Adjudicating Area Disparate Treatment Claims within the Evidentiary Framework of Title VII: An Order of Proof for Age Discrimination Cases

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COMMENTS

ADJUDICATING ADEA DISPARATE TREATMENT CLAIMS WITHIN THE EVIDENTIARY FRAMEWORK OF TITLE VII: AN ORDER OF PROOF FOR AGE DISCRIMINATION CASES

Congress enacted the Age Discrimination in Employment Act of 1967 (Act or ADEA), to extend equal employment rights to the aged by protecting older workers from arbitrary employment practices. The Act is essentially modeled after title VII of the Civil Rights Act, but borrows the enforcement provisions of the Fair Labor Standards Act (FLSA). It pro-


2. As originally enacted, the ADEA extended protection to persons between the ages of 40 and 65. The upper age limit was raised to 70 in the 1978 amendment to the Act. See 29 U.S.C. § 631(a) (Supp. V 1981). The upper age limit was justified as being "reasonably related to the age when individuals generally cease to be able to function effectively in the work force and retire." B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 393 (1976).


Section 703 of title VII contains the primary substantive prohibitions and provides in pertinent part:

(a) [I]t shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


hibits hiring, promotion, and discharge decisions based upon age related factors. Despite the ADEA's verbatim adoption of title VII's substantive prohibitions, the ADEA remains a separate and distinct piece of fair employment legislation.

During the ADEA's first decade of implementation, judicial preoccupation with procedural issues and ineffective agency administration hindered enforcement. The ADEA was enacted in response to the Secretary of Labor's report, United States Department of Labor, The Older American Worker Age Discrimination in Employment, 111 CONG. REC. 23,037 (daily ed. Sept. 7, 1965). Congress had a twofold purpose in enacting the ADEA as a separate statute rather than as an amendment to title VII: to take advantage of hindsight by avoiding those statutory provisions under title VII that Congress found unsatisfactory and to ensure an adequate review of age discrimination complaints by not additionally burdening title VII's administrative agency with ADEA claims. See infra note 133 and accompanying text.

7. The two major procedural issues that distracted the courts from considering the merits of an ADEA claim concerned the right to a jury trial and the jurisdictional prerequisites to suit.

After 10 years of circuit court debate the Supreme Court in Lorillard v. Pons, 434 U.S. 575 (1978), concluded that a statutory right to a jury trial for lost wages in a damage suit was impliedly granted by Congress under the Act. Congress subsequently expanded the Supreme Court's ruling by expressly recognizing in the 1978 amendments to the ADEA that a jury trial was available for liquidated damages as well as lost wages where equitable relief was also sought. 29 U.S.C. § 626(c)(2) (Supp. V 1981).

The Federal Courts also repeatedly addressed whether the § 626(d) requirement of filing a notice of intent to sue with the Secretary of Labor constituted a jurisdictional prerequisite to suit. Congress somewhat mooted this procedural issue by amending § 626(d) in 1978 to replace the notice of intent to sue requirement with the less onerous requirement of filing a "charge" of potential suit. 29 U.S.C. § 626(d) (Supp. V 1981). Although the substitution itself does not expressly resolve the issue, legislative history indicates that the "charge" requirement was not intended as a jurisdictional prerequisite. H.R. REP. NO. 950, 95th Cong., 2d Sess. 12 (1978).

For a more detailed discussion of these procedural issues, see, for example, Bickerton, The...
ordered the progress of the Act’s remedial purposes. Currently, the enforcement of the Act is frustrated by the continuing debate in the federal circuits over the proper allocation of burdens of proof for ADEA disparate treatment claims. The Supreme Court has acknowledged, in the title VII context, the difficulty a plaintiff would have in sustaining a traditional burden of production—particularly proof of discriminatory mo-


8. See Kovarsky & Kovarsky, Economic, Medical and Legal Aspects of Age Discrimination in Employment, 27 VAND. L. REV. 829, 876-77 (1974) (“As of 1969, there were less than 1,000 enforcement officers in the Wage and Hour Division [of the Department of Labor] devoting less than ten percent of their time to age discrimination complaints . . . .”). As the author predicted, the administration of the ADEA was transferred from the Wage and Hour Division of the Department of Labor to the Equal Employment Opportunity Commission (EEOC) which was already charged with title VII’s administration. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978); Exec. Order No. 12, 144, 44 Fed. Reg. 37,193 (1979).

9. “Burden of proof” is an ambiguous term encompassing the burden of pleading, the burden of production and the burden of persuasion. Typically in a civil suit the party with the burden of pleading carries two additional burdens at trial—the burden of production and the burden of persuasion. The initial burden at trial—the burden of production—requires the plaintiff to produce sufficient evidence during his case-in-chief on each element of his claim or otherwise suffer an adverse directed verdict. In any event, the plaintiff is not entitled to a favorable verdict unless he successfully carries his ultimate burden—the burden of persuasion. The plaintiff is required to persuade the trier of fact, usually by a preponderance of the evidence, that the evidence produced is sufficient for a favorable finding. See generally, MCCORMICK’S HANDBOOK ON THE LAW OF EVIDENCE §§ 336-345 (E. Cleary ed. 1972). In this Comment, as in ADEA and title VII caselaw, the term “burden of proof” encompasses the trial burdens of production and persuasion.

10. As the Supreme Court noted in one of its title VII decisions, disparate treatment means:

[i]tthe employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . .

Claims of disparate treatment may be distinguished from claims that stress ‘disparate impact.’ The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. . . . International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

The disparate treatment-disparate impact dichotomy rests primarily on the distinction in the medium through which discrimination is being practiced—direct discriminatory conduct against an individual as opposed to a neutral employment policy that discriminates in its impact—although a claim of discrimination may be established by use of either theory. See, e.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (title VII race discrimination suit brought by black job applicants who had been rejected by the defendant in favor of white applicants because of a “by recommendation only” hiring scheme that resulted in an approved employment list solely comprised of white laborers).

The disparate treatment-disparate impact dichotomy was developed initially by courts adjudicating title VII claims and in light of the statutory similarity, has been generally recognized in the ADEA context. See, e.g., Allison v. Western Union, 680 F.2d 1318 (11th Cir. 1982).
To remedy this inequity and to facilitate the enforcement of title VII, the Court, in *McDonnell Douglas Corp. v. Green*, reordered the burdens of proof typical in a civil case. The Court held that discriminatory intent is presumed when the plaintiff establishes a prima facie case of discrimination that satisfies the criteria specified in *McDonnell Douglas*. The defendant must then come forward with some evidence to rebut the presumption. The plaintiff, however, can subsequently challenge the defendant's evidence on the basis that the justification given is merely a pretext.

In adjudicating ADEA disparate treatment claims, the federal courts have failed to reach a consensus as to whether the *McDonnell Douglas* allocation should apply to age discrimination claims. A majority of the courts of appeals have agreed that a presumption of discriminatory motive is equally warranted in ADEA cases. The United States Court of Appeals for the Sixth Circuit, in rejecting the majority's extension, maintains that *McDonnell Douglas* is limited by its facts and by considerations peculiar to title VII. Even under the prevailing view favoring adoption of title VII's order of proof, however, the courts of appeals disagree on how strictly they should borrow the *McDonnell Douglas* elements of a prima facie case in determining whether the plaintiff has raised an inference of discriminatory intent in ADEA cases.

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13. *Id*.
14. In this comment, as in title VII and ADEA caselaw, the term "prima facie case" denotes the creation of a rebuttable presumption upon a particular set of factual elements. The presumption created conditionally relieves the burden of producing further proof on an essential element of the claim. *See, e.g.*, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) (title VII suit in which court similarly defines its use of the term "prima facie case"). For a more thorough discussion on the operation of a prima facie case, see *McCormick's Handbook on the Law of Evidence*, supra note 9, at §§ 342-345.
15. *See infra* note 53 and accompanying text.
16. *See infra* notes 54-55 and accompanying text.
This Comment first explains the holding of *McDonnell Douglas* and the conflict over the extension of *McDonnell Douglas'* framework to ADEA disparate treatment claims. It then examines the debate in the federal circuits that have adopted the *McDonnell Douglas* framework over the proper elements of a prima facie case in ADEA cases. The Comment justifies the adoption of the title VII framework for ADEA disparate treatment cases in light of policy considerations and statutory construction and concludes that the prima facie case elements specified in *McDonnell Douglas* are generally sufficient to raise an analogous inference of age discrimination.

I. ORDER OF PROOF IN TITLE VII DISPARATE TREATMENT CASES

While the ADEA suffered procedural setbacks, its parent statute—title VII—was advanced judicially with the Supreme Court's decision in *McDonnell Douglas Corp. v. Green.* Noting the lack of harmony among the three court of appeals judges, the Court set forth the proper order of proof in title VII disparate treatment cases.

A. The McDonnell Douglas Evidentiary Framework

Percy Green, a black male, brought suit in the United States District Court for the Eastern District of Missouri against McDonnell Douglas Corporation alleging discrimination in violation of title VII and section 1981 of the Civil Rights Act. The plaintiff had been employed by McDonnell Douglas from 1956 until 1964 when he was laid off due to a general reduction in force. During his employment Mr. Green had participated in civil rights protests directed at his employer. After his layoff he continued to organize and participate in demonstrations that challenged McDonnell Douglas' employment practices as racially discriminatory. Two of the demonstrations involved the obstruction of traffic on the access road to the defendant's plant and the padlocking of a

21. *Id.*
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
24. The plaintiff, in protest of his layoff, organized and lead a "stall-in" during the month of October of 1964, blocking access to the defendant's plant at the time of a shift change. The plaintiff was arrested, plead guilty and paid a fifty dollar fine. *Id.* at 848-49.
company office building during business hours.\(^{25}\)

Shortly after these protests, Mr. Green applied for a mechanic's position that was advertised by the defendant. McDonnell Douglas rejected his application, stating that although Mr. Green was qualified for the job, his participation in the illegal "stall-in" and "lock-in" disqualified him from consideration for reemployment. The plaintiff maintained that these civil rights activities were protected under section 704,\(^{26}\) which prohibits an employer from retaliating against employees and applicants who challenge the employer's unlawful practices.\(^{27}\)

The district court stated that Green's statutory claims were premised on the defendant's refusal to rehire in violation of section 704 and discriminatory layoff in violation of section 1981.\(^{28}\) The section 1981 claim was held barred by the statute of limitations\(^{29}\) and the section 704 claim was ultimately dismissed for failure of the plaintiff to sustain his burden of proof.\(^{30}\) The court, having already ruled that the "stall-in" and "lock-in" were not protected activity,\(^{31}\) reasoned that Mr. Green failed to demonstrate that other reasons, such as racial prejudice or retaliation for legitimate reasons.

\(^{25}\) On July 2, 1965 the plaintiff's civil rights protest organization picketed against McDonnell Douglas' layoffs at the defendant's plant. During the course of this demonstration, some of the defendant's employees were locked in their offices by members of the plaintiff's organization. The district court ruled that the plaintiff was vicariously responsible for the "lock-in." \textit{Id.} at 848-49. On remand from the Supreme Court it was established that Green himself may have padlocked the doors. \textit{Green}, 528 F.2d 1102, 1106 n.7 (8th Cir. 1976).

\(^{26}\) Title VII § 704 provides in pertinent part:

\[ \text{(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a change, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.} \]

\[ \text{42 U.S.C. § 2000e-3(a) (1976).} \]

\(^{27}\) There is some debate as to the extent of activities protected under title VII § 704(a). The Eighth Circuit, agreeing with the lower court, held that in any event it does not protect unlawful activities. \textit{Green}, 463 F.2d 337, 341 (8th Cir. 1972).

\(^{28}\) The pleadings were unclear as to whether the plaintiff was proceeding against McDonnell Douglas Corporation for discriminatory layoff under § 1981 or title VII and whether the plaintiff's title VII rehiring claim was solely premised on § 704 (retaliatory rejection) or sufficiently included a § 703 racial discrimination charge. The district court concluded that the plaintiff alleged discriminatory layoff only under § 1981. \textit{Green}, 318 F. Supp. at 849. The title VII § 703 discriminatory rehiring claim was dismissed upon the defendant's motion to strike because the EEOC had not made a "reasonable cause finding." \textit{Green}, 299 F. Supp. 1100 (E.D. Mo. 1969). \textit{See infra} notes 38-40 and accompanying text.

\(^{29}\) The state statute of limitations for analogous suits was borrowed because there is no express statute of limitations under § 1981. \textit{Green}, 318 F. Supp. at 849.

\(^{30}\) \textit{Id.} at 830.

\(^{31}\) The court characterized these activities as unlawful acts unprotected by the first amendment or § 704. \textit{Id.} at 851.
mate civil rights activities, were the real motives behind the refusal to rehire. Green appealed to the United States Court of Appeals for the Eight Circuit.

In his appeal, Green alleged that the district court erred in: (1) dismissing his section 1981 claim as barred by the statute of limitations; (2) holding that his protest demonstrations were not protected by section 704; and (3) striking his section 703 claim for failure to comply with the jurisdictional prerequisite of an Equal Employment Opportunity Commission (EEOC) “reasonable cause” finding. All three judges agreed that the section 1981 claim alleging discriminatory layoff was properly dismissed because it was not pleaded within the five year statute of limitations. The panel also essentially agreed that unlawful conduct is not legitimate civil rights activity protected within the meaning of section 704. The judges, however, rendered three divergent opinions with regard to the district court's dismissal of the section 703 claim.

Judge Bright, writing for the majority, reversed the trial court, holding that under the prevailing view, “an EEOC reasonable cause finding is not a jurisdictional prerequisite to suit” under title VII. Judge Lay concurred and Justice Johnsen, in his dissenting opinion, conceded that the trial court erred, but contended that the plaintiff suffered no prejudice because the issue was nonetheless tried by consent.

The Eighth Circuit split over the characterization of this error. The majority and concurring opinions contended that the district court committed reversible error in striking the plaintiff’s section 703 disparate treatment claim. As Judge Bright stated, “[w]e cannot say that the district court’s action . . . did not hamper the preparation and presentation of [Mr.]

32. Id. at 851.
33. Green, 463 F.2d 337 (8th Cir. 1972).
34. Id. at 340. See supra note 28 and accompanying text.
35. Green, 463 F.2d at 340-41, 346 (Johnsen, J., dissenting).
36. Judge Bright and Judge Lay disagreed with the dissent and the district court that there was conclusive evidence to hold Mr. Green responsible for the “lock-in,” but all three judges agreed that the plaintiff was involved in the “stall-in.” Id. at 341, 345 (Lay, J., concurring), 347-48 (Johnsen, J., dissenting).
37. See infra note 52 and accompanying text.
38. Green, 463 F.2d at 342 (“the enforcement provisions of title VII are silent as to the necessity of such a finding . . . .”).
39. Id. at 344 (“The Court’s order refusing plaintiff leave to amend his complaint and utilize discovery on the issue of racial discrimination because the E.E.O.C. had not based its findings of probable cause on this ground is conceded error.”).
40. Id. at 346, 351 (“the failure of the Commission to make a finding of reasonable cause on some particular charge does not preclude that charge from being asserted . . . . I am not able, however . . . to agree . . . [it] entitles him to a reversal . . . .”).
Green's case . . ."^{41} Both Judge Bright and Judge Lay concluded that even though Mr. Green failed to make a case of retaliation under section 704, he could still proceed with a section 703 allegation of racial discrimination. Mr. Green was entitled, therefore, to have the trial court determine whether the "stall-in" or "lock-in" was activity that would sufficiently justify a refusal to rehire under section 703 of title VII.^{42} The majority explained that this justification was required because racial discrimination "is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements."^{43}

The court ultimately remanded the section 703 claim to be tried in accordance with the following standards:{^{44}

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, . . . he presents a prima facie case of racial discrimination.

. . . .

Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the "lock-in" and the "stall-in," as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision.^{45}

41. *Id.* at 342.

42. As Judge Bright maintained, §§ 703 & 704 "apply to wholly different facets of the employment relationship." *Id.* at 343. Section 704 focuses on whether the employer's retaliatory rejection was due to the plaintiff's protected protest activity while § 703's focal concern is whether the employer's reasons for rejection "were related to the requirements of job." *Id.* at 342, 345-46. See infra notes 43, 48-49 and accompanying text.

43. *Id.* at 343. The majority borrowed for disparate treatment analysis the same burden imposed on the employer in the disparate impact case of Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Griggs* required the employer to show a business necessity for the employment testing device by establishing its relationship to job performance in order to sustain the discriminatory practice under title VII. *Griggs* at 431. The burden imposed, however, is a statutory requirement peculiar to a disparate impact case. Section 703 provides:

nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

44. Upon McDonnell Douglas' petition for rehearing, the majority revised its opinion regarding the standards for retrial by substituting modified language. *Id.* at 352. The dissent filed a supplemental opinion comparing the substituted language and stated that "I am not certain as to the intended effect of these changes, and I suspect that the district court also will have difficulty in trying to assess the significance of the substituted language." *Id.* at 354.

45. *Id.* at 353 (revised majority opinion).
Judge Johnsen dissented as to the reversal and remand of the section 703 claim. He maintained that the trial court’s error was not prejudicial because “the district court did not adhere to its initial pleading ruling.” Rather, it received evidence on the section 703 disparate treatment claim and concluded that the plaintiff failed to establish racial prejudice.

The majority was also criticized for holding that a rejection alone of a qualified job candidate was sufficient to establish a prima facie case of racial discrimination merely when the applicant is black. Judge Johnsen charged that this does not sufficiently establish that “racial motivation was in fact involved,” which is an essential element in a disparate treatment claim. The dissent also took issue with the majority’s standard that the employer demonstrate in “some objective way” that the applicant’s disqualifying conduct was “related to the requirements of the job.” Judge Johnsen argued that the majority improperly borrowed the requirement of "business necessity" from the disparate impact case of Griggs v. Duke Power Co.

McDonnell Douglas appealed to the United States Supreme Court. The Court unanimously affirmed the Eighth Circuit’s reversal regarding the section 703 issue, but ordered retrial upon a different allocation of burdens. The Court also implicitly acknowledged the competing concerns of premature exposure to employer liability under title VII and burden of proof problems regarding discriminatory intent. Writing for the Court, Justice Powell struck a balance in the allocation of evidentiary burdens by creating a three step framework, under which the title VII plaintiff is to carry the initial burden of establishing a prima facie case of disparate treatment. The plaintiff may sustain this burden by showing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and

46. Id. at 351 (Johnsen, C.J., dissenting).
47. Id. Judge Johnsen argued that the district court’s ultimate findings regarding the defendant’s refusal to rehire were dispositive of the § 703 claim as well as the § 704 claim. See supra notes 31-32 and accompanying text.
48. Id. at 349-50.
49. Id. at 354-55 (supplemental dissenting opinion).
50. Id. at 350. See supra note 43.
52. The Court agreed that the “absence of a commission finding of reasonable cause cannot bar suit . . . .” Id. at 798. In concluding that the error was prejudicial, the Court rejected Judge Johnsen’s consent argument, see supra notes 46-47 and accompanying text, finding instead that “[t]he trial court did not discuss [the plaintiff’s] § 703(a)(1) claim in its opinion and denied requests for discovery of statistical material which may have been relevant to that claim.” Id. at 800 n.10.
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.53

The burden then is shifted “to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection,” but such justification need not amount to a “business necessity.”54 If the justification offered rebuts the prima facie case, the trial court's inquiry is to continue, with the plaintiff being afforded an opportunity to demonstrate that the stated reasons for rejection are pretextual.55

B. The McDonnell Douglas Progeny

In the ten years following the McDonnell Douglas decision the lower federal courts were minimally successful in uniformly implementing the disparate treatment framework. The Supreme Court was forced to intervene on several occasions in order to clarify the principles enunciated in McDonnell Douglas. The refinements were necessary because the McDonnell Douglas Court, in allocating this burden of proof, failed to state a rationale for departing from the typical allocation in a civil case.

The Supreme Court’s first attempt to clarify the McDonnell Douglas framework was made in Teamsters v. United States.56 The defendants, employer and labor union,57 contended that the government, in a class action suit, must conform its proof to the McDonnell Douglas prima facie case by introducing specific evidence of disparate treatment as to each

53. Id. at 802. The Court adopted Judge Bright’s specifications of the prima facie case, rejecting Judge Johnsen's objection that the element of intent is lacking, and cautioned that “prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations.” Id. at 802 n.13.

54. Id. at 802-03. The Court, by agreeing with Judge Johnsen that the burden placed on the employer by the majority is not compelled by title VII, noted that the Griggs burden of proving “business necessity” is required only “[w]here employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants.” Id. at 802 n.14, 806-07.

55. Id. at 804. The Court suggested that a pretext may be established by showing the justification given does not adequately explain the differential treatment. Id. at 804 (for example, “white employees involved in acts . . . of comparable seriousness to the “stall-in” were nevertheless retained or rehired”). For a more extensive discussion of the ways in which the plaintiff may demonstrate a pretext, see Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 STAN. L. REV. 1129, 1154 n.128 (1980).

56. 431 U.S. 324 (1977). The United States Attorney General brought a class action disparate treatment suit alleging that the defendants’ seniority system was racially discriminatory. Although the EEOC substituted the United States as plaintiff, the United States was retained as a party for jurisdiction purposes, when 42 U.S.C. § 2000e-6(c) was amended to transfer litigating authority from the Attorney General’s office to the EEOC. Id. at 325 n.1.

57. The mandates of title VII apply to labor unions as well as employers and employment agencies. See § 703(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-703(c) (1976).
class member in order to establish liability. Justice Stewart, writing for
the Court, stated that

[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [t]itle VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based upon a discriminatory criterion illegal under the Act.

In a footnote discussion immediately following, the Court explained that *McDonnell Douglas* eliminated the need for direct proof of discriminatory intent by condoning the use of a prima facie case under which an inference of discrimination can be sufficiently created. The Court concluded that, when dealing with a disparate treatment claim in the context of a class action, proof of a discriminatory hiring pattern and practice was sufficient at the liability stage of trial to make out a “prima facie case of discrimination against the individual class members . . . .”

Justice Stewart also attempted to supply the reasoning, absent from the *McDonnell Douglas* decision, for invoking a presumption of discrimination and intent. He justified *McDonnell Douglas*’s use of a prima facie case as consistent with the common law, noting that historically “[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party’s superior access to proof.”

Justice Stewart concluded that a *McDonnell Douglas* prima facie case was warranted in disparate treatment cases because it established the probability that intentional discrimination had occurred and because “the employer [is] in the best position to show why any individual

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58. *Teamsters*, 431 U.S. at 357. The government sought retroactive seniority for the entire class, including minority employees and applicants, by establishing disparate treatment as to 40 of the class members. *Id.*

59. *Id.* at 358.

60. *Id.* at 358 n.44. The *McDonnell Douglas* specification was sufficient to create the necessary inference in that case because it eliminated “the two most common [nondiscriminatory] reasons . . . to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.” *Id.*

61. The Court distinguished for purposes of proof the liability stage of trial from the remedial stage in a class action disparate treatment suit. At the liability stage, the plaintiff need not produce evidence that each class member was in fact disparately treated. It is sufficient to show that the defendant had a regular procedure or policy of discriminating against the class group. When time for individual relief comes, only those class members that the government has shown were applicants for a job or promotion are entitled to relief. *Id.* at 360–62.

62. *Id.* at 359.

63. *Id.* at 359 n.45 (citations omitted).
employee was denied an employment opportunity.”

Less than one year after *Teamsters*, the Supreme Court was again faced with an appeal regarding the *McDonnell Douglas* framework. In *Furnco Construction Corp. v. Waters*, the Court addressed the legal significance of the prima facie case. Reprimanding the court of appeals for “equating a prima facie case under *McDonnell Douglas* with an ultimate finding of fact as to discrimination,” Justice Rehnquist cautioned that the prima facie case merely raises a rebuttable presumption of disparate treatment.

The Court explained that the distinction significantly affected the extent of the defendant’s burden under *McDonnell Douglas*. The Seventh Circuit had required the employer to prove after the plaintiff’s prima facie case that the contested hiring practice was the least onerous way in which he could pursue his legitimate business objectives or otherwise he would be forced to adopt a court devised hiring scheme. The Supreme Court unanimously held that, in light of the *McDonnell Douglas* prima facie case and the rebuttable nature of the presumption, the employer need only establish a legitimate, nondiscriminatory reason for the employment action taken. To require more, the Court reasoned, would be premature since a conclusive finding of discrimination is not made until the end of the *McDonnell Douglas* paradigm.

The issue creating the most controversy in the lower courts—the evidentiary nature of the defendant’s burden of proof under *McDonnell Douglas*—was conclusively resolved in *Texas Department of Community Affairs v. Burdine*. Justice Powell explained that *McDonnell Douglas*’ use

64. *Id.*  
66. *Id.* at 576.  
67. *Id.* at 579-80.  
68. *Id.* at 574.  
69. Although Justice Marshall filed a dissenting opinion joined by Justice Brennan, they concurred as to the majority’s holding regarding the disparate treatment theory. *Id.* at 581-83 (Marshall, J., dissenting). They dissented from the majority’s foreclosure of the disparate impact claim. *Id.* at 583.  
70. *Id.* at 577.  
71. *Id.* at 578.  
72. For a more extensive discussion of the split among the lower courts concerning the nature of the defendant’s burden under *McDonnell Douglas*, see Mendez, supra note 55 at 1135-39.  
73. See supra note 9.  
of the term "prima facie case" denoted "the establishment of a legally mandatory, rebuttable presumption." Reasoning further that "the word 'presumption' properly used refers only to a device for allocating the production burden," Justice Powell concluded that only a burden of production shifted to the defendant under the *McDonnell Douglas* allocation. The burden of persuasion "remains at all times with the plaintiff."

II. ORDER OF PROOF IN ADEA DISPARATE TREATMENT CASES

Like section 703 of title VII, section 623 of the ADEA prohibits disparate treatment in employment. This statutory similarity triggered the debate among the federal circuits over whether title VII's allocation of burdens is controlling by analogy in age discrimination claims and, if so, to what extent should the *McDonnell Douglas* elements of a prima facie case be borrowed.

**A. ADEA's Allocation of Burdens**

Before the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, the United States Court of Appeals for the Fifth Circuit, in *Hodgson v. First Federal Savings and Loan*, addressed the issue of the proper allocation of evidentiary burdens in an ADEA disparate treatment case. Secretary of Labor James Hodgson brought suit on behalf of Mrs. Betty Hall and alleged that her employment rejection was in violation of section 623 of the ADEA. The trial court denied relief citing failure of proof.

76. 450 U.S. at 255 n.8 (citations omitted).
77. *Id.* at 254.
78. *Id.* at 253.
79. Compare supra note 3 with supra note 5.
80. 455 F.2d 818 (5th Cir. 1972).
81. The Secretary of Labor was empowered under 29 U.S.C. § 626 (1969) to bring suit to enforce the right of any person aggrieved under the Act. Since 1978 the enforcement authority has been transferred to the EEOC. *See supra* note 8.
82. *See supra* note 5.
83. Mrs. Hall, then 47 years of age, had sought employment at the defendant's banking institute but was rejected on the pretense that her overweight condition made her physically incapable of the long hours of standing required for the job. The Secretary of Labor brought suit seeking a back pay award for Mrs. Hall and an injunction against further violations towards similarly situated persons since there was also evidence that the defendant had listed the position at an employment agency requesting applicants between the ages of 21 and 24. *Hodgson*, 455 F.2d at 819-20.
84. The district court granted the injunction sought but denied the backpay award for Mrs. Hall, finding that the Secretary of Labor failed to produce proof of intentional discrimination. *Id.* at 821-22.
The Secretary appealed, claiming that the district court relied upon erroneous standards of proof.85

Although this was the first ADEA disparate treatment case to reach the circuit level, the Fifth Circuit nonetheless felt that the "law with respect to [the] burden of proof [was] well settled."86 Relying upon its title VII precedent of Weeks v. Southern Bell Telephone and Telegraph Co.,87 the court unanimously reversed and held that "[t]he plaintiff is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendant to justify the existence of any disparities."88

The Fifth Circuit's reliance on the Weeks allocation of evidentiary burdens, though, superficially appears to be misplaced because Weeks involved the affirmative defense of a bona fide occupational qualification (BFOQ).89 Traditionally, the burden of proving an affirmative defense rests on the pleader.90 Hodgson, however, did not rely singularly on Weeks. Rather, the court also reasoned that the shift in the burden of proof was justified in disparate treatment cases because the defendant is in the best "position to know whether he failed to hire a person for reasons which would exonerate him."91

The United States Court of Appeals for the Sixth Circuit, in Laugesen v. Anaconda Co.,92 declined to follow the Fifth Circuit's lead. In the interim

85. The Secretary of Labor also contended that the district court erred in limiting the injunction to the hiring of tellers since evidence that the defendant discriminated on account of age in its advertisement for other banking personnel was introduced at trial. Id.
86. Id.
87. 408 F.2d 228 (5th Cir. 1969). Weeks involved a title VII § 703 complaint alleging sex discrimination. The defendant argued that state protective legislation preventing women and minors from occupying employment positions that required the lifting of more than 30 pounds constituted a valid defense of a bona fide occupation qualification (BFOQ) under § 703(e)(1). Id. at 232-33. Although the court was more immediately concerned with the standards for a BFOQ defense, it summarily dealt with the allocation of burdens in a disparate treatment case by stating that since the plaintiff had made out a prima facie case of discrimination the defendant had the burden of proving a defense. Id. at 231-32.
88. Hodgson, 455 F.2d at 822.
89. See supra note 87 and accompanying text. The Weeks decision pointed to legislative history and an EEOC regulation characterizing the BFOQ exception as an affirmative defense. Weeks, 408 F.2d at 232.
90. See McCormick's Handbook on the Law of Evidence, supra note 9, at § 338.
91. Hodgson, 455 F.2d at 822.
92. 510 F.2d 307 (6th Cir. 1975). The plaintiff at age 56 was permanently laid off by the defendant due to a general reduction in force (RIF). At trial, he introduced evidence that his work performance was satisfactory overall and that his position, after the company's reorganization, was filled by an employee 39 years of age. He also introduced statistical evidence demonstrating that the post-RIF average age of the defendant's employees was reduced from 43 to 37 years of age. On appeal, the plaintiff argued that he was entitled to a directed verdict or, in the alternative, a jury instruction stating that, under McDonnell Douglas, he had sufficiently established a prima facie case. Id. at 310-11.
following Hodgson the Supreme Court enunciated the McDonnell Douglas framework which was essentially an elaborate version of the Fifth Circuit's disparate treatment analysis. The Laugesen court, nevertheless, stated that "[w]hile it may not be unreasonable to assume that in the proper case, the guidelines established by McDonnell Douglas v. Green can be applied in age discrimination cases, we believe it would be inappropriate to simply borrow and apply them automatically."  

Laugesen involved a section 623 ADEA discriminatory discharge claim in which judgment was rendered in favor of the employer. The plaintiff appealed on the grounds that the jury instructions were defective. One ground of inadequacy cited by the plaintiff was the failure to instruct the jury that the burden of proof, in accordance with McDonnell Douglas' standards, shifted to the defendant. The Sixth Circuit eventually remanded on another ground of error, but intimated three reasons why the McDonnell Douglas allocation was inappropriate.

The court's major objection was that McDonnell Douglas did not address the "problems and procedures inherent in the submission of issues to the jury." Judge Engel, writing for the Sixth Circuit Panel, was apparently concerned with the potential "problem" of jury confusion and the difficult "procedures" of jury instruction. He argued that the McDonnell Douglas framework was designed specifically for nonjury proceedings and questioned whether title VII's evidentiary allocation could be adapted to ADEA cases where the right to a jury trial is generally recognized. Implicit in this argument are the assumptions that the McDonnell Douglas standards would be recited verbatim to the jury and that the jury, rather than the judge, would monitor the shifting of burdens.

The Sixth Circuit also rejected the McDonnell Douglas framework as being too formalistic for ADEA claims. Characterizing McDonnell Douglas as a strict approach to employment discrimination due to the "auto-

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93. See and compare notes 53-55, 88 and accompanying text. The important similarity is that a burden of proof shifts to the defendant upon a prima facie showing of discrimination by the plaintiff.
94. Laugesen, 510 F.2d at 312.
95. Id.
96. The court remanded "because the jury instructions taken as a whole failed to make it clear that even if more than one factor affected the decision to discharge, [the plaintiff] could nevertheless recover if one factor was his age..." Id. at 310.
97. Id. at 312.
98. By noting that title VII does not afford the right to a jury trial, Judge Engel concluded that McDonnell Douglas was tailored for bench proceedings. Id. at 312 n.2.
99. Id. At the time of the Laugesen decision a minority of federal circuits had concluded that the ADEA did not afford the right to a jury trial. Since then the Supreme Court and Congress have recognized the right. See supra note 7.
matic presumption” invoked upon a prespecified prima facie case, Judge Engel concluded that similar analysis in age discrimination cases was contrary to congressional intent. He argued that legislative history directed a case-by-case analysis of ADEA claims, and noted that the separate enactment of the ADEA apart from title VII indicated that dissimilar judicial treatment was intended. A less formalistic approach was warranted under the ADEA, Judge Engel contended, because the progression and subsequent replacement of older workers by younger ones is usually a reflection of the natural process of aging and not discrimination. According to the court, adopting the McDonnell Douglas framework in ADEA cases would fail to account for the distinction between age and the classifications under title VII.

The court was also concerned with the factual distinction between McDonnell Douglas, a discriminatory hiring suit, and Laugesen, a discriminatory discharge suit. Although recognizing that McDonnell Douglas’ prima facie case was not a strict formulation, the Sixth Circuit still found that the factual differences were a significant justification for declining to follow McDonnell Douglas. The distinction is more properly a concern with the modifications necessary to adopt McDonnell Douglas’ prima facie case to differing factual situations.

100. Id. at 312-13 n.4.
101. Id.
102. Id. at 312.
103. Id. at 312-13 n.4.
104. Id. at 312 n.3.
105. Id. at 312. The significance of the court’s distinction is not apparent because, the Sixth Circuit, recognizing that the Supreme Court expressly authorized the modification of the prima facie proof, has conceded that McDonnell Douglas’ shift in burdens could be extended to other factual situations. The court possibly made the distinction in order to hold that the plaintiff in Laugesen could not use the McDonnell Douglas’ prima facie case to establish an inference of discrimination. This also would explain the Sixth Circuit’s distinction between age and race. See supra notes 100-03 and accompanying text. This explanation, however, fails for two reasons: the plaintiff did not attempt to rely strictly on McDonnell Douglas’ specification of proof to establish a prima facie case, see supra note 93, and the court made these objections not only to McDonnell Douglas’ specification of prima facie proof but also to its guidelines. Laugesen, 510 F.2d at 312 (“While it may not be unreasonable to assume that . . . the guidelines established in McDonnell Douglas v. Green can be applied in age discrimination jury cases, we believe it would be inappropriate . . . .”). It is more likely that the Laugesen court in finding McDonnell Douglas inappropriate for ADEA cases was refusing to shift the burden of persuasion to the defendant, which prior to Burdine, see supra notes 72-78 and accompanying text, had been the general interpretation of McDonnell Douglas’ allocation. See, e.g., Rodriguez v. Taylor, 569 F.2d 1231, 1239 n.14 (3d Cir. 1977); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978).
B. ADEA's Prima Facie Case

The federal circuits have unanimously rejected the Sixth Circuit's conclusion in Laugesen, choosing instead to follow the Fifth Circuit by applying the McDonnell Douglas framework in ADEA cases. They dismiss the Sixth Circuit's hesitancy as being more appropriately directed at the rigid application of McDonnell Douglas' specification of a prima facie proof rather than at the adoption of title VII's disparate treatment framework. A consensus, however, does not exist regarding the degree of modification necessary to translate the McDonnell Douglas prima facie case in the ADEA context.

The major area of contention is with the Laugesen fact situation—ADEA discriminatory discharge suits—because of its immediate factual dissimilarity with McDonnell Douglas. The Fifth Circuit, one of the more vocal authorities involved in this debate, set forth in Wilson v. Sealtest Foods the analogous McDonnell Douglas prima facie case for an ADEA discharge suit. In that case, the plaintiff, a sixty-two year old accounting clerk, had been forced by his employer to take early retirement and was replaced by a fifty year old employee. The district court granted the defendant's motion for a directed verdict finding insufficient evidence of age discrimination. The Fifth Circuit reversed, holding that the plaintiff raised an inference of discrimination by showing that he "was within the protected class, was asked to take early retirement against his will, was doing apparently satisfactory work, and was replaced by a younger person." Three years later, the Fifth Circuit again addressed the minimal showing required of the plaintiff in an ADEA case. In Marshall v. Goodyear Tire & Rubber Co., the court responded to the Laugesen court's concern by concluding that a stronger prima facie case is required in the ADEA context to shift the burden because the aging process causes employees constantly to exit

106. See supra note 17 for a listing of the relevant cases.
107. See, e.g., Smith v. Flax, 618 F.2d 1062, 1066 n.3 (4th Cir. 1980) ("[W]e perceive no difficulty in utilizing [McDonnell Douglas] for the purposes of guidance in this age discrimination case.")
108. 501 F.2d 85 (5th Cir. 1974).
109. Id. at 86.
110. 554 F.2d 730 (5th Cir. 1977). The Secretary of Labor brought suit on behalf of William Reed for violation of § 623(a)(1), seeking individual relief as well as a nationwide injunction against further violations. The defendant had fired Mr. Reed, a 57 year old salesman, and advertised for sales applicants between the ages of 19-26. The Court of Appeals held that the injunction requested and granted by the district court was too broad for only a single violation, but upheld the grant of specific relief to Mr. Reed. Id. at 735.
111. See supra notes 100-03 and accompanying text.
the labor market while younger ones enter, simply the replacement of an older employee by a younger worker does not raise the same inference of improper motive that attends replacement of a black by a white person in a Title VII case.\textsuperscript{112}

The Fifth Circuit then upheld the district court's finding that the plaintiff sustained his burden by showing that he was discharged within ADEA's protected class, that the employer sought a younger replacement, and that a younger person outside the protected class did replace the plaintiff.\textsuperscript{113}

Considerable confusion attended the \textit{Goodyear} decision because the Fifth Circuit appeared to sanction the defendant's conception of a prima facie case as well as the district court's finding, both of which vary considerably with the last two factors in \textit{Wilson}.\textsuperscript{114} The defendant, Goodyear Tire, argued that "proof of (1) the employee's membership in the protected group; (2) his discharge; (3) his replacement with a person outside the protected group; and (4) his ability to do the job" is essential to constitute an ADEA prima facie case.\textsuperscript{115}

Although the Fifth Circuit did concede that Goodyear's elements parallel \textit{McDonnell Douglas}, it is arguable that the court in \textit{Goodyear} was demonstrating that "\textit{McDonnell Douglas} does not establish an immutable definition of a prima facie case"\textsuperscript{116} and the district court's finding was the minimal showing required. This explanation of \textit{Goodyear}, however, was not sustained by subsequent Fifth Circuit decisions. Within a year and a half of the \textit{Goodyear} decision, the Fifth Circuit set forth two inconsistent standards for a prima facie case of discriminatory discharge.

In \textit{Price v. Maryland Casualty Co.},\textsuperscript{117} the Fifth Circuit recognized the inconsistency in its earlier decisions. The court, attempting to clarify the \textit{Goodyear} decision, held that the plaintiff must show not only that he was a protected class member and had been discharged from employment, but also that he had the job qualifications and was replaced by a nonprotected class member.\textsuperscript{118} The \textit{Price} decision adopted almost verbatim the defend-

\begin{itemize}
\item \textsuperscript{112} \textit{Goodyear}, 554 F.2d at 736.
\item \textsuperscript{113} \textit{Id.} at 735-36.
\item \textsuperscript{114} Compare supra note 109 and notes 113-15 and accompanying text. All three versions of an ADEA prima facie case agree as to the first two elements but disagree with respect to the third and fourth factors. \textit{Wilson} said satisfactory work performance and replacement by a younger person but not necessarily one outside the protected class was sufficient to complete the inference of discrimination. \textit{Wilson}, 501 F.2d at 86. The defendant in \textit{Goodyear} insisted that replacement by a nonprotected class member was necessary but proof of satisfactory work performance was unessential. See \textit{Goodyear}, 554 F.2d at 735-36.
\item \textsuperscript{115} \textit{Goodyear}, 554 F.2d at 735.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} 561 F.2d 609 (5th Cir. 1977).
\item \textsuperscript{118} \textit{Id.} at 612.
\end{itemize}
ant's position in Goodyear as the minimum standard. The district court's judgment for the employer in Price was affirmed because the employee's position was eliminated, and therefore, no replacement was needed. In *Marshall v. Westinghouse Electric Corp.*, the Fifth Circuit retreated from its position in Price and held that Wilson and Goodyear required the plaintiff to show that "he was within the statutorily protected age group, that he was discharged, that the employer sought to replace him with a younger person and that he was replaced with a younger person outside the protected age group." The Fifth Circuit now adopted the district court's finding in Goodyear and eliminated the need for proof of satisfactory work performance. The Westinghouse decision, however, was not in line with the Wilson standards that had only required replacement of the employee, but not necessarily replacement by a nonprotected class member.

The various and inconsistent formulations of prima facie proof by the Fifth Circuit are also indicative of the lack of uniformity among the federal courts in adopting the *McDonnell Douglas* framework in ADEA cases. In specifying the minimal proof necessary to raise an analogous *McDonnell Douglas* inference of discriminatory intent, the courts have attempted to effect the ADEA's remedial purposes while keeping in per-

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119. *Id.* at 612-13. The court held, in the alternative, that even if the plaintiff was replaced, he was not replaced by a nonprotected class member. The court also held that the defendant sufficiently rebutted a prima facie case of discrimination. *Id.*

120. 576 F.2d 588 (5th Cir. 1978).

121. *Id.* at 590.

122. *See supra* note 109 and accompanying text. In *Wilson*, the 62 year-old plaintiff had been replaced by a 50 year-old worker which the court held did not preclude an inference of discrimination. *Wilson*, 501 F.2d at 86.

123. *See, e.g.*, Kelly v. American Standard, Inc., 640 F.2d 974, 980 (9th Cir. 1981) (proof of qualifications and replacement by nonprotected class member essential to establish a prima facie case); Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979) (proof of replacement not required by nonprotected class member or even a younger person; only need to demonstrate that the employer sought a replacement with similar qualifications); Bonham v. Dresser Industries, Inc., 569 F.2d 187, 195 (3d Cir.), *cert. denied*, 439 U.S. 821 (1978) (proof of replacement by a younger person not always required); Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1115 (8th Cir. 1977) (replacement by younger person, but not necessarily a nonprotected class member, essential to establish a prima facie case).

There is also disagreement among the federal courts over the prima facie proof necessary to ADEA disparate hiring and promotion cases. *See, e.g.*, Smithers v. Bailar, 629 F.2d 892, 895 (3d Cir. 1980) (ADEA disparate promotion suit where court required proof that a younger employee was instead promoted); Leftwich v. Harris-Loiseppe College, 29 Fair Empl. Prac. Cas. (BNA) 71, 75 (May 5, 1982) (ADEA disparate hiring suit where court required proof that a nonprotected class member was instead retained); Bell v. Bolgar, 29 Fair Empl. Prac. Cas. (BNA) 116, 118 (Mar. 4, 1982) (ADEA disparate promotion suit where court required proof that a nonprotected class member was instead promoted).

124. *See supra* note I and accompanying text.
spective the nondiscriminatory character that ordinarily attends the progression and replacement of older workers. The compromises made in balancing these competing goals have not been uniform.

III. JUSTIFICATIONS FOR THE USE OF THE MCDONNELL DOUGLAS FRAMEWORK IN ADEA DISPARATE TREATMENT CASES

The dispute over whether and to what extent the McDonnell Douglas framework should govern the evidentiary burdens in ADEA disparate treatment cases has preoccupied the federal courts for almost a decade. By dispelling the Laugesen court's fears and by focusing on the Supreme Court's refinements of the McDonnell Douglas framework, this twofold debate may be satisfactorily resolved in favor of the ADEA's adoption of title VII analysis.

A. Judicial Interpretation and Statutory Construction

In Laugesen, the Sixth Circuit counseled strongly against the automatic application of McDonnell Douglas to ADEA suits. Primarily, the court reasoned that the McDonnell Douglas allocation shifted the burden of proof to the defendant in recognition of the wholly arbitrary nature of racial classifications. Interpreting this burden to be one of persuasion, the Sixth Circuit characterized McDonnell Douglas as a strict, formalistic approach. Despite the identical prohibitions of title VII and the ADEA, the court maintained that congressional approval of a less strict approach was embodied in Congress' separation of the two statutory schemes.

This argument against extending title VII analysis to age discrimination claims is a misjudgment of congressional intent and judicial precedent. As the Supreme Court noted in Lorrillard v. Pons, the ADEA is a hybrid statute incorporating the enforcement provisions of the FLSA and the substantive prohibitions of title VII. The hybrid design of the ADEA, the Court stated, is a reflection of congressional "dissatisfaction with some ele-

125. See supra note 103 and accompanying text.
128. See supra notes 100-03 and accompanying text.
129. See supra note 105.
130. 510 F.2d at 312-13 n.4.
132. Id. at 578.
ments of each of the preexisting schemes." By selectively incorporating the efficacious sections of each "scheme," Congress corrected title VII's deficiencies and simultaneously maintained consistency in fair employment legislation.

The Pons Court deemed that Congress, in enacting the ADEA, impliedly condoned the extension of judicial interpretation accorded title VII and the FLSA. In determining whether Congress afforded the right to a jury trial under the ADEA, the Court resorted to a comparative analysis of the ADEA provision at issue to the model scheme. Justice Marshall, writing for a unanimous Court, preliminarily noted that under current judicial interpretation there is a right to a jury trial in actions under the FLSA. He found "a significant indication of Congress' intent" to afford the same right under the ADEA because of the similarity in the procedural provisions of the two statutes. The Court justified its interpretation of congressional intent by stating that "where, as here, Congress adopts a new law incorporating sections of prior law, Congress normally can be presumed to have had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute."

Laugesen ignored the message of Congress by deemphasizing the similarity between title VII and the ADEA's substantive prohibitions. Contrary to the Sixth Circuit's conclusion, Congress impliedly approved of the McDonnell Douglas allocation of burdens by similarly structuring the prohibitions of title VII and the ADEA. The judicial construction and implementation of title VII's substantive prohibitions in McDonnell Douglas should be extended to the ADEA under the Pons analysis. The fact that McDonnell Douglas post dated the ADEA's enactment does not detract from this conclusion. Holding Congress to post-enactment judicial interpretation of pre-existing schemes.

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133. Id. The Supreme Court discussed the three major areas of dissatisfaction. Congress rejected the judicial interpretation of the FLSA restricting injunctive relief to suits brought by the Secretary of Labor by providing under § 626(b) of the ADEA that injunctive relief was available in any action, including private suits. Id. at 581. Congress also rejected the FLSA's criminal penalties provision. Id. at 581-82. Finally, Congress rejected title VII's liquidated damages penalty by incorporating the FLSA's provision that requires proof of willful violations as a precondition to the penalty. Id. at 581.

Moreover, to avoid overburdening the EEOC, Congress placed administration of the ADEA in the hands of the Wage and Hour Division of the Department of Labor which also administers the FLSA. Note, The Age Discrimination in Employment Act Amendments of 1978: A Legal and Economic Analysis, 7 Pepperdine L. Rev. 85, 91-92 (1979).

134. Pons, 434 U.S. at 580-81.

135. Id. at 580.

136. Id.

137. Id. at 581.

138. Laugesen, 510 F.2d at 311. See also supra note 3 and accompanying text.
interpretation is still consistent with Justice Marshall's reasoning that when Congress has exhibited a detailed knowledge of the judicial interpretation accorded the model scheme, then the presumption of congressional approval is appropriate. Congress exhibited that knowledge in the extensive revisions it made to the ADEA in the 1978 amendments following the *McDonnell Douglas* decision.

The Sixth Circuit is also incorrect for characterizing *McDonnell Douglas* as a strict, formalistic approach properly confined to discrimination claims involving “the immutable characteristics of color, sex, and national origin.” This interpretation of *McDonnell Douglas* was based on the erroneous assumption that *McDonnell Douglas* shifted the burden of persuasion to the defendant. Laugesen apparently concluded that given the nonarbitrary nature of some age classifications the burden of persuasion should remain with the plaintiff even though a prima facie case of discrimination could be made under *McDonnell Douglas*’ specification. The refinement made by the Supreme Court subsequent to *McDonnell Douglas* eliminates this concern. Justice Powell explained in *Burdine* that the burden of production in *McDonnell Douglas* shifted only when the employer was required “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” He cautioned that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff.”

*McDonnell Douglas* “is merely a sensible, orderly way to evaluate evidence in light of common experience” and not a strict approach to individual discrimination. The Court in *McDonnell Douglas* simply resorted to the common law device of evidentiary presumptions for traditionally recognized purposes. By dividing the burden of production between the plaintiff and the defendant the Court was recognizing the plaintiff’s inferior access to evidence of motive, the probability that the acts complained of, “if otherwise unexplained, are . . . based on the consideration

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140. See supra note 7. When the 1978 amendments were enacted, Congress was aware that the Supreme Court would presume congressional approval of prior judicial interpretation unless affirmative legislative action was taken. The 1978 amendment that extended the right to a jury trial in ADEA cases was in direct response to *Pons*. *Pons*, 434 U.S. at 581.
141. *Laugesen*, 510 F.2d at 312-13 n.4. See supra notes 100-03 and accompanying text.
142. *Laugesen*, 510 F.2d at 313.
143. Id. See also supra note 105.
144. *Burdine*, 450 U.S. at 253-56. See also supra notes 77-80 and accompanying text.
146. *Furnco*, 438 U.S. at 577.
147. See supra notes 60-64 and accompanying text.
of impermissible factors," and the important social policy behind equal employment legislation.

Arguably the Supreme Court has itself impugned the use of McDonnell Douglas in ADEA disparate treatment cases. In the Burdine refinements to McDonnell Douglas, the Court cited with approval the First Circuit's decision in Loeb v. Textron, Inc. The Loeb court had earlier concluded that, because of the statutory similarity of the ADEA and title VII, the McDonnell Douglas framework was also appropriate in ADEA litigation. Justice Powell in Burdine cited Loeb as correctly holding that the defendant bears merely the burden of production under the Supreme Court's title VII precedents. On its discussion regarding the defendant's ability to meet this burden under McDonnell Douglas, the Supreme Court twice referred to the Loeb decision. These three citations to Loeb suggest that the Supreme Court approved the ultimate conclusion reached by the First Circuit.

B. Dividing Responsibility Between Judge and Jury

The Sixth Circuit criticized McDonnell Douglas because it did not deal with the complications associated with a jury proceeding. The Laugesen court argued that McDonnell Douglas' burden allocation was inappropriate for age discrimination cases because it would confuse the jury. Apparently, the Sixth Circuit assumed that the McDonnell Douglas standards would be included verbatim in the jury instructions leaving

149. Furnco, 438 U.S. at 577.
150. McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273, 279-80 (1976). Two white employees alleged their employment discharge was racially discriminatory under title VII. The Court held that the McDonnell Douglas guidelines equally applied to allegations of race discrimination brought by whites since title VII prohibits "[d]iscriminatory preference of any [racial] group, minority or majority." Id. at 279 (emphasis in original) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).
151. See supra notes 72-78 and accompanying text.
152. Burdine, 450 U.S. at 252 n.4, 258-59.
153. 600 F.2d 1003 (1st Cir. 1979).
154. Loeb, 600 F.2d at 1010.
155. Burdine, 450 U.S. at 252 n.4 (citation to Loeb comparing it to other circuit decisions interpreting the nature of the defendant's burden under McDonnell Douglas).
156. Id. at 258, 259. The Supreme Court agreed with Loeb that "the defendant's explanation of its reasons must be clear and reasonably specific." Id. at 258 (citing Loeb, 600 F.2d at 1011-12 & n.5). The Court also agreed that the reasonableness of the employer's judgment is not properly a part of his production burden. Id. at 259 (citing Loeb, 600 F.2d at 1012 n.6).
157. See supra notes 97-99 and accompanying text.
158. Laugesen, 510 F.2d at 312.
laymen to monitor the shift in evidentiary burdens.\textsuperscript{159}

The First Circuit, however, found little difficulty in adapting the \textit{McDonnell Douglas} principles to age discrimination despite the jury trial feature of ADEA proceedings. In \textit{Loeb},\textsuperscript{160} the court stated that "\textit{McDonnell Douglas} was not written as a prospective jury charge."\textsuperscript{161} Indirectly responding to the Sixth Circuit's concern, \textit{Loeb} held that "only the factual determinations necessary to the underlying rationale of \textit{McDonnell Douglas} need be made by the jury—the burden shifting can and should be monitored by the judge."\textsuperscript{162} Any instruction to the jury on the factual issues identified by \textit{McDonnell Douglas} could be translated into lay terms by the judge.

The First Circuit's response in \textit{Loeb} was based on common sense and hindsight. The hindsight emanated from the Supreme Court decision in \textit{Board of Trustees of Keene State College v. Sweeney}.\textsuperscript{163} In \textit{Sweeney}, the Supreme Court corrected the First Circuit's prior interpretation of \textit{McDonnell Douglas} and stressed careful attention to \textit{McDonnell Douglas}' conceptual underpinnings.\textsuperscript{164} With that lesson in mind, the First Circuit concluded that "\textit{McDonnell Douglas} to a large extent is an analytical framework . . . to give judges a method of organizing evidence and assigning burdens of production and persuasion in a discrimination case."\textsuperscript{165}

\section*{C. Policy Considerations}

There are no countervailing policy concerns that would prevent the extension of \textit{McDonnell Douglas} to ADEA disparate treatment cases. The overriding aim of both title VII and the ADEA is "the elimination of discrimination from the workplace."\textsuperscript{166} Congressional intolerance of covert employment discrimination is equally manifested in the ADEA as borne out by the structural similarity of the two statutes.\textsuperscript{167}

Nevertheless, there may be some concern that title VII analysis in ADEA suits will congest the federal court docket because \textit{McDonnell Douglas}' allocation of evidentiary burdens reduces the risk of directed verdicts while ensuring full inquiry into circumstantial discrimination

\begin{itemize}
\item \textsuperscript{159} See supra notes 97-99 and accompanying text.
\item \textsuperscript{160} 600 F.2d 1003 (1st Cir. 1979).
\item \textsuperscript{161} Id. at 1016.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} 439 U.S. 24 (1978). See also supra note 74 and accompanying text.
\item \textsuperscript{164} 439 U.S. 24 (1978). The First Circuit had incorrectly interpreted \textit{McDonnell Douglas} as imposing a burden of persuasion on the defendant.
\item \textsuperscript{165} \textit{Loeb}, 600 F.2d at 1016.
\item \textsuperscript{166} \textit{Pons}, 434 U.S. at 584.
\item \textsuperscript{167} Id.
\end{itemize}
claims. Typically, in a civil suit the plaintiff alone carries the burden of production. This requires the plaintiff to produce sufficient evidence on each element of the claim to avoid an adverse directed verdict. Under *McDonnell Douglas*, however, the plaintiff is temporarily relieved of the burden of production regarding discriminatory intent. By establishing a prima facie case of discrimination, the plaintiff is shielded from judgment until after he has concluded his pretext argument. Congress, though, foresaw the threat of increased litigation and attempted to alleviate the problem by requiring the parties to submit to administrative conciliation and conference prior to trial. Although this is only a partial solution, it does have the intended effect of weeding out meritless discrimination claims.

Commentators have voiced an additional concern that employers will essentially be forced to accommodate the aged in order to prevent intrusion by the courts into legitimate business decisions. This fear is unwarranted for two reasons. First, the ADEA, like title VII, only encourages employers to make employment decisions on a more individualized basis. As the Supreme Court noted,

> Congress did not intend by [title VII] to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, . . . is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. The ADEA expressly embodies this notion by extracting the phrase "any action . . . where the differentiation is based on reasonable factors other than age" from the statutory prohibitions.

Second, as long as impermissible factors are not the basis of employment decisions, employers may freely go about business management.

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168. *Burdine*, 450 U.S. at 254-56. See also *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980).
169. See supra note 9.
171. Id. at 256.
The court's judgment is not to be substituted in the place of management's until a conclusive finding of discrimination is made.176

IV. MODIFYING THE MCDONNELL DOUGLAS PRIMA FACIE CASE TO SUIT ADEA DISPARATE TREATMENT CLAIMS

The majority of federal courts have concluded that a modified version of the McDonnell Douglas framework is appropriate in ADEA disparate treatment cases.177 These courts deem the Sixth Circuit's concern over the differences between age and title VII's classifications178 as more properly a matter of adapting McDonnell Douglas' prima facie proof to suit ADEA cases.179 They note that the Supreme Court, in McDonnell Douglas, expressly authorized the modification of the prima facie elements to accommodate "differing factual situations."180

The courts, however, disagree over the modification that is necessary to transfer the McDonnell Douglas inference of discriminatory intent to age discrimination claims.181 Of the four elements of prima facie proof specified in McDonnell Douglas, only the first two standing requirements, membership in the statutory protected class and employment rejection,182 have been uniformly borrowed by the courts in formulating a prima facie case under the ADEA.183 The latter two proof requirements, employment competency and continued search for similarly qualified persons,184 have been the subject of considerable debate.185

A. Differences Between Age and Race

The controversy is not surprising since the federal courts had little guidance, prior to the Burdine refinements, in devising an analogous McDonnell Douglas prima facie case.186 Once the Supreme Court clarified the

176. Furnco, 438 U.S. at 578 ("courts may not impose [a judicially divised hiring scheme] on an employer at least until a violation of title VII has been proved . . . ."). See also supra notes 65-71 and accompanying text.
177. See supra note 17.
178. See supra notes 100-03 and accompanying text.
179. See supra note 105 and accompanying text.
181. See supra note 19.
183. See supra notes 106-28 and accompanying text.
185. See, e.g., Douglas v. Anderson, 656 F.2d 528, 532 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979).
186. See supra notes 72-80 and accompanying text.
proof necessary in terms of "circumstances which give rise to an inference of unlawful discrimination"\textsuperscript{187} by "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection,"\textsuperscript{188} the courts focused on the nature of age discrimination, and compared it to racial discrimination.\textsuperscript{189} The compromises in the prima facie proof by the different courts reflect, to a large degree, the extent to which they have compensated for the differences between age and race.\textsuperscript{190}

In discriminatory discharge suits, the Sixth Circuit strongly counseled the examiner to pay critical attention to the fact that "[t]he progression of age is a universal human process."\textsuperscript{191} The court explained that the replacement of older workers by younger ones is an inherent consequence of the aging process and should not be interpreted in the ordinary case, as it would be under \textit{McDonnell Douglas}, as an act of discrimination.\textsuperscript{192} The Fifth Circuit heeded this caution by noting that

> [b]ecause the aging process causes employees constantly to exit the workforce while younger ones enter, simply the replacement of an older employee by a younger worker does not raise the same inference of improper motive that attends the replacement of a black by a white person in a Title VII case.\textsuperscript{193}

The court concluded that proof of replacement by a younger person outside the protected group was necessary to strengthen the inference of discrimination in an ADEA case.\textsuperscript{194}

Indeed, the courts are correct in reasoning that the progression and replacement of older workers does not alone create an inference of discriminatory discharge. They are incorrect, however, in concluding that \textit{McDonnell Douglas}' prima facie proof must be strengthened in ADEA cases. The distinction noted by the courts is simply that age is related to an employee's retirement decision. \textit{McDonnell Douglas}, though, requires as an element of the prima facie case that the plaintiff was subject to an adverse employment decision.\textsuperscript{195} In discharge situations, the plaintiff must show that he was involuntarily terminated. When an older worker, or for that matter, a black employee, voluntarily terminates his employment, he

\textsuperscript{187} \textit{Burdine}, 450 U.S. at 253.
\textsuperscript{188} \textit{Id.} at 253-54.
\textsuperscript{189} See, e.g., Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).
\textsuperscript{190} See \textit{supra} notes 123-26 and accompanying text.
\textsuperscript{191} \textit{Laugesen}, 510 F.2d at 312-13 n.4.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Goodyear}, 554 F.2d at 736.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} See \textit{supra} note 53 and accompanying text.
lacks the requisite standing embodied in the *McDonnell Douglas* prima facie case to claim discriminatory discharge.

Other courts have focused on the distinction of age as a valid indicator of ability to justify modification of the *McDonnell Douglas* prima facie case. In *Cunningham v. Central Beverage, Inc.*, the United States District Court for the Northern District of Texas stated that "the aged unlike, say those who have been discriminated on the basis of race . . . [have not] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." On a generalized basis there is a rational relationship between age and ability. This distinction from race, though, does not warrant modification of the *McDonnell Douglas* prima facie case. In *McDonnell Douglas*, the plaintiff was required to show that he "was qualified for the job" to sustain his prima facie case of disparate hiring. *Furnco* explained that the presumption of discrimination was dependent upon proof of ability since the lack of job qualifications is a legitimate reason for employment rejection. Similarly, in disparate discharge suits, satisfactory work performance would be an essential element of the prima facie case. The peculiarity of age as an indicator of ability is sufficiently accommodated by *McDonnell Douglas*.

**B. Circumstances Which Give Rise to an Inference of Unlawful Discrimination**

In specifying the "circumstances which give rise to an inference of unlawful discrimination" in ADEA cases, the courts have imposed proof requirements in excess of *McDonnell Douglas*. For disparate discharge claims, the courts have generally required proof of replacement by someone substantially younger or outside the protected class with equal or inferior qualifications. The plaintiff in an ADEA disparate hiring or promotion suit has been similarly required to produce evidence that a person either younger or under forty, who was equally or less qualified, was employed instead. This "replacement" proof is a gloss on the *McDonnell Douglas* factor that "the position remained open and the employer continued to seek applicants from persons of the complainant's..."
McDonnell Douglas imposed this last factor to ensure that there was a job vacancy and to eliminate any notion that the employer sought a more capable person for the job. In discussing job vacancy, the Supreme Court did not require proof that the position was filled. The Court merely required that the employer had continued to seek applicants after the plaintiff's rejection. The distinction is important because it recognizes that an employer eventually may decide for economic reasons not to hire at all and yet may have discriminated during the time the job opening existed. In addition, requiring proof of "replacement" would also allow the sophisticated employer, who rejected applicants on an impermissible basis, to skirt liability by temporarily withdrawing the job listing.

In discriminatory discharge cases, both the McDonnell Douglas factor and the ADEA "replacement" requirement are inappropriate. It is quite common for an employer to reduce his workforce without seeking or retaining a replacement for the discharged employees. The employer, however, may decide which employees to terminate on the basis of prohibited considerations such as age or race.

Where proof of "replacement" is available, however, it is relevant in supporting or diminishing the plaintiff's prima facie case of disparate treatment. For example, if a black applicant is rejected in favor of a white applicant, the claim of racial discrimination is strengthened. Similarly, if another black applicant is chosen for the job the inference of racial discrimination is lacking. In age discrimination cases, though, the replacement of a discharged employee or job applicant by one within the protected age group should not automatically foreclose a prima facie case. The most obvious example is the sixty-nine-year old employee replaced, despite his satisfactory work performance, by an individual of age forty. Given the broad age range encompassed by the ADEA and the progressive nature of aging, the employer may be impermissibly differentiating between age brackets within the protected group itself. The EEOC interpretations of the ADEA confirm that the preference of one protected class member over another would be equally unlawful. As the interpretive regulation explains "if two people apply for the same position, and one is forty-two and the other fifty-two, the employer may not lawfully turn down either one on the basis of age . . . ."

204. Id. at 803.
205. See supra note 2.
207. Id.
On the other hand, "replacement" by someone the same age does not create the inference of age discrimination. Where "replacement" proof is available, its significance should be judged under a standard of material difference in age that a reasonable person would conclude that age was a factor in the employment decision. The standard is phrased in terms of "different in age" for two reasons. First, the ADEA prohibits not only preference for "younger" workers outside the protected class, but also preference towards members within the statutory protected age group, whether younger or older than the plaintiff. Secondly, if the standard were to be stated as a predetermined age disparity, it would create a safety zone contrary to the ADEA's prohibitions in which employers could intentionally differentiate between workers within the age span without challenge unless there was direct proof of disparate treatment.

V. Conclusion

The McDonnell Douglas allocation of evidentiary burdens remedies the inequity of motivation proof while facilitating the enforcement of title VII. Given the similarity in substantive prohibitions and Pons' statutory construction of the ADEA, title VII's disparate treatment framework is appropriate for ADEA cases. The differences recognized by the courts between age and the impermissible classifications under title VII do not warrant a modification of the McDonnell Douglas prima facie case. The proof specified in McDonnell Douglas adequately accommodates the peculiarity of age as both an indicator of ability and a consideration in retirement decisions. However, unlike race discrimination, age discrimination may still be indicated where employment preference is given to one within the protected class. Therefore, the controlling standard for "replacement" proof in ADEA disparate treatment cases should be "materially different in age" rather than a protected/nonprotected class distinction.

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208. See supra notes 206-07 and accompanying text.