191 Because the fact finder may rely on any vaguely articulated reason to find for the de-

186. Id. at 2752.
187. Id. at 2754.
188. Id. at 2762 (Souter, J. dissenting).
189. Id. at 2763.
190. Id.
191. Id.
fendant, the plaintiff must rebut all reasons that may "lurk in the record."\textsuperscript{192}

Another problem is that pre-trial discovery must now be expanded because a much wider range of facts could prove relevant and important at trial. Thus, the dissent argued that the Court’s scheme will promote both longer trials and more extensive pre-trial discovery.\textsuperscript{193} This threatens an increased expense for both plaintiffs and defendants in Title VII litigation.\textsuperscript{194}

Finally, the "perverse result[s]" of the majority opinion will benefit employers who are unable to discover the true reasons for its employment decision and then lie about it in court.\textsuperscript{195} The majority, however, stated that it is absurd to say that an individual is lying when a fact finder disbelieves his testimony.\textsuperscript{196} The dissent, on the other hand, finds nothing unfair in labelling testimony which is disbelieved by the fact finder as a lie.\textsuperscript{197} Thus, the dissent finds no justification for favoring employers who present false evidence in court.\textsuperscript{198} Instead, employers should be bound by the reasons they put forth rather than being exempted from responsibility for lying.\textsuperscript{199}

Even more startling, employers who do not know the reason for their employment decisions will be encouraged or even forced to lie in order to defend successfully a Title VII action.\textsuperscript{200} One is pressed to think of another scheme that requires a party to lie in order to prevail.\textsuperscript{201}

\textsuperscript{192} Id. at 2762-63.
\textsuperscript{193} Id. at 2763.
\textsuperscript{194} Id.
\textsuperscript{195} Id. at 2764.
\textsuperscript{196} Id. at 2754.
\textsuperscript{197} Id. at 2763 n.11 (Souter, J., dissenting).
\textsuperscript{198} Id. at 2763.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 2764.
\textsuperscript{201} Id. at 2764; see also infra part V.C.
V. ANALYSIS

A. The Plaintiff's Burden of Persuasion is Fulfilled by Discrediting the Defendant's Reasons

It is undisputed that only the burden of production shifts to the defendant after the plaintiff proves a prima facie case. The burden of persuasion rests always with the plaintiff. That is, the plaintiff continues to bear the "risk of non-persuasion." The defendant need only articulate a reason for the employment action. This reason, if presumed true, should be sufficient to justify judgment for the defendant. The defendant is not obliged to offer proof of credibility about its articulated reason. It is the plaintiff who must disprove the defendant's reason. If the plaintiff cannot disprove the defendant's reason, the plaintiff loses. In this way, the plaintiff bears the risk of being unable to convince the fact-finder on the issue of pretext. Thus, Federal Rule of Evidence 301 is not violated because the defendant is not required to prove that the proffered reason for the employment action is the true reason. On the contrary, the explanation is presumed true and the plaintiff must disprove the reason. Otherwise, the plaintiff loses.

Therefore, the question is not whether the plaintiff must prove intentional discrimination, because this much is undisputed. Instead, the question is about how the plaintiff can prove intentional discrimination. The majority's scheme increases the plaintiff's burden. Now, the plaintiff must do something more than merely discredit the defendant's proffered reasons for the employment action. This is clearly contrary to the language in McDonnell Douglas.

202. Id. at 2759.
203. FED. R. EVID. 301.
205. Id.
206. Id. at 256.
207. See id.
209. Id.
210. 411 U.S. 792, 807 (1973) (explaining that a plaintiff "must be afforded a fair
These cases stated that the plaintiff could meet the burden of proof indirectly by discrediting the defendant’s reasons. In other words, by proving that the defendant’s reasons were untrue, the plaintiff indirectly proves discrimination by a preponderance of the evidence. This indirect approach is accomplished by showing that the defendant who lies is, more likely than not, trying to cover up the discrimination alleged by the plaintiff. This is consistent with the teachings of *McDonnell Douglas* and the cases that followed. These cases taught that the entire evidentiary framework was developed for the purpose of dealing with the problem of indirect or circumstantial evidence. However, the effect of the Court’s holding is that even persuasive indirect evidence may no longer be enough to sustain a finding of discrimination.

Under the majority’s analysis, the plaintiff who lacks direct proof will now suffer the onerous burden of disproving all possible nondiscriminatory reasons that the trier of fact might discover in the record. This increased burden is made clear by the majority’s suggestion that proving discrimination is equivalent to “disprov[ing] all other reasons suggested, no matter how vaguely, in the record.” Furthermore, plaintiff’s burden is increased because the plaintiff no longer gets the benefit of focusing solely on disproving the defendant’s articulated reasons.

---

211. 450 U.S. 248, 256 (1981) (explaining that plaintiffs may meet their burden of persuasion “either directly . . . or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”) (citing *McDonnell Douglas*, 411 U.S. at 804-05).
212. 460 U.S. at 716 (quoting language from *Burdine*, 450 U.S. 248 (1981)).
214. Id. at 2757.
215. Ironically, most plaintiffs who are in court are there precisely because they lack direct proof. If a plaintiff has the “smoking gun” showing that the defendant intentionally violated Title VII, such a case would likely settle out of court.
216. *Hicks*, 113 S. Ct. at 2763 (Souter, J. dissenting).
217. Id. at 2755-56.
B. Narrowing the Factual Inquiry

The dissent highlighted the true purpose of placing the burden of production on the defendant after the plaintiff proves a prima facie case.\(^{218}\) As indicated in *Burdine*, once the defendant meets this burden of production, the factual inquiry proceeds to a new level of specificity.\(^{219}\) The majority's explanation of this new level of specificity is that the focus is narrowed to the question of discriminatory motivation.\(^{220}\) It requires little effort to see the majority's error in this regard. The focus is on discriminatory motivation throughout the trial. Therefore, focusing on the question of discriminatory motivation in no way narrows the factual inquiry. Rather, under the majority's analysis, the inquiry remains unchanged.

In addition, placing the burden of production on the defendant serves two important purposes, the second of which is neglected by the majority.\(^{221}\) First, the burden of production forces the defendant to meet the plaintiff's prima facie case by offering a legitimate reason for the employment decision.\(^{222}\) Second, the remaining factual issue is framed with sufficient clarity so that the plaintiff will have a fair opportunity to show pretext.\(^{223}\) These purposes are consistent with the plaintiff's ultimate burden of persuasion because, if the plaintiff proves pretext, it is more likely than not that the defendant was driven by discriminatory motivation.

In *Burdine*, the Fifth Circuit Court of Appeals attempted to actually shift the burden of persuasion onto the defendant because it feared that the employer could compose fictitious reasons for his actions.\(^{224}\) The Supreme Court rejected this holding.\(^{225}\) In response to the Fifth

---

\(^{218}\) *Id.* at 2759 (Souter J., dissenting).
\(^{219}\) *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981).
\(^{220}\) *Hicks*, 113 S. Ct. at 2752.
\(^{221}\) *Id.* at 2759 (Souter, J., dissenting).
\(^{222}\) *Burdine*, 450 U.S. at 255.
\(^{223}\) *Hicks*, 113 S. Ct. at 2759 (quoting *Burdine*, 450 U.S. at 255-56).
\(^{224}\) *Burdine*, 450 U.S. at 257-58 (quoting *Turner v. Texas Instruments, Inc.* 555 F.2d 1251, 1255 (5th Cir. 1977)).
\(^{225}\) *Id.* at 258 (1981).
Circuit’s concerns that the defendant could get away with lying, the Court found that limiting the defendant’s burden to one of production will not unduly hinder the plaintiff because the defendant’s explanation is required to be “clear and reasonably specific”. Thus, the plaintiff gets a fair opportunity to respond.

But Hicks undercuts Burdine’s requirement that the defendant’s reasons be “clear and reasonably specific” in order to narrow the factual inquiry to allow the plaintiff a fair opportunity to respond. In fact, there is no longer a requirement that the defendant produce “clear and reasonably specific” reasons because the defendant can now escape liability based on wholly unarticulated reasons. Thus, Burdine cannot survive the holding in Hicks that requires the plaintiff to “disprove all other reasons suggested, no matter how vaguely, in the record.”

C. The Majority’s Hypothetical

The majority’s hypothetical, previously set forth, misplaced the concern underlying Title VII litigation. The hypothetical is concerned with protecting those employers who do not have direct evidence of a legitimate, non-discriminatory reason. The concern should be in dealing with the plaintiff’s problem of indirect proof. The Court used the hypothetical to say that, in some cases, the employer with strong circumstantial evidence of non-discrimination could lose to a plaintiff with a weak prima facie case, even though the plaintiff would not appear to have enough evidence to sustain the burden of persuasion. This hypothetical, however, is misleading. First, the hypothetical is not analogous to Hicks. In the hypothetical, the employer presumably cannot identify its reasons. In Hicks, however, the employer did come forward with a reason but the fact finder found the reason to be discredited. This hypothetical, therefore, presents a different

226. Id. at 258.
227. Id.
228. Id. at 255-56, 258; see also Hicks, 113 S. Ct. at 2759.
229. Hicks, 113 S. Ct. at 2755-56.
230. Id. at 2750-51.
231. Id. at 2751.
problem than one of an untruthful defendant. It presents the problem of an employer who simply doesn't know the reason for the employment action. Such a defendant is not affected by the *Hicks* decision unless that defendant decides to fabricate a reason.

Under the Court's own analysis of how *McDonnell Douglas* operates, honest defendants will lose if they do not know the reason for the employment action. If the employers do not have an explanation, all the honest employers could do is remain silent and lose because they could not rebut the plaintiff's prima facie case. Under *Hicks*, the honest defendant would still lose. It is only by lying that a defendant who does not know the reason for the employment decision could possibly prevail. In this way, the majority's analysis encourages employers to fabricate a reason when they cannot determine exactly why the plaintiff was not hired.

Furthermore, contrary to what the Court stated, it is a rare case in which the employer cannot identify a reason for its action, even if it means reasoning inferentially from the facts. Take the Court's hypothetical, for example: the plaintiff's prima facie is weak, the applicant is minimally qualified, and the employer has a high percentage of minorities in its workforce. The honest employer would admit a lack of personal knowledge but would also offer evidence to explain why the reason could not have been discriminatory. The employer could show the relative qualifications of those hired and the lack of plaintiff's qualification to set him apart from the general applicant pool. The employer would win.

In short, the Court's reliance on this hypothetical is misplaced. For the reasons set forth above, this hypothetical falls short in the Court's attempt to justify its holding. Instead, the majority's analysis encourages defendants to be untruthful and then protects them if they need to lie to defend themselves.

---

233. *Burdine*, 450 U.S. at 255.
234. See *Hicks*, 113 S. Ct. at 2764 n.12 (Souter, J. dissenting).
D. The Proper Interpretation of the Majority's Holding

The dissent argued that the majority's holding is susceptible to two interpretations.\textsuperscript{235} However, the most accurate interpretation of the Court's opinion indicates that discrediting the defendant's reasons is sufficient at law to find for the plaintiff provided that the fact finder concludes that such proof answers the ultimate question of intentional discrimination.\textsuperscript{236} The Court stated that the trier of fact would be permitted to infer discrimination from the plaintiff's proof of pretext.\textsuperscript{237} Although a prediction of how the lower courts will interpret Hicks would be premature, a few lower courts have adopted this interpretation.\textsuperscript{238}

Assuming that this interpretation is correct, the 1991 Amendments to the Civil Rights Act providing for a jury trial will lessen the negative impact on Title VII plaintiffs.\textsuperscript{239} Juries are considered more sympathetic to employees, while members of the federal judiciary are viewed as employer oriented.\textsuperscript{240} Thus, juries are more likely than judges to conclude that the plaintiff who proves pretext has proven discrimination under Title VII. One author describes "the game" now as one of just getting to the jury.\textsuperscript{241} Indeed, the Court's holding permits juries to come to the common sense conclusion that the lying

\begin{itemize}
\item \textsuperscript{235} See supra part IV.B.3.
\item \textsuperscript{236} Hicks, 113 S. Ct. at 2749 n.4.
\item \textsuperscript{237} Id. at 2749.
\item \textsuperscript{239} 42 U.S.C. § 1981a(c) (Supp III 1991) (providing the right to a jury trial in some Title VII actions).
\item \textsuperscript{240} DOUGLAS B. HURON, 'HICKS' RULING: PLAINTIFFS' GOAL REMAINS GETTING TO THE JURY, 1 EMPLOYMENT LAW STRATEGIST, (No. 4, August, 1993) (Leader Publications, a division of New York Law Publishing, New York, N.Y.).
\item \textsuperscript{241} Id. The California Court of Appeals has concluded that Hicks will make it nearly impossible for employers to succeed on summary judgment motions. Quite simply, even if the plaintiff lacks specific evidence to show that the employer's reasons were pretextual, the case still goes to the jury to decide the ultimate question of discrimination. Moisi v. College of the Sequoias Community College Dist., 62 U.S.L.W. 2237 (U.S. Oct 26, 1993) (Cal. Ct. App. 1993).
\end{itemize}
defendant is more likely than not covering up the illegal discrimination alleged by the plaintiff.\textsuperscript{242} If the defendant lies, juries will likely administer the "common sense" response, namely judgment for the plaintiff.

\textbf{E. A Proposal for West Virginia}

The Supreme Court of Appeals of West Virginia has adopted the \textit{McDonnell Douglas} framework for West Virginia Human Rights Act litigation.\textsuperscript{243} However, the purpose of the Human Rights Act now mandates a deviation from the federal precedent. The purpose of the West Virginia Human Rights Act states with force that employment discrimination "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society."\textsuperscript{244} Furthermore, the Legislature mandated that the Act "be liberally construed to accomplish its objectives and purposes."\textsuperscript{245} It is a reasonable inference that the legislature desired that the courts not impose heavy burdens and unreasonable limitations on plaintiffs. Such a heavy burden would frustrate the purpose of the Act.

Likewise, the Supreme Court of Appeals of West Virginia has not placed an oppressive burden on plaintiffs under the Human Rights Act. In fact, reassurance is found in \textit{Fourco Glass Co. v. West Virginia Human Rights Commission} that the West Virginia court agrees with the dissent's interpretation.\textsuperscript{246} The court states, unequivocally, that for plaintiffs to prove discrimination by a preponderance of the evidence, they "must demonstrate that the reason proffered by the employer is untrue or not the true motivation for the discharge."\textsuperscript{247} Also, the

\begin{itemize}
\item \textsuperscript{242} St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993).
\item \textsuperscript{244} W. VA. CODE § 5-11-2 (1990). The West Virginia Supreme Court compares unlawful discrimination to treason because both "undermine[s] the very foundations of our democracy." Allen v. West Virginia Human Rights Comm'n, 324 S.E.2d 99, 108 (W. Va. 1984).
\item \textsuperscript{245} W. VA. CODE § 5-11-15 (1990).
\item \textsuperscript{246} 367 S.E.2d 760, 763 (W. Va. 1988).
\item \textsuperscript{247} Id.
\end{itemize}
West Virginia court has quoted with approval the phrase from *Burdine* which allows plaintiffs to succeed in meeting their burden of proof either directly or indirectly by discrediting the defendant’s proffered reasons for the employment decision.\(^{248}\) Again, even the majority agreed that this language in *Burdine* bears no other meaning but that a lie by the defendant is alone enough to compel judgment for the plaintiff.\(^{249}\)

Therefore, West Virginia should not be swayed by the majority’s ultimate holding in *Hicks*. Instead, the court should remember the strong public policy of eliminating discrimination. This public policy of the West Virginia Human Rights Act is best served by the dissent’s interpretation of this issue.\(^{250}\) Moreover, language from West Virginia Supreme Court precedent indicates that proof of pretext satisfies the plaintiff’s burden of proof.\(^{251}\)

### VI. Conclusion

Initially, *St. Mary’s Honor Center v. Hicks* seems relatively innocuous. After all, it merely held that the fact finder’s rejection of the defendant’s asserted reasons is sufficient to sustain a judgment for the plaintiff, but such a judgment is not compelled. The reasoning behind this decision is that the plaintiff always bears the burden of persuasion on the issue of discriminatory motive.\(^{252}\) This reasoning is not disputed.

What is disputed is the Court’s interpretation of precedent. *Hicks* is a deviation from the relevant precedent and this deviation will serve to undermine the entire *McDonnell Douglas* framework. The presum-

---

248. *State ex rel. West Virginia Human Rights Comm’n v. Logan-Mingo Area Mental Health Agency, Inc.*, 329 S.E.2d 77, 87 (W. Va. 1985). It is interesting to note that the Court, when referring to this statement from *Burdine*, cites with approval Justice Blackmun’s concurring opinion in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 717 (1983). As previously indicated, Justice Blackmun wrote a separate concurrence solely to point out that the Court was holding what the dissent now asserts in *Hicks*.

249. *Hicks*, 113 S. Ct. at 2752.


252. *Hicks*, 113 S. Ct. at 2749.
tion arising from the plaintiff’s proof of a prima facie case has little or no meaning, as the defendant can rebut this presumption with a lie. Even further, the defendant can vaguely articulate many reasons, true or false, to try to persuade the fact finder to adopt any one of them. Placing the burden of production on the defendant, therefore, is a “useless ritual” because it no longer serves the goal of narrowing the factual inquiry.253 Thus, the Court has reiterated that the plaintiff has the “ultimate burden of persuasion” in convincing the fact finder of discrimination. However, with the McDonnell Douglas analysis so substantially altered, the plaintiffs are left with little guidance as to how the burden of proof can be met with the indirect proof that typically characterizes Title VII litigation.

Likewise, Hicks is not even consistent with the purpose of Title VII. On the contrary, the Title VII interpretation in Hicks is driven by concern for employers who lie in court. In fact, under the majority’s analysis, the employer who does not know the reason for the adverse employment action must lie or lose.254 But that neglects the class of people that Title VII was designed to protect, namely victims of employment discrimination.255

Consequently, Congressional action is expected. In fact, it is reported that legislation will be introduced to overturn this decision.256 While its clear that Congress has implicitly approved “a framework carefully crafted in precedents as old as twenty years,”257 it is not so obvious that Congress has adopted the interpretation of the Hicks majority. Like Hicks, another decision of the Court also “weakened the scope and effectiveness of Federal civil rights protections.”258 Con-

253. Id. at 2761 (Souter, J., dissenting).
254. Id. at 2755.
256. Senator Howard Metzenbaum, Chair of the Subcommittee on Labor of the Committee on Labor and Human Resources, plans to introduce legislation that will overturn St. Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993). This information was obtained pursuant to a telephone interview with Len Henzke, Staff Assistant to Senator Howard Metzenbaum (September 8, 1993).
257. Hicks, 113 S. Ct. at 2764.
258. 42 U.S.C. § 1981 note (Supp. III 1991) (listing the purposes of the 1991 Amendment, one of which was to overturn Wards Cove Packing Co. v. Atonio, 490 U.S. 642
gress responded with the 1991 Amendment to the Civil Rights Act of 1964.\textsuperscript{259} Thus, Title VII plaintiffs are once again forced to look to the legislative process for protection from harsh judicial doctrine.

\textit{Teresa Clark Postle\textsuperscript{*}}


* The author wishes to express gratitude to Professor Robert M. Bastress and Professor Franklin D. Cleckley, both of West Virginia University. Their assistance is greatly appreciated.