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Age Discrimination in Employment Act: Life After St. Mary's Honor Center v. Hicks — Rolling the Dice Against a Stacked Deck

David Culp*

INTRODUCTION

This article explores the fallout created by the Supreme Court of the United States’ 5-4 decision in St. Mary's Honor Center v. Hicks.1 It also discusses the Republican Party's “Contract with America,” the legislative proposal that the loser pay the winner's attorney's fee, and the effect that this legislation, coupled with the St. Mary's Honor Center decision, will have on civil rights enforcement. The article argues the need for legislative changes if civil rights enforcement is to be effective.

I. TOLBERT V. THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In July 1989, the Philadelphia Regional Office of the United States Department of Housing and Urban Development (“HUD”) sought to fill three Equal Opportunity Specialist (“EOS”) positions in its Fair Housing and Equal Opportunity office.2 HUD created the vacancies to process a backlog of housing discrimination complaints at its Philadelphia Regional Office.3

HUD announced the positions through two vacancy announcements: Recruiting Bulletin No. 03-DEE-89-018 (the “018” announcement), which was directed to the general public, and Notice of Position Vacancy No. 03-MSE-89-075z (the “075z” announcement), which was directed at current employees of the

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federal government and those former employees of the federal
government who were "reinstatement eligible."4 "Reinstatement
eligible" is federal employment terminology that means that the
government can rehire a former federal employee bypassing the
normal competitive process where he or she would compete with
other applicants.5 Both announcements described the same three
EOS positions, which HUD advertised at both the GS-9 and GS-11
government pay-scale levels.6

Lee Tolbert submitted two applications in response to the 018
vacancy announcement (one for the GS-11 position and one for the
GS-9 position), stating in both applications that he had previously
been a career federal employee and had held GS-12 positions as an
Equal Opportunity Specialist in several federal agencies, including
the Department of Housing and Urban Development where he had
been an EOS GS-12.7 Lee Tolbert was forty-nine years of age when
he responded to the 018 vacancy announcements.8 Although Lee
Tolbert was "reinstatement eligible," since he had previously
worked for the government as an EOS, he was unaware of the 075z
vacancy announcement and applied only under the 018 vacancy
announcement.9

Tolbert informed HUD interviewers during the selection process
that he was a reinstatement eligible and that he had noted his
reinstatement eligibility on his application form.10 "Although a
specific notation to this effect was not included in the application,
it is clear from the application that Tolbert had previously worked
for the federal government between 1974 and 1983 as an EOS at
the GS-11 and GS-12 levels at the Department of Labor; the
Department of Health, Education and Welfare; and HUD."11

HUD rated and ranked the applicants: Mr. Tolbert (49 years old)
and Mr. Joseph Saunders (64 years old) were the two most highly
rated applicants for the EOS positions. They were also the oldest
applicants. Each of them received a total score of 105 points,
which included a 5-point veteran's preference for their previous
service in the United States armed forces.12

4. Id.
5. Id. at *2 (citing testimony of Cecilia Green, Personnel Specialist for HUD).
6. Id. at *1.
7. Id.
8. Tolbert, 1993 WL 544402, at *1.
9. Id.
10. Id.
11. Id.
12. Id.
Nevertheless, neither Mr. Tolbert nor Mr. Saunders was selected for the EOS positions because HUD went through a series of machinations to avoid selecting them. In October 1989, HUD extended five offers to fill the EOS positions. HUD first extended offers to an Allan Hollis (42 years old) and Paul Mimless (41 years old) at the GS-11 level. They rejected the offers, since they already held GS-12 positions at another federal agency. At that point, instead of offering one of the EOS positions to Mr. Tolbert, who had previously been a GS-12 EOS at HUD, HUD awarded two of the EOS positions to lateral transfers from other federal agencies and one to a reinstatement eligible. HUD offered one GS-12 position to Mr. Rucker (37 years old). Mr. Rucker had not applied under either vacancy announcement and had never investigated housing discrimination cases before. HUD offered another position at a GS-12 level to Mr. Mimless, who also had no previous HUD investigative experience. Instead of hiring Mr. Tolbert, HUD offered a third EOS position to Elaina Spina (42 years old) who also had no previous EOS experience with HUD and whom HUD had already rejected under one of the vacancy announcements. In addition, in its most recent selection of an EOS investigator prior to October 1989, HUD had hired a GS-12 EOS who was considerably younger than Mr. Tolbert; that individual, Al Grier (38 years old) had no HUD experience.

After learning of his non-selection, despite the fact that he was the top-ranked candidate from the vacancy announcement 018, Mr. Tolbert filed an ADEA complaint with the agency. HUD investigated the complaint, but never made a finding as to whether or not it believed that Mr. Tolbert had been discriminated against on the basis of age. As a result, on June 8, 1992, Lee Tolbert filed an ADEA action against the United States Department of Housing and Urban Development in the United States District Court for the Eastern District of Pennsylvania.

14. Id. at *2.
15. Id. at *4.
16. Id. at *1.
17. Id. at *4.
II. SETTING OUT A PRIMA FACIE CASE IN TOLBERT

The Honorable Jan DuBois, sitting without a jury, tried the Tolbert case. Lee Tolbert's first burden was to make out a prima facie case. As set out in McDonnell Douglas Corp. v. Green, and confirmed in Texas Dept' of Community Affairs v. Burdine, a prima facie case of age discrimination requires a plaintiff to satisfy a four-part test: The plaintiff must show that he or she belongs to the protected class; that the person applied for a job and met the qualifications of an open job; that he or she was rejected; that the employer continued to seek applications from persons with similar qualifications and/or selected someone who was younger than the plaintiff.

A prima facie case creates an inference that the employer's action was discriminatory. One issue that has developed in age discrimination cases is how much younger must the selected person must be to create an inference of age discrimination. The ADEA does not specify this. In fact, prior to the Tolbert case, several courts had said quite simply that the ADEA mandates that an employer reach employment decisions without regard to age. In this regard, in Moore v. Sears, Roebuck and Co., a federal district court held that a plaintiff can make out a case of age discrimination even if the proffered or selected individual is also within the protected class of persons between the ages of forty and seventy. After all, the purpose of the ADEA is to insure that an employer treat an employee's age in a neutral fashion.

In April 1996, in a 9-0 opinion written by Justice Scalia, the Supreme Court of the United States confirmed the above analysis.

24. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 248.
27. Id. at 360.
In *O'Connor v. Consolidated Coin Caterers Corp.*, the Supreme Court reversed a district court finding that the plaintiff had failed to make out a prima facie case of age discrimination under the *McDonnell Douglas* test. In *O'Connor*, the plaintiff was fired at age 56 by his employer and replaced with a 40-year old worker. Plaintiff filed suit, alleging that his discharge violated the ADEA. The district court granted the employer's motion for summary judgment, and the Court of Appeals affirmed. Both courts held that the plaintiff had failed to make out a prima facie case, since there could be no presumption of age discrimination where the plaintiff was not replaced by someone outside the age group protected by the ADEA. In reversing and remanding, a unanimous Supreme Court held that the ADEA "bans discrimination against employees because of their age. . . ." That "one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." The Supreme Court noted that a prima facie case of age discrimination requires evidence adequate to create an inference that an employment decision was based on age. Such an inference can not be drawn, Justice Scalia wrote, "from the replacement of one worker with another worker insignificantly younger." An inference of age discrimination, however, could be drawn where the plaintiff was replaced by a worker "substantially younger than the plaintiff."

Nevertheless, both before and after the Supreme Court's *O'Connor v. Consolidated Coin Caterers Corp.* decision, courts have struggled with how much of an age difference between the plaintiff and the person selected is necessary to create a prima facie case of age discrimination. Thus, in a 1995 case in the Eastern District of Pennsylvania, *Zambelli v. Historic-Landmarks, Inc.*, Justice Dalzall held that an eleven months difference between the

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31. *Id.* at 309.
32. *Id.*
33. *Id.*
34. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
plaintiff (Zambelli) and the person who replaced plaintiff (Rubin) after plaintiff's termination "is immaterial." Inevitably, as the Supreme Court in O'Connor held, the question turns on whether the person selected or the person who replaced the older worker is "sufficiently younger to permit an inference of age discrimination." The courts, however, have not been able to develop a bright line as to what is a sufficient age difference to establish the elusive "inference" of discrimination.

In the Tolbert case, Lee Tolbert argued that he had met the four prongs of the McDonnell Douglas test and had established a prima facie case of age discrimination. First, Mr. Tolbert "belongs to the protected class," as he was 49 years old when HUD failed to select him over other applicants. Second, he applied for the EOS positions and was eminently qualified to perform that work for HUD, as he had already previously been a GS-12 EOS at HUD; in fact, the positions he applied for were at a lower grade level (GS-9 and GS-11) and therefore entailed less responsibility and less difficulty than the GS-12 Position he had previously held. Third, Lee Tolbert was "rejected" for the positions, and fourth, persons with "similar qualifications" who were substantially younger than Mr. Tolbert were selected for the positions.

In order to fill the three EOS positions, five offers were made, and each one of those offered the position was considerably younger than Mr. Tolbert. Mr. Tolbert and Mr. Saunders (age 64) were the two oldest applicants applying for the positions. One individual offered a position was Wayman Rucker, who was 37 years old and who had not even applied for the posted positions. At the time of his selection, Mr. Rucker, who was outside the protected age group of 40-70, was 12 years younger than Mr. Tolbert. HUD also offered a position to Mr. Mimless, who was 41 years old at the time, eight years younger than Mr. Tolbert. Mr. Mimless was offered the position twice, once at the GS-11 level, which he turned down, and again at the GS-12 level, which he accepted. HUD also offered a position to Mr. Hollis, who was 42 years, and to Ms. Spina, also 42 years old, both seven years younger than Mr. Tolbert.

Thus, the age difference between Mr. Tolbert and the five who received offers was not insignificant. Also, this was not an isolated

41. Zambelli, 1995 WL 116669 at *14. The Court continued, "There is no evidence in the record that anyone at Historic Landmarks thought that they would gain an age-associated benefit from firing Zambelli and hiring Rubin." Id.

42. See, e.g., Billet v. Cigna Corp., 940 F.2d 812, 816 n.3 (3d Cir. 1991).
incident. On five different occasions, HUD offered posted EOS positions to someone other than Mr. Tolbert, all of whom were seven to twelve years younger than Mr. Tolbert. In fact, HUD offered the positions to the youngest of the candidates. No one who applied for the positions was younger than Mr. Rucker, age 37. No 25 or 30 year olds applied for the EOS positions. HUD, therefore, could not have hired anyone younger than the persons ultimately selected.

Judge DuBois held that Lee Tolbert had established a prima facie case of age discrimination. Judge DuBois noted that in making out a prima facie case, "The younger person or persons replacing the plaintiff may be in the protected class." Ultimately, however, 'the probative value of the [difference in age] as evidence of discrimination will depend on the circumstances of the case.' Judge DuBois stated that, "Plaintiff established that he belonged to the protected class, was qualified for the job, and was not offered the job." Nevertheless, Judge DuBois only begrudgingly held that Lee Tolbert had made out a prima facie case of discrimination, stating that the "age difference between plaintiff and the candidates who were offered positions is barely sufficient" under the Third Circuit's opinion in Maxfield v. Sinclair Int'l "to permit an inference of discrimination." Judge DuBois continued, "In Maxfield, the Third Circuit held that a twenty-year difference was sufficient to create an inference of discrimination that would allow plaintiff to establish a prima facie case . . . but noted that in a case where the age difference is insignificant a district court would likely find insufficient evidence to permit an inference of discrimination."

In Tolbert, Judge DuBois noted, however, that "the greatest difference in age between plaintiff and an employee offered the job he sought is eleven years." Under those facts, the court found that the plaintiff "has presented the bare minimum under Maxfield to
establish a prima facie case of discrimination." What Judge DuBois could have noted, but did not, is that there were no younger candidates who had applied for the EOS positions than those selected. There were simply no 25 or 30-year olds available in the pool of applicants. Thus, under the circumstances of the Tolbert case, the prima facie case seems stronger than Judge DuBois intimated. Nonetheless, Judge DuBois held that having "presented a prima facie case, plaintiff . . . succeeds in shifting the burden to defendant to offer one or more legitimate, nondiscriminatory reasons for its decision to hire the other candidates rather than Tolbert."52

III. THE SHIFTING BURDEN OF ST. MARY'S HONOR CENTER: BETWEEN A ROCK AND A HARD PLACE

As Judge DuBois explained, once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant "to articulate a legitimate, nondiscriminatory reason for the employee's rejection." Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by the preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. This has been the judicial standard since the Supreme Court's opinion in McDonnell Douglas, more than twenty years ago.

This standard, however, suffered a major twist in 1993 with the Supreme Court's 5-4 decision in St. Mary's Honor Center v. Hicks. In St. Mary's Honor Center, in a suit against an employer alleging intentional racial discrimination under Title VII, the Supreme Court granted certiorari to determine whether the factfinder's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff. In other words, if the trier of fact finds that the supposedly non-discriminatory reasons given by the employer for its actions are not credible, must the trier of fact find for the plaintiff?

The court of appeals had answered that question in the

51. Id. at *6.
52. Id.
53. Tolbert, 1993 WL 544402, at *6 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)).
54. McDonnell Douglas, 411 U.S. at 804; Burdine, 450 U.S. at 252-53.
56. St. Mary's Honor Center, 509 U.S. at 504.
affirmative: Once the employee proved all of the employer's "proffered reasons for the adverse employment actions to be pretextual," the employee "was entitled to judgment as a matter of law."57 The Eighth Circuit reasoned, "Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, the defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against the plaintiff on the basis of his race."58

The Supreme Court disagreed, the five-member majority holding that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination"59 but does not compel such a result. The Supreme Court held that the court of appeals was correct in noting that, "upon such rejection, '[n]o additional proof of discrimination is required.' . . . But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff . . . ignores our repeated admonishment that the Title VII plaintiff at all times bears the ultimate burden of persuasion."60

The Supreme Court majority held that the defendant's burden is to come forward with a non-discriminatory explanation or evidence.61 If the defendant does so, the Supreme Court held that the defendant "has met its burden of production" and "has thus rebutted any legal presumption of intentional discrimination," since the defendant's "production" of an explanation "can involve no credibility assessment."62 Excuse me? How can one rebut a presumption of intentional discrimination when the defendant's explanation is bogus?

In Tolbert, Justice DuBois accurately and concisely summarized the holding in St. Mary's Honor Center. Thus, Justice DuBois wrote, "A demonstration by the plaintiff that the defendant's reasons are not credible does not . . . require a finding of discrimination. . . . Rather, the plaintiff must still prove by a preponderance of the evidence that the defendant intentionally

57. Id. at 505 (citing St. Mary's Honor Center v. Hicks, 970 F.2d at 492 (8th Cir. 1992)).
58. Id. at 508.
59. Id. at 511 (citations omitted.)
60. Id.
61. Id. at 510 n.3.
62. Id. at 508.
discriminated against him.\textsuperscript{63}

The plaintiff in an ADEA case must still prove "by a preponderance of the evidence that age was the determinative factor in the employer's decision.\textsuperscript{64} Except, how is a plaintiff to offer any additional evidence? Plaintiff offers evidence sufficient for the trier of fact to infer that the action taken by the employer was discriminatory. The employer then offers its best reasons for why the action should be viewed as a legitimate business decision. The trier of fact determines that the employers' reasons are not believable. Thus, the employer has not successfully rebutted the inference of discrimination. Yet the Supreme Court, in \textit{St. Mary's Honor Center}, says this may not be enough for the plaintiff to win. The plaintiff, however, can do no more. Left hanging in the courtroom is the "inference" or "presumption" that the action was discriminatory.

Justices Souter, White, Blackmun, and Stevens dissented in \textit{St. Mary's Honor Center},\textsuperscript{65} arguing that the decision set aside "settled precedent" and "two decades of stable law" in the Supreme Court.\textsuperscript{66} The dissent outlined the parade of horribles that it believed the \textit{St. Mary's Honor Center} decision would unfurl. The dissent noted that under the majority's rationale, if a plaintiff succeeds in demonstrating at trial that the defendant has presented illegitimate pretextual reasons for its actions in response to a prima facie showing of discrimination, "the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove."\textsuperscript{67} This scheme of proof "promises to be unfair and unworkable."\textsuperscript{68}

\textbf{IV. TOLBERT BUTTS HEADS WITH \textit{ST. MARY'S HONOR CENTER}}

Whether the majority or the dissent made the better argument in \textit{St. Mary's Honor Center}, Judge DuBois was left with the task of applying the majority opinion to the facts of Lee Tolbert's case. Having determined that Lee Tolbert had made out a prima facie case of discrimination, Judge DuBois was left to analyze the

\begin{itemize}
  \item \textsuperscript{63} Tolbert, 1993 WL 54402 at *5
  \item \textsuperscript{64} Id. (citations omitted).
  \item \textsuperscript{65} Id. at 525 (Souter, J., dissenting).
  \item \textsuperscript{66} Id. at 525 (Souter, J., dissenting).
  \item \textsuperscript{67} Id. at 525 (Souter, J., dissenting).
  \item \textsuperscript{68} Id.
\end{itemize}
validity of the reasons HUD gave for not selecting Mr. Tolbert.

At trial, HUD offered three reasons why it did not select Mr. Tolbert over the successful candidates, who were all younger and who were given five offers for the EOS positions: HUD was seeking candidates who had more recent investigative experience than Mr. Tolbert, the successful candidates had interviewed exceptionally well, and that "Tolbert's personality made him a less desirable candidate for the job." Judge DuBois found none of these reasons credible.

The selection process for filling these vacancies involved a panel which interviewed the applicants on the best qualified list. HUD's personnel officer in the Philadelphia Regional Office was Cecilia Green, a Personnel Management Specialist. She posted the job announcements, compiled the applications and lists of candidates, and referred them to the selecting official, Raymond Solecki, Regional Director of Fair Housing and Equal Opportunity. Mr. Solecki, however, testified at trial that he "allowed the individuals who would be the immediate supervisors of the new employees to interview the candidates for the positions and delegated most of the responsibility for selecting the new employees to them."

Thus, a panel of three HUD employees selected the new employees. All of the candidates were interviewed by the panel, which on any given interview included two or more of the following individuals: Henry Smith, who "participated in most if not all of the interviews"; Laura Pelzer, who participated in "most of the interviews"; Cynthia Jetter, who participated in some of the interviews; and John Dolan, who participated in an unknown number of interviews. Testimony at trial indicated that of the four, Smith and Pelzer had the most responsibility in determining who would be selected.

At trial, the panel members testified that HUD was "seeking candidates who had more recent investigative experience than Tolbert, who had not worked as an EOS for six years at the time

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69. Tolbert, 1993 WL 54402, at *3.
70. Id.
71. Id. at *3.
72. Id. at *6.
73. Id. at *4.
74. Tolbert, 1993 WL 544402 at *2.
75. Id.
76. Id. at *2.
77. Id.
he applied for the job." Further testimony at trial, however, showed that this asserted "legitimate, nondiscriminatory" reason for not selecting Lee Tolbert was a sham. At the conclusion of the evidence, Judge DuBois found that "the testimony regarding HUD's preference for candidates with recent investigative experience was contradicted by considerable evidence." Further testimony at trial, however, showed that this asserted "legitimate, nondiscriminatory" reason for not selecting Lee Tolbert was a sham. At the conclusion of the evidence, Judge DuBois found that "the testimony regarding HUD's preference for candidates with recent investigative experience was contradicted by considerable evidence." Further testimony at trial, however, showed that this asserted "legitimate, nondiscriminatory" reason for not selecting Lee Tolbert was a sham. At the conclusion of the evidence, Judge DuBois found that "the testimony regarding HUD's preference for candidates with recent investigative experience was contradicted by considerable evidence."

For example, Elaina Spina, who, like Tolbert, also had not performed investigative work for a number of years, nevertheless was offered an EOS position. In addition, Ms. Spina had a disadvantage in the race for an EOS position with Mr. Tolbert in that she had never been an EOS at HUD, while Mr. Tolbert had previously been a GS-12 at HUD performing EOS investigations under federal housing regulations. One of the HUD interviewers, Henry Smith, was so unimpressed with Ms. Spina's application that he testified that Ms. Spina lacked the basic skills necessary for the job.

In this regard, at trial, Mr. Smith was asked questions on cross-examination about Ms. Spina's qualifications:

Q: All right. And did you determine that she wasn't qualified for the job?
A: Yes. I did.

A: By not being qualified, I meant that she did not have all the skills that were necessary to perform the job.

Q: What skills was she lacking?
A: I believe she was lacking the skills of communication.
Q: And when you say that she was lacking the skills of communication, what do you mean by that?
A: The ability ... to communicate from one person to another. I was thinking mostly about interviewing — communication during interviewing prospective complainants and respondents.

A: ... She comes on so strongly that I didn't feel as though she had the ability to — to actually be able to communicate with individuals.

78. Id. at *3.
79. Id. at *1.
80. Id. at *3.
81. Id. at *4.
Q: In terms of not having the skills, did you think she lacked investigative skills?
A: I believe so.
Q: On what basis did you think she lacked investigative skills?
A: Just by talking with her during the interview.82

Incredibly, even though Ms. Spina was so poorly thought of as a candidate for an EOS position, and despite Ms. Spina not having recent investigative experience, and despite Ms. Spina’s lack of prior experience as an EOS at HUD, the agency offered her a position over Mr. Tolbert. Clearly, the agency’s argument that it wanted people with “recent” investigative experience falls on its face, as the agency offered a position to Ms. Spina who had no recent investigative experience, and in so doing, they offered the position to someone for whom the agency also had little regard.83

HUD’s proffered rationale that it wanted candidates with recent investigative experience is further contradicted by its selection of Paul Mimless. In regard to his selection, Paul Mimless testified that he was hired “with the understanding that he would not be doing investigative work. . . .”84 Mimless was, in fact, assigned investigative work during his HUD employment. As a result of being assigned to conduct investigations, he resigned from HUD.85

In addition, Judge DuBois noted during the trial that the evidence showed that Paul Mimless and Wayman Rucker “required, and were given, training to familiarize them with housing discrimination law and investigative practices.”86 Unlike Mr. Tolbert, neither Mr. Mimless nor Mr. Rucker had had any previous experience with housing discrimination laws and investigative practices of such laws. Mr. Mimless and Mr. Rucker, therefore, required a start-up time that Mr. Tolbert would not have required. The agency, however, proffered that it wanted people who could go out into the field immediately without any start-up time.87 Ms. Pelzer testified on

83. Id. No one who testified articulated that Ms. Spina had impressed them.
84. Id.
85. Id.
86. Id. At trial, Mr. Rucker testified that immediately after being hired at HUD, the agency sent him and Al Grier for a week-long orientation program in Washington, D.C. to learn how to investigate Title VIII fair housing cases. See Trial Transcript, Tolbert v. Cisneros, (No. 92-3318) (E.D. Pa., Dec. 29, 1993) at 2-8 and 2-9. Mr. Tolbert, however, was already knowledgeable about Title VIII investigative work from his previous investigations of such cases for HUD as a GS-12 EOS.
87. See testimony of Laura Pelzer, one of the selection panel members. Trial Transcript,
behalf of the agency that, "We needed people to go immediately, because of the large case load. We needed people . . . who . . . would not require a lot of training and could come in, such as myself and be hired one day and go in the field the next day."88 Mr. Tolbert fit that description of HUD's "need"; Mr. Mimless and Mr. Rucker did not.

For the reasons set out above — the hiring of Spina who had no recent investigative experience, the hiring of Mimless for a non-investigative position, and the immediate need to provide training to Rucker and Mimless after they were hired — Judge DuBois determined that HUD's argument that Mr. Tolbert was not hired because he lacked recent investigative experience lacked credibility.

A second "legitimate, nondiscriminatory" reason asserted by HUD for failing to select Mr. Tolbert is that those selected had outstanding interviews. Again, Judge DuBois found this rationale not credible. For example, Judge DuBois noted that although Ms. Pelzer testified at trial that Mr. Mimless' interview was "outstanding," this testimony "contradicted her deposition testimony, in which she stated that she did not recall anything about the interview with Mimless."89 Judge DuBois also noted that although Mr. Smith testified at trial that he was "impressed by the interviews with Mimless and Hollis," this testimony "contradicted his deposition testimony in which he stated that none of the interviewees made much of an impression on him."90

A third "legitimate, nondiscriminatory" reason offered by HUD at trial for not selecting Mr. Tolbert was Mr. Smith's testimony that "his association with Tolbert prior to Tolbert's application for an EOS position at HUD" led him to "believe that Tolbert's personality made him a less desirable candidate for the job."91 Judge DuBois found that this testimony was "partially contradicted" by Mr. Smith's deposition testimony in which, in response to a question asking why Mr. Tolbert was not selected for the EOS position, he stated "that Tolbert was not hired because he had been away from


88. See Trial Transcript, Tolbert v. Cisneros, (No. 92-3318) (E.D. Pa., Dec. 29, 1993) at 1-247 and 1-248 wherein Ms. Pelzer discusses this issue in her deposition testimony.

89. Tolbert, 1993 WL 544402, at *5. See Trial Transcript, Tolbert v. Cisneros, (No. 92-3318) (E.D. Pa., Dec. 29, 1993) at 1-237 and 1-238, in which Ms. Pelzer acknowledges that at her deposition she had testified that she could not recall anything about her interview with Mr. Mimless.

90. Tolbert, 1993 WL 544402, at *3.

91. Id.
investigative work for a period of time. In answering that deposition question, Smith made no mention of any personality problems regarding Tolbert." Nor did any of the other HUD personnel who testified at trial mention that Mr. Tolbert had had any personality problems when he had previously worked at HUD — neither Mr. Solecki, Ms. Pelzer, Ms. Jetter, nor Mr. Dolan.

92. _Id._ Specifically, the following question and answer exchange took place during Mr. Smith's deposition between Mr. Smith and Tolbert's counsel:

Q: Do you have any idea why Mr. Tolbert was not selected for one of the EOS positions?
A: Yes, we were looking for someone that I stated before, still had — still had — that was working in the field of discrimination and someone that had a knowledge — current knowledge of the investigation of discrimination techniques.

Deposition of Henry Smith, Tolbert v. Cisneros, (No. 92-3318) (E.D. Pa., Dec. 29, 1993) at 47, discussed with Mr. Smith in Trial Transcript, Tolbert v. Cisneros, (No. 92-3318) (E.D. Pa., Dec. 29, 1993) at 3-21 and 3-22 (emphasis added). At other parts of his deposition, Mr. Smith had discussed why Tolbert was not selected, never once intimating that "personality" was the reason.

93. Trial Transcript, Tolbert v. Cisneros, (No. 92-3318) (E.D. Pa., Dec. 29, 1993), at 2-120, 2-120, 2-133. Mr. Solecki testified that he did not remember having any discussions with the panel members about any applicants: "I do not recall any of the discussion I had with the panel. I remember agreeing with their recommendations . . ." _Id._ at 2-133.

94. _Id._ at 2-160. At trial, Mr. Tolbert's counsel asked Ms. Jetter, a member of the selecting panel, the following questions:

Q: Was there ever, at any time, any discussion that you were a party to, as to why Mr. Tolbert was not selected for one of the EOS positions?
A: No.

Q: And you've never heard any discussions at all about why he was not selected?
A: No.

Q: And you've never heard anybody discussing Mr. Tolbert's competence or work ethic?
A: No.

_Id._

95. _Id._ at 1-239; 2-67. At trial, Mr. Tolbert's counsel asked Ms. Pelzer the following questions:

Q: Have you ever heard anybody discuss Mr. Tolbert's competence or work ethic?
A: No.

Q: And previous to the selections for these three EOS positions being made in 1989, had you ever heard anything about Mr. Tolbert?
A: No.

_Id._ at 1-239. During her deposition (and elicited during her testimony), Ms. Pelzer acknowledged that she had never heard anything negative about Mr. Tolbert. Thus, she was asked, "Do you recall whether anything was said about Mr. Tolbert during that meeting with Mr. Solecki?" _Id._ at 2-67. (The reference is to a panel member meeting with Mr. Solecki for the purpose of discussing the candidates.) To this question, Ms. Pelzer responded: "Nothing, to my knowledge, was ever said negative about him." _Id._ Clearly, therefore, Ms. Pelzer had never heard as a reason for Tolbert's non-selection that his personality was inappropriate for an EOS investigator.

96. _Id._ at 2-7. Mr. Dolan did not testify at the trial, but by agreement of the parties, Tolbert introduced his deposition into the record. In that deposition, Mr. Dolan stated that he never had any discussions with other panel members about Mr. Tolbert. _See Trial Transcript,
made any reference to Mr. Tolbert's personality as a reason for not selecting him. Nor did Mr. Tolbert's demeanor at trial indicate any personality problems. At one point near the conclusion of the trial, Judge DuBois asked whether the case could be settled and whether HUD could offer Mr. Tolbert the next available EOS position; in so doing, he indicated that Mr. Tolbert certainly was qualified to perform the work and certainly seemed like a nice man. Also, during the time that Mr. Tolbert previously worked for HUD, he had been promoted to a GS-12 EOS position. This, it would seem, showed two things: that Mr. Tolbert was certainly competent to do complex HUD investigations and that he did not suffer any personality "problem" or "disorder," since if he had, he would not likely have been promoted.

In his opinion, Judge DuBois summarized the defendant's attempts to offer a legitimate, non-discriminatory reason for its decision to hire the other candidates rather than Tolbert and its attempts to rebut Mr. Tolbert's prima facie case. Thus, Judge Tolbert v. Cisneros at 2-7 (Oct. 20, 1993). When asked whether he had ever heard "any reason as to why he [Mr. Tolbert] wasn't selected for one of the Equal Opportunity Specialist positions," Mr. Dolan answered, "No." Id. Thus, Mr. Dolan had never heard as a reason for Tolbert's non-selection that his personality was inappropriate for an EOS investigator. The "personality" factor was a sham. Mr. Smith had not worked with Lee Tolbert since the early 1960's when they worked in the mail room together. See Trial Transcript, Tolbert v. Cisneros, (No. 92-3318) (E.D. Pa., Dec. 29, 1993) at 2-165, 2-168 and 2-169. In a contrived manner, in discussing Mr. Tolbert in the present as a 49-year old person, Mr. Smith, testified, "(H)e's... a very forward, outgoing young man." Id. at 2-165. (emphasis added.) Mr. Smith testified that he had had a "cordial" relationship with Mr. Tolbert when they worked together in the mail room. Id. at 3-4. He described Mr. Tolbert in the 1960's as "friendly." Id. at 3-5.

Moreover, in discussing Mr. Tolbert's interview for the EOS position in 1989, Mr. Smith had testified in his deposition that Mr. Tolbert was "pleasant," "articulate," and "bright." Id. at 3-20, 3-21. In his deposition, Mr. Smith had testified that the only reason that Mr. Tolbert was not offered one of the five EOS positions in 1989 was that he believed Mr. Tolbert had been out of the investigative field for a period of time and could not make the transition to investigator. However, this reason simply did not "sell," since the agency hired Elaina Spina, who had been out of investigative work most of her professional career, and hired Rucker and Mimless who needed immediate training before they could do any investigations. Mr. Tolbert, on the other hand, had for several years investigated violations of the Title VIII fair housing laws on the basis of race, color, national origin, and sex discrimination — the same provisions he would be investigating if HUD had hired him in 1989. See Trial Transcript, Tolbert v. Cisneros at 2-193 and 2-194. At trial, Smith shifted the emphasis to Mr. Tolbert's personality, since the proffered reason of the agency for failing to hire Tolbert — his lack of recent investigative experience — had been dismantled in depositions and in the early stages of the trial.

Mr. Tolbert had risen in the ranks as an EOS investigator, starting as a GS-9, promoted to GS-11, and later, promoted to a GS-12 position.
DuBois set out the defendant's articulated reasons why Tolbert was passed over for an EOS position: the more recent investigative experience of Hollis, Mimless, and Rucker; the impressive interviews of Hollis and Mimless; Smith's testimony regarding his assessment of Tolbert's personality. In analyzing HUD's proffered reasons, Judge DuBois succinctly stated, "The Court concludes that the defendant's proffered reasons were less than completely credible."

Despite rejecting HUD's proffered reasons for not selecting Lee Tolbert, Judge DuBois found against Mr. Tolbert, basing his decision on St. Mary's Honor Center, which held that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" but does not compel such a result. Although "permitted" under the rationale of St. Mary's Honor Center to find for Mr. Tolbert, Judge DuBois was not "compelled" to make such a finding and chose not to do so. Thus, Judge DuBois wrote that while the defendant's proffered reasons for passing over Lee Tolbert in favor of Hollis, Mimless, Rucker, and Spina were not completely credible, he stated that the "[c]ourt concludes nonetheless that plaintiff has failed to meet his ultimate burden of proving that age was the determinative factor in HUD's decision not to hire plaintiff."

In a discussion that Judge DuBois had with this writer at the conclusion of the trial, Judge DuBois indicated that he was troubled by the case, that it was a difficult case for him. He stated that there was some reason why HUD did not want to hire Mr. Tolbert, but that he did not know what that reason was. Certainly, his written opinion is evidence that HUD's proffered reasons did not persuade him.

The Tolbert court was faced with a prima facie case of age discrimination and reasons articulated by the defendant that were unpersuasive. In St. Mary's Honor Center, the dissent voiced its concern that in such a case, the five-member majority rule "permitted" the court to find no discrimination. Thus, the dissent

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100. Tolbert, 1993 WL 54402, at *7.
101. Id.
102. St. Mary's Honor Center, 509 U.S. at 511.
103. Tolbert, 1993 WL 54402, at *8.
104. Id. at *7.
105. This discussion took place at the conclusion of the trial after closing arguments.
107. St. Mary's Honor Center, 509 U.S. at 534 (Souter, J., dissenting).
voiced its concern that even if the defendant's reasons were not credible, the "factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove."^{108}

But in Tolbert, the record contained no other evidence for Judge DuBois to roam, searching for an explanation of why HUD failed to select Mr. Tolbert. In this sense, the Tolbert case presents even more of a nightmare result than the four dissenting justices in St. Mary's Honor Center had anticipated. Judge DuBois did not, for example, search the record and ever discern any glimpse of the reasons why HUD refused to hire Mr. Tolbert. Instead, the most that Judge DuBois could rely on in bolstering his decision to deny a verdict for Mr. Tolbert was his statement that the "HUD employees most responsible for handling the hiring process for the EOS positions all testified credibly that the age of the candidates was neither discussed nor considered as a factor in determining who to select, and the Court so finds."^{109}

With all due respect to Judge DuBois,^{110} those who discriminate seldom, if ever, come to court and say, "Yes, we did not hire the plaintiff because of his age." This is simply not how corporate America works. If anything, management stands behind management, and as a result, in most cases, there is no smoking gun which shows or proves discrimination.

For that reason, over twenty years ago, in McDonnell Douglas, the Supreme Court conceived the "prima facie test," so that when there was no direct, but only circumstantial evidence, the court could construct a "presumption" of discrimination in those instances where discrimination seemed most likely. After all, the defendants could rebut that presumption or inference merely by articulating and presenting evidence of a legitimate and reasonable basis for its decision. That certainly does not seem like a difficult burden, provided, of course, that the defendant does, in fact, have a legitimate reason. After all, it is the defendant who knows why it did or did not hire someone. The defendant is privy to the meetings and the discussions; the defendant makes and keeps the notes of candidate interviews, not the plaintiff.

Moreover, Judge DuBois' finding that the interviewers were

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108. *Id.* at 524 (Souter, J., dissenting).
110. Judge DuBois is a very fine, intelligent man. He is a gentleman, and it was a pleasure to appear in his court.
credible when they stated that they never talked about anyone's age seems strange in another sense. After all, Judge DuBois determined that the interviewers' reasons for failing to select Mr. Tolbert were not believable. It is odd, therefore, that finding these witnesses not believable on the guts of the defendant's case, he would find them credible on another aspect of the case, one on which no cross-examination would likely be effective, since the witnesses could just keep saying over and over, "No, we did not discuss age."

The bottom line is that, despite Lee Tolbert's having made out a prima facie case and despite the lack of credibility of the defendant's proffered reasons, Judge DuBois, in reliance on St. Mary's Honor Center, nevertheless, held that Lee Tolbert retained the burden of proving by a preponderance of the evidence that his age was the determinative factor in HUD's decision not to hire him: "The Court concludes that plaintiff has not met that burden."  

V. THE AFTERMATH OF ST. MARY'S HONOR CENTER AND THE NEED FOR LEGISLATION AND/OR JUDICIAL ACTIVISM.

The Tolbert case is an example of dissenting Justices Souter, White, Blackmun and Steven's concerns over the unfairness and unworkability of the rule fashioned by the five-member majority in St. Mary's Honor Center. Lee Tolbert made out a prima facie case of age discrimination; he successfully rebutted the "legitimate, nondiscriminatory reasons" the defendant offered; there was no other evidence in the record as to why Mr. Tolbert was not selected for one of the five EOS positions, and yet the court rendered a verdict for the defendant. Lee Tolbert could do no more in presenting his case. Whatever other real or imagined reasons HUD had for not selecting him for an EOS position are forever locked inside the minds of the agency's witnesses. In the end, although HUD's proffered reasons for not selecting Mr. Tolbert were rejected by the court, HUD nevertheless won because of the court's "gut" feel, not because of the evidentiary record before it.

Since the Supreme Court's 1993 decision in St. Mary's Honor Center, other federal courts, in addition to the Tolbert court, have struggled with the interpretation and workability of that decision. After St. Mary's Honor Center, courts have struggled with the appropriateness of granting summary judgment or a directed

111. Tolbert, 1993 WL 54402, at *8.
verdict for the defendant.\textsuperscript{112} if the plaintiff has rebutted the defendant's proffered legitimate, non-discriminatory reasons for its actions but has not produced any additional evidence to prove discrimination. After all, the \textit{St. Mary's Honor Center} Court has held that, at all times, the plaintiff retains the burden of proof.\textsuperscript{113}

The post-\textit{St. Mary's Honor Center} era has divided into two camps. Based on its interpretation of \textit{St. Mary's Honor Center}, the Third Circuit, as well as the Fourth, Sixth, Seventh, Ninth, and District of Columbia Circuits, have held that a plaintiff will survive summary judgment if he or she can produce sufficient evidence that the employer's proffered nondiscriminatory reasons for its employment action was not the true reason.\textsuperscript{114} The courts have characterized this approach as the "pretext-only" rule.

In \textit{Sheridan v. E.I. Dupont De Nemours and Co.},\textsuperscript{115} the Third Circuit, sitting en banc on November 14, 1996, adopted a pretext-only interpretation of the \textit{St. Mary's Honor Center v. Hicks} decision. In an 11-1 decision, the Third Circuit majority held that a plaintiff may survive summary judgment, or judgment as a matter of law, if the plaintiff produces "sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action."\textsuperscript{116} The court further stated, "There is no reason why the evidence that supported the prima facie case coupled with the jury's determination that the employer's proffered explanations are pretextual is not sufficient to support a verdict of discrimination."\textsuperscript{117}

In other words, after the \textit{St. Mary's Honor Center} decision the factfinder is "permitted," but not "required," to find for the plaintiff if he or she successfully rebuts the defendant's proffer of "a legitimate, nondiscriminatory reason" for its actions. Even though the plaintiff retains the burden of persuasion, nothing more is required of the plaintiff to survive a motion for summary judgment or a directed verdict other than to rebut the defendant's proffered reasons for its actions. Therefore, to survive a nonsuit, the plaintiff

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\textsuperscript{112.} See, \textit{e.g.}, Sheridan v. E.I. Dupont De Nemours and Co., 100 F. 3d 1061 (3d Cir. 1996); Rothmeier v. Investment Advisers, Inc, 85 F.3d 1328 (8th Cir.1996); Weisbrot v. Medical College of Wisc., 79 F.3d 677 (7th Cir. 1996); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994); Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993).

\textsuperscript{113.} 509 U.S. at 511.

\textsuperscript{114.} See, \textit{e.g.}, Sheridan v. E.I. Dupont De Nemours and Co., 100 F.3d 1061 (3d Cir. 1996), and cases discussed therein.

\textsuperscript{115.} \textit{Sheridan}, 100 F.3d at 1079.

\textsuperscript{116.} Id.

\textsuperscript{117.} Id. at 1069.
does not have to provide "additional evidence" beyond refutation of the defendant's articulated "legitimate, nondiscriminatory" reasons.

After all, "the initial presumption of discrimination" arises from plaintiff's prima facie case because one can "presume" that these acts, "if otherwise unexplained, are more likely than not based on . . . impermissible factors." In *Sheridan*, Chief Justice Sloviter, writing for the eleven member majority, crisply noted, "We routinely expect that a party give honest testimony in a court of law. . . . If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril."119

Although five other federal circuit courts have adopted a "pretext-only" interpretation of *St. Mary's Honor Center*, the First, Fifth, and Eleventh Circuits have adopted a different approach, tabbed the "pretext plus" rule.120 Thus, in *Rhodes v. Guiberson Oil Tools*,121 all seventeen justices of the Fifth Circuit, sitting en banc, adopted the "pretext plus" interpretation of *St. Mary's Honor Center*.122

In *Rhodes*, the Fifth Circuit explained its confusion with *St. Mary's Honor Center*, noting that according to the *St. Mary's Honor Center* decision, "evidence of pretext will permit the trier of fact to infer that the discrimination was intentional."123 "It is unclear, however," the Fifth Circuit explained, "whether the Court intended that in all such cases in which an inference of discrimination is permitted, a verdict of discrimination is necessarily supported by sufficient evidence."124 The Fifth Circuit held that the Supreme Court had not intended such a result.

125 The Fifth Circuit unanimously agreed that the plaintiff's refutation of the defendant's proffered reason(s) for its actions would "ordinarily," but "not always" support a verdict for the

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118. *Id.* (citing Fumco Const. Corp. v. Waters, 438 U.S. 567 (1978)).
119. *Id.*
120. See *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc); *Isenbergh v. Knight-Ridder Newspaper Sales*, Inc., 97 F.3d 463 (442-43 (11th Cir. 1996); *Woods v. Friction Mat'l's, Inc.*, 30 F.3d 255, 260-61 n.3 (1st Cir. 1994); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993), cert. denied, 511 U.S. 1018 (1994). These cases and the "pretext plus" adaptation are discussed in Justice Alito's dissenting opinion in *Sheridan*, 100 F.3d at 1082.
122. *Id.* at 996.
123. *Id.* at 993.
124. *Id.*
125. *Id.*
plaintiff — that in some instances the plaintiff must bring forward "additional evidence" of discrimination. The Fifth Circuit's interpretation is based on the "sufficiency of the evidence" rule: Although the plaintiff may rely on the same evidence to prove both pretext and discrimination, the evidence must still be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by discriminatory animus to sustain a jury verdict.

Thus, the Fifth Circuit reasoned, "[T]here may be cases in which the [prima facie case and proof of pretext] goes the plaintiff's way, but a judgment for the plaintiff would still be legally questionable." For example, "if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent."

The "pretext plus" rule is premised on the "bursting bubble" theory — if the defendant offers a legitimate, nondiscriminatory reason for the challenged employment action, "the presumption raised by the plaintiff's prima facie case disappears. Since the defendant has met his "burden of production," the presumption of discrimination disappears, and the case is then treated like any other case based on the sufficiency of the evidence. Thus, once the presumption of discrimination is destroyed, the proponent of the presumption has no guarantee that his or her case will go to the trier of fact. All the defendant must do to destroy the presumption is to "offer" to the court a legitimate, nondiscriminatory reason for its actions. Even if the plaintiff shows that these reasons are pretextual and/or specious, he has lost the "presumption" or "inference" that the actions against him were discriminatory. In other words, once the "presumption" or "inference" of discrimination is destroyed, it is not resurrected even if the employer's proffered reasons prove to be clearly specious. Thus, in "pretext-plus" jurisdictions, in some cases, proving the defendant's reasons were "pretextual" may not save a plaintiff from summary judgment or a directed verdict since the court may

126. Rhodes, 65 F.3d at 993.
127. Id. at 993-94.
128. Id. at 994.
129. Id.
130. Id. at 996.
131. Sheridan, 100 F.3d at 1062 (Alito, J., dissenting). Judge Alito argues that the proper interpretation of St. Mary's Honor Center is "pretext plus" in some cases, a position that eleven other Third Circuit judges refused to adopt. This doesn't, of course, make him necessarily wrong, merely outnumbered.
require "additional evidence" of discrimination beyond the proven pretext.

Each camp — "pretext only" and "pretext plus" — has found solace for its interpretation of *St. Mary's Honor Center v. Hicks* in the rationale provided by Justice Scalia, writing for the five-member majority. In adopting the "pretext only" interpretation of *St. Mary's Honor Center*, the Third Circuit in *Sheridan* noted the key passage from that decision. In that passage, Justice Scalia explained that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" and upon such rejection, "[n]o additional proof of discrimination is required." The Third Circuit in *Sheridan* held that adopting a "pretext-plus" rule is "inconsistent" with this statement in *St. Mary's Honor Center*.

Proponents of the "pretext-plus" rule, however, have also found solace in the Supreme Court's rationale in *St. Mary's Honor Center*. In *St. Mary's Honor Center*, Justice Scalia noted that while the "presumption" of discrimination established through a prima facie case shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." For the proponents, critical in this analysis is what happens when the defendant satisfies its production burden. In *St. Mary's Honor Center*, Justice Scalia explained that if the defendant meets its production burden, "the McDonnell Douglas framework — with its presumptions and burdens — is no longer relevant" and should not be "resurrect[ed]." "The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." The presumption having dropped out of the picture, proponents of "pretext plus" argue the court must then determine whether there is sufficient evidence to support a verdict for the plaintiff. The case

132. Id.
133. *St. Mary's Honor Center*, 509 U.S. 510 (emphasis added.)
134. *Sheridan*, 100 F.3d at 1067 (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993)).
136. *Sheridan*, 100 F.3d at 1062 (J. Alito, dissenting). Judge Alito advocated a "pretext plus" interpretation of *St. Mary's Honor Center*.
proceeds, in other words, "as though there had never been a presumption at all." Proponents of “pretext plus” have dismantled what appears to be an unequivocal passage in *St. Mary's Honor Center*: that upon rejection of the defendants’ proffered reasons for its action, “no additional proof of discrimination is required.”

Justice Alioto, dissenting in the Third Circuit’s decision in *Sheridan* argued that this “passage from [St. Mary's Honor Center v. Hicks] may be interpreted to mean that such additional proof (i.e., the “plus” in “pretext plus”) is not always required.” In other words, the passage from *St. Mary's Honor Center* simply means that “there is no blanket legal requirement of such proof” but that each case must be judged on its own merits and in some cases additional proof of discrimination, beyond showing pretext, would be required.

As to which of these two approaches — “pretext only” and “pretext plus” — is the better interpretation of *St. Mary's Honor Center*, it seems difficult to avoid the rather clear language in that case. Upon proof of pretext, *St. Mary's Honor Center* provides that “no additional proof of discrimination is required.” In addition, if the plaintiff has successfully refuted the defendants’ explanation of legitimate, non-discriminatory reasons for its actions, what the court is left with is the “inference” or “presumption” of discrimination. After all, if the plaintiff makes out a prima facie case, this means that the plaintiff has produced sufficient evidence to show that more probably than not he or she was discriminated against, absent a reasonable explanation by the defendant as to its motivation. Moreover, as the majority in *Sheridan* argued, adoption of the “pretext plus” and “some evidence” approach is unworkable. The Third Circuit in *Sheridan* argued that adoption of the “pretext plus” and “some evidence” language that other circuit courts have adopted would “bring the courts of this circuit back to the confusion and uncertainty created” by such an approach “that prompted this court to consider this case en banc.”

Although the Third Circuit created uniformity within its jurisdiction with its *en banc* opinion in *Sheridan*, the Eighth Circuit

139. *Sheridan*, 100 F.3d at 1079 (Alito, J., dissenting).
140. *St. Mary's Honor Center*, 509 U.S. at 511.
141. *Sheridan*, 100 F.3d at 1079 (Alito, J., dissenting).
142. *Id.*
143. *Id.*
144. *St. Mary's Honor Center*, 509 U.S. at 512.
145. *Sheridan*, 100 F.3d at 1070.
has waffled in three-member panel decisions between different interpretations of the *St. Mary's Honor Center* decision. In June 1996, in its most recent pronouncement, a three-member panel in *Rothmeier v. Investment Advisors, Inc.*[^146] rejected the “pretext only” interpretation of *St. Mary's Honor Center*. In that case, Rothmeier brought an action against his former employer, alleging he was discharged because of his age in violation of the ADEA.[^147] The district court granted summary judgment in favor of the employer even though the employee had offered evidence that the defendant’s proffered reasons for his termination were pretextual, and on appeal, the Eighth Circuit panel affirmed.[^148] In affirming, the panel held that “in some cases” the overall strength of the prima facie case coupled with evidence of pretext will be sufficient to withstand a motion for summary judgment, but “in other cases the prima facie case in tandem with evidence of pretext will not be sufficient to permit a finding of intentional discrimination.”[^149] In the latter cases, “additional proof of discrimination is required.”[^150] Thus, this particular Eighth Circuit panel followed the approach taken by such other circuit courts as the First, Fifth and Seventh Circuits.

The *Rothmeier* panel, however, in muted understatement, also noted that, “Post-*St. Mary's Honor Center*, our Circuit’s pronouncements on this issue have not been models of apparent consistency.”[^151] Thus, in *Krenik v. County of Le Sueur*,[^152] a three-member panel held that in order for the plaintiff to survive a motion for summary judgment after *St. Mary's Honor Center*, “a plaintiff must demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext and that the real reason for its action was intentional discrimination.”[^153] The *Krenik* panel’s language is

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[^146]: Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996).
[^147]: Id. at 1330.
[^148]: Id. at 1333-39.
[^149]: Id. at 1334-35. The Eighth Circuit panel stated that “evidence discrediting an employer’s nondiscriminatory explanation is not necessarily sufficient (i.e., it is sufficient in some cases but not all cases) because an age-discrimination plaintiff cannot prevail unless the factfinder . . . believe(s) the plaintiff’s explanation of intentional discrimination.” Id. at 1336 (citations omitted).
[^150]: Id. at 1335.
[^151]: Rothmeier, 85 F.3d at 1336.
[^152]: 47 F.3d 953 (8th Cir. 1995).
[^153]: Krenik, 47 F.3d at 958. See also an earlier panel decision, *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796 (8th Cir. 1994), where the panel similarly held that an employee must do more than simply discredit an employer's nondiscriminatory explanation; he must also present evidence capable of proving that the real reason for his termination
unequivocal and that panel apparently adopted a post-*St. Mary's Honor Center* rule that in all cases "additional evidence of discrimination" beyond showing pretext was required.154 However, two other Eighth Circuit panels155 interpreting *St. Mary's Honor Center* rejected any form of the "pretext plus" rule and, instead, adopted a "pretext only" approach. In *Kobrin v. University of Minn.*,156 for example, a panel concluded that a plaintiff "may overcome summary judgment by producing evidence that, if believed, would allow "a reasonable jury to reject the defendant's proffered reasons for its actions."157

The Eighth Circuit panels, therefore, have offered three different interpretations of *St. Mary's Honor Center*. To survive a motion for summary judgment or a directed verdict, the plaintiff must show (1) "pretext only," (2) "pretext plus additional evidence sometimes," (3) "pretext plus additional evidence in every case." Despite Rothmeier's assertion that these three differing interpretations of *St. Mary's Honor Center* can all be reconciled,158 the fact is that the Eighth Circuit, as well as other circuits, have struggled with the implications of *St. Mary's Honor Center* v. Hicks. The Eighth Circuit cases show, rather graphically, the confusion generated by the *St. Mary's Honor Center* decision.

The tag-team effect of the *St. Mary's Honor Center* decision, coupled with the pretext-plus interpretation of that decision by some circuits, have whittled away at effective civil rights protections. Even bringing suit appears more costly for plaintiffs as the lower courts have struggled with interpreting the *St. Mary's Honor Center* decision.159

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154. This is a pure form of the "pretext plus" rule and is not the "pretext plus in some cases" rule that the First, Fifth, and Seventh Circuits have adopted.


156. 34 F.3d 698 (8th Cir. 1994).

157. *Kobrin*, 34 F.3d at 703.

158. 85 F.3d at 1336. The Eighth Circuit has not, as yet, heard a discrimination case en banc to adopt a singular approach.

159. The confusion and rising costs associated with civil rights litigation after *St. Mary's Honor Center* is exemplified by the Fifth Circuit's decision in *Rhodes v. Gulberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996). In *Rhodes*, a discharged 56-year-old salesman brought an action against his former employer under the ADEA. *Id.* at 992. Following a jury trial in which the jury found that Rhodes had been discharged because of his age, the district court dismissed the action as time-barred because of Rhodes' failure to file a timely charge with the EEOC. *Id.* Rhodes appealed, and the court of appeals reversed and remanded for a determination of damages. *Id.* On remand, the district court entered judgment for Rhodes. *Id.* The former employer appealed, contending the judgment was not supported by sufficient
As the dissent in *St. Mary's Honor Center* argued, the *St. Mary's Honor Center* decision eroded over twenty years of settled civil rights enforcement. Unfortunately, after the *St. Mary's Honor Center* decision, those courts that adopted the pretext plus rule have further watered down civil rights law, making it increasingly difficult to prove a discrimination case. Seldom is there a "smoking gun" in discrimination cases. For that reason, in *McDonnell Douglas*, the Supreme Court set out the circumstances in which the plaintiff could establish, through circumstantial evidence, a "presumption" or "inference" of discrimination. In such instances, in the absence of a reasonable and legitimate explanation by the employer, the Supreme Court held that it was more probable than not that the employer's decision was based on an illegitimate, discriminatory motive.

The *St. Mary's Honor Center* decision and its progeny of "pretext plus" decisions have stepped backward in effective civil rights enforcement. In a "pretext plus" jurisdiction, a plaintiff can prove that the reasons the defendant proffered for its actions were pretextual, and yet the plaintiff still may be non-suited. With such a doctrine, the cards are stacked against the plaintiff, who simply does not have, and can never have, access to all the information on his or her case in the defendant's possession.

What Tolbert and other cases show is that after the Supreme Court's *St. Mary's Honor Center* decision, even in jurisdictions adopting a "pretext only" interpretation of *St. Mary's Honor Center*, civil rights enforcement will be left to the vagaries and idiosyncrasies of individual justices and juries. One can, of course, argue that decisions are always the result of the idiosyncrasies of individual judges and juries, but *St. Mary's Honor Center* creates even less stability in the law than before. *St. Mary's Honor Center* leaves the door wide open to such idiosyncrasies when the Court holds that if a plaintiff rebuts the defendant's proffered reasons for
its actions, the court can find discrimination if it so desires, or it can find there is no discrimination if it so desires.

The decision is left to the whim of the individual judge and is not based on an evidentiary record, for indeed, a court's discretion in this arena seems unreviewable. For example, the majority in *St. Mary's Honor Center* held that the "factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. . . . Thus, rejection of the defendants proffered reasons, will permit the trier of fact to infer discrimination" but does not compel judgment for the plaintiff.161

It would appear that a judge's or jury's discretion here is absolute. A factfinder's rejection of the defendant's reasons for its action no longer compels the fact-finder to render a verdict for the plaintiff. The factfinder can do as it pleases. The problem of effective civil rights enforcement is exacerbated in those jurisdictions that have held that a plaintiff must do more than show that the defendant's proffered reasons for its actions were pretextual, requiring that the plaintiff provide "additional evidence" of discrimination.

As the dissent in *St. Mary's Honor Center* points out, whether intentional discrimination exists is an "elusive factual question."162 After all, there "will seldom be 'eyewitness' testimony as to the employer's mental processes."163 Unfortunately, the twist that the *St. Mary's Honor Center* majority placed on this area of the law does not sharpen the inquiry as to whether discrimination occurred. Instead, it significantly muddies the picture, and a plaintiff should consider long and hard as to whether he or she wants to expend the high costs and time required for a trial, even if the plaintiff has a prima facie case and can destroy the purported reasons the employer may give for its actions. As a result, *St. Mary's Honor Center* likely will have the effect of good civil rights cases never being filed.

In addition, the civil rights enforcement problems unfurled by the *St. Mary's Honor Center* decision are compounded by proposed Republican legislation rooted in the "Contract with America." After the Republicans took control of both congressional houses in 1994, they proposed legislation providing that the loser pay the winning

161. *Id.* at 526 (Souter, J., dissenting).
162. *Id.* at 525 (Souter, J., dissenting).
163. *Id.* at 526 (Souter, J., dissenting).
party's attorney's fees in selected areas, including federal discrimination suits. Thus, if a plaintiff were to lose an age discrimination case under the ADEA, the plaintiff would have to pay not only his or her own attorney's fees, but would also be compelled to pay the attorney's fees of the defendant. Even if the plaintiff won at the trial level, if the case were reversed on appeal and the defendant subsequently vindicated, the plaintiff would still pick up the tab for the defendant's fees. Although this bill has not as yet passed, a "loser pays bill" sounds yet another alarm in effective civil rights enforcement.

Coupled with the St. Mary's Honor Center decision, if a loser-pays provision for civil rights cases eventually passes Congress and becomes law, the effect on civil rights enforcement would be devastating. For example, one thing is clear after St. Mary's Honor Center v. Hicks — even if a plaintiff can establish a "presumption" of discrimination and can also shoot holes in the "legitimate, nondiscriminatory reasons" articulated by the defendant for its actions, this does not mean the court will render a plaintiff's verdict. Even if the court determines that the "legitimate, non-discriminatory" reasons the defendant has proffered are not credible, and even if the record contains no other explanation for said actions, and the defendant refuses to come forward with any additional explanation, the court can simply render a verdict for the defendant — as the court did in Tolbert v. Cisneros. And yet, there likely is no other evidence the plaintiff could present in such a case. Other than to show that the "legitimate, nondiscriminatory reasons" the defendant offers to the court are a sham, the plaintiff has a very limited ability to get inside the mind of the defendant.

164. The proposed legislation would require the party who loses the litigation to pay the winner's attorney's fees in four types of cases: automobile accident, products liability, medical malpractice, and civil rights.

165. The "loser pays" bill was proposed in January 1995. Although it has not passed either house of Congress, a Republican-controlled Congress makes it more likely that, at some point in time, a "loser pays" provision will pass, and civil rights litigation appears to be one of the targeted areas. With a "loser pays" provision, I do not think any of the "civil rights" clients I have represented in the past twelve years would have risked litigation under those circumstances. A "loser pays" provision in civil rights cases would have the effect of completely shutting down civil rights litigation, no matter how meritorious the case. Civil rights litigants are not normally the deep pockets, and a "loser pays" provision would encourage large corporations and businesses to "run the tab" and "burn out" civil rights litigants. I have practiced civil rights law in the private sector since 1984, and during that time, there have certainly been times when I believed the defendant was attempting to run up the cost of litigation to a point where the plaintiff could not continue, as the defendant filed motion after motion after motion, many of which were meritless.
when the defendant won't say any more. In such a case, the defendant holds the key to further evidence, not the plaintiff. Under such circumstances, it is "unfair and utterly impractical to saddle the victims of discrimination with the burden of... eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."166

The St. Mary's Honor Center decision and its progeny have created uncertainty, confusion, and have been detrimental to effective civil rights enforcement. As the majority in St. Mary's Honor Center notes, however, "Congress remains free to alter what we have done."167

Congress should accept this invitation by the St. Mary's Honor Center's five-member majority and dismantle the St. Mary's Honor Center v. Hicks decision by passing legislation that adopts the McDonnell Douglas/Burdine approach to civil rights cases. Under that approach, once a plaintiff has made out a prima facie case of discrimination, the burden shifts to the employer to articulate, through the introduction of admissible evidence, one or more legitimate, nondiscriminatory reasons for its actions.168 If the employer meets this burden of production, the plaintiff must prove by a preponderance of the evidence that the proffered reasons are pretextual.169 Plaintiff can meet this burden in two ways: 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.170 If the plaintiff fails to show pretext, the employer is entitled to judgment as a matter of law.171 If, on the other hand, the plaintiff carries his burden of showing "pretext," the court must order a prompt and appropriate remedy for the plaintiff.172

Congress should enact the McDonnell Douglas/Burdine approach into law and dismantle St. Mary's Honor Center and its progeny. In St. Mary's Honor Center, a 5-4 majority abandoned settled law that had provided a clear structure for litigating civil rights cases. In its place, the Court adopted a judicial scheme that, as the Tolbert decision shows, is "unfair to plaintiffs, unworkable in practice, and

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166. St. Mary's Honor Center, 509 U.S. at 529 (Souter, J., dissenting).
167. Id. at 541 (Souter, J., dissenting).
169. Burdine, 450 U.S. at 256.
170. Id.
172. Id.
inexplicable in forgiving employers who present false evidence in court.” In Tolbert, for example, despite Judge DuBois’ acknowledgment that HUD’s proffered reasons were pretextual, and despite no other evidence in the record that would otherwise explain HUD’s actions, Judge DuBois entered judgment against Lee Tolbert. In Tolbert, the defendant’s employees presented false evidence and offered no legitimate reason for its failure to hire Mr. Tolbert. Nevertheless, with a waive of his hand, Judge DuBois swept it all aside.

The suggestion that Congress rewrite civil rights law to achieve more effective enforcement is not new. After the Supreme Court went stone-cold on civil rights enforcement in the late 1980’s, Congress passed the Civil Rights Act of 1991. Congress explained that a primary purpose in passing the 1991 Civil Rights Act was “to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions.” As the House Report sets out, the 1991 Civil Rights Act overruled key aspects of the Supreme Court’s decisions in no less than four cases decided in 1989. Thus, when the Supreme Court has strayed too far outside the mainstream, Congress has sometimes responded. In this instance, Congress needs to dismantle St. Mary’s Honor Center v. Hicks.

If Congress does not act, however, the federal courts must be the centurion for enforcing the civil rights laws. Given the discretionary language found in St. Mary’s Honor Center, such a task seems possible. It will merely entail reasoning that when a plaintiff has established a prima facie case and a “presumption” of discrimination, and the factfinder rejects the defendant’s proffered reasons as being unworthy of belief, that the court, although not “mandated” to do so, will, nevertheless, find that the plaintiff has proven his or her case of discrimination. After all, as the majority in St. Mary’s Honor Center stated, “rejection of the defendant’s proffered reasons will permit the trier of fact to infer the ultimate

173. St. Mary’s Honor Center, 509 U.S. at 533 (Souter, J., dissenting).
175. Id. See the “Summary and Purpose” section of H. Rep. No. 120-40, 102d Cong. (1st Sess. 1991).
177. See Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Martin v. Wilks, 490 U.S. 755 (1989). For a discussion of how these cases, or key parts of these cases, were overturned, see the analysis in H. Rep. No. 120-40, 102d Cong. (1st Sess. 1991).
fact of intentional discrimination. . . .”178 If the Supreme Court really means what I believe this language clearly says, then the factfinder’s verdict for the plaintiff in such cases would be unreviewable.

178.  *St. Mary's Honor Center*, 509 U.S. at 512.