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Iadimarco v. Runyon and Reverse Discrimination: Gaining Majority Support for Majority Plaintiffs

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IADIMARCO v. RUNYON AND REVERSE DISCRIMINATION: GAINING MAJORITY SUPPORT FOR MAJORITY PLAINTIFFS

I. INTRODUCTION

On September 8, 1999, in a matter of first impression, the Third Circuit Court of Appeals in *Iadimarco v. Runyon*[1] resolved an intra-circuit dispute regarding what standard of proof is necessary for non-minorities to prove that they have been the victim of discrimination in the workplace based upon a protected trait.[2] By

[1]190 F.3d 151 (3rd Cir. 1999).

[2]In *Iadimarco*, a white male postal worker filed an employment discrimination claim based upon race after his African American supervisor promoted a less qualified minority to a position that Iadimarco had been under serious consideration for. 190 F.3d at 154. At the time of the employment decision, Iadimarco was the only candidate who received a "superior" rating in all job classifications. *Id.* at 164. The minority candidate was recruited after the deadline for applications had passed and was never evaluated for the position. *Id.* Although no formal affirmative action program was in place, a memo signed by an African American manager directed supervisors to give "very serious consideration" to the issue of diversity when making their employment decisions. *Id.* at 155.

overturning the decision of the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals joined a growing number of circuits that have rejected a long-standing method of evaluating evidence in employment discrimination disputes based upon the societal status of the plaintiff.[3]

Despite the significant number of discrimination claims brought by non-minorities, federal circuit courts remain entrenched in a dispute over the appropriate legal standard to apply when evaluating claims of "reverse discrimination."[4] The inconsistency among circuits is self-evident in the following commentaries:

> A plaintiff's minority status by itself is sufficient in light of historical practice in the workplace toward such socially disfavored groups, to give rise to an inference of discriminatory motivation. White males, who as a group historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate against them.[5]

> We have serious misgivings about the soundness of a test that imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts.[6]

The Supreme Court has advanced the split among the circuits by failing to directly address the issue of reverse discrimination.[7] Nine years after the enactment of Title VII, the Court established a framework designed to allocate the burdens of

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[3]*See infra* notes 115-117 and accompanying text discussing the inequality that results when courts determine the standard of proof in employment discrimination claims on the basis of minority or majority status as opposed to identifying whether a particular plaintiff is being treated less favorably than others based upon a trait that is protected under Title VII.

[4]A "traditional" employment discrimination claim involves bias against a person who is identified as being a member of a historically disfavored group, such as an African American or a woman. In contrast, a "reverse" employment discrimination claim involves bias against a person who is identified as being a member of a group favored historically in employment, such as a Caucasian or a male. Individuals in the former group are commonly referred to as "minority" plaintiffs while individuals in the latter group are referred to as "majority" plaintiffs. *See generally* Eric Matusewitch, *Courts Split on Standard for Evaluating 'Reverse' Discrimination Claims*, 13 No. 10 ANDREWS EMPLOYMENT LITIG. REP. 3 (March 23, 1999) (observing that in fiscal year 1995, reverse discrimination complaints constituted 14% of the approximately 30,000 race bias charges filed with the Equal Employment Opportunity Commission).

[5]Bishopp v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986).

[6]Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994).

[7]Several Supreme Court rulings concerning the validity of voluntary affirmative action programs offer a perspective into how the Court might address the standard of proof necessary for a prima facie showing of reverse racial discrimination. *See infra* notes 145-160 and accompanying text; *see generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

proof in traditional employment discrimination cases.[8] However, twenty-seven years later the Supreme Court remains unresponsive to the rising variance among circuit courts regarding the classification and treatment of plaintiffs in reverse employment discrimination cases.[9] As this country moves further away from the segregated employment systems whose discriminatory effects provided the impetus for Title VII, the lack of clearly defined protections for non-minority plaintiffs provides crucial support to those who oppose anti-discrimination laws.

This Note will argue that the Supreme Court should resolve the inconsistency within the federal system concerning the appropriate standard of proof in reverse discrimination disputes by adopting the reasoning set forth by the Third Circuit Court of Appeals. Section II will profile the history and purpose of Title VII, with emphasis on the "burden shifting" framework established by the Supreme Court to analyze claims of racial discrimination in the workplace. Section III will contrast the development of the "background circumstances" test applied by lower federal courts to discrimination claims brought by majority plaintiffs with the Supreme Court's recognition of equal treatment for all racial groups, minority and majority. Section IV will examine recent circuit court decisions that indicate a movement towards majority support for the rejection of different standards of proof in race discrimination cases based upon the majority or minority status of the plaintiff. Lastly, Section V will analyze how the Supreme Court should resolve the controversy surrounding the altered standard of proof in reverse discrimination cases.

II. TITLE VII AND RACIAL DISCRIMINATION IN THE WORKPLACE

A. History and Purpose of Title VII – Protective or Remedial?[10]

Title VII of the Civil Rights Act of 1964 prohibits public and private employers, labor organizations, and employment agencies from discriminating in employment on the basis of race, color, sex, religion, and national origin.[11] The primary reason Congress enacted Title VII was to provide a remedy for African Americans who suffered from racial discrimination in employment.[12] However, the purpose of Title

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[8]*See infra* notes 32-33 and accompanying text; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[9]*See* Notari v. Denver Water Dept., 971 F.2d 585, 588 (10th Cir. 1992) ("Although it is clear that Title VII's protection is not limited to those individuals who are members of historically or socially disfavored groups, [the] Supreme Court has not addressed whether the showing required to state a prima facie case must be altered in a 'reverse discrimination' case.").

[10]For purposes of this Note, the term "protective" refers to the purpose behind Title VII of ensuring that current employment decisions are made without reference to a prohibited criterion. The terms "remedial" and "remedial purpose" refer to employment actions specifically undertaken with a prohibited criterion in mind as a way of equalizing the workplace for protected groups and correcting the present effects of past discrimination.

[11]42 U.S.C. § 2000 (1994).

[12]Addressing the House of Representatives, Democrat Manny Celler proclaimed:

> Mr. Chairman, what we are considering this day in effect is a bill of particulars on a petition in the language of our Constitution for a redress of grievances. The grievances are real and genuine, the proof is in, the gathering of evidence has gone on

VII was to ensure that all employment decisions were made based on an individual's qualifications rather than a prohibited factor.[13] Though Congress may have intended Title VII to effectuate a national policy of equality in employment, by failing to provide a statutory definition of discrimination, federal courts were left to define the parameters of unlawful discrimination through societal perceptions of equality.[14]

Liberal construction of Title VII during the first decade of its enforcement led to the emergence of two views of equality: equal treatment and equal opportunity.[15] Under the equal treatment view of equality, similarly qualified individual employees should be treated the same by an employer regardless of the employee's race, color, religion, sex or national origin. Accordingly, equal treatment focuses on the fairness to the individual instead of fairness to the protected group of which the individual is a member.[16] In contrast, under the equal opportunity conception of equality, it is sometimes appropriate for an employer to consider the race or sex of an employee in order to remedy the past and continuing effects of race or sex discrimination in the workplace.[17] Equal opportunity therefore focuses on the fairness to the protected group to which an individual is a member and attempts to eradicate disproportionate representation of protected groups.[18]

Recognizing these competing views of equality, in 1977 the Supreme Court clarified two basic theories of discrimination under which employment

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> for over a century. The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. It bestows no preference on any one group; what it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people, not only to those who by accident of birth were born with white skins … Both parties joined hands.

CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE 104 (1985).

[13]"What the bill does…is simply make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States." 110 CONG. REC. 13088 (1964) (remarks of Senator Humphrey).

[14]A memorandum entered into the Congressional Record by Senators Case and Clark, co-sponsors of Title VII, states that: "[t]o discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin." 110 CONG. REC. 7213 (1964).

[15]*See* Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531, 538-42 (1981).

[16]*Id.* at 540.

[17]*Id.* at 541.

[18]Much of the equal opportunity interpretation of Title VII came from decisions of the Fourth and Fifth Circuit Court of Appeals, aptly characterized as the "Southern jurisprudence" of Title VII. In leading the attack on segregated employment systems, the Fourth and Fifth circuits impacted other circuit court judges who "seemed to defer informally to their counterparts in the south who had intimately experienced the relationship between racial prejudice and employment practices." Alfred A. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L. J. 313, 340-42 (1984).

discrimination disputes are currently classified – disparate treatment and disparate impact.[19] Under disparate treatment discrimination, the employer treats some people less favorably than others because of their race, color, sex, religion, or national origin.[20] Echoing the sentiments of the equal treatment view of equality, disparate treatment focuses on intentional discrimination in the workplace against an individual; therefore, the claimant must provide proof of an employer's discriminatory motivation.[21] Conversely, disparate impact discrimination focuses on employment practices that are facially neutral in their treatment of different groups but, in fact, fall more harshly on one group than another without a proper business justification.[22] Unlike disparate treatment claims, proof of discriminatory motivation is not required for a successful disparate impact claim.[23] Echoing the sentiments of the equal opportunity view of equality, the disparate impact theory holds an employer liable where specific employment practices unwillingly perpetuate discrimination and segregation of protected groups.[24] As a result, the focal point of

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[19]*See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[20]*Id.*

[21]The necessity of providing proof of discriminatory intent comes from judicial interpretation of the "because of" language contained in Section 703(a)(1) of Title VII:

Sec. 703 [42 U.S.C. Section 2000e-2]. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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.

Belton, *supra* note 15, at 540; *see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[22]*Teamsters*, 431 U.S. at 335 n.15.

[23]The non-necessity of providing proof of discriminatory intent comes from judicial interpretation of the "deprive[s] or tend[s] to deprive" language contained in Section 703(a)(2) of Title VII:

Sec. 703 [42 U.S.C. Section 2000e-2]. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(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.

Belton, *supra* note 15, at 541; *see also* Connecticut v. Teal, 457 U.S. 440, 448 (1982).

[24]Examples of employment practices which can operate to discriminate against protected groups include the use of: performance tests, probationary periods, informal or casual interviews, unscored application forms, training programs, and educational or work experience requirements.

disparate impact is upon the treatment of protected groups rather than treatment of an individual claimant.[25]

Arguably, the Supreme Court's analysis of the underlying theories of equality embodied in Title VII signifies that it perceives anti-discrimination legislation as protecting all individuals against employment decisions that are based on factors other than an individual's qualifications. However, the Court has also recognized a remedial purpose to Title VII that allows an employer to consider a prohibited factor in addition to job qualifications when making an employment decision. The Court envisioned this purpose through its interpretation of language contained in Section 703(j) of Title VII.[26] In *United Steelworkers of America v. Weber*, the Supreme Court stated that "the natural inference [in the language of Section 703(j)] is that Congress chose not to forbid all voluntary race-conscious affirmative action programs."[27] While the Court specifically refused to define in detail what constitutes permissible or impermissible affirmative action,[28] a number of factors were outlined. Under *Weber*, a race-conscious program is permissive if it: (1) aims at breaking down old patterns of racial segregation and hierarchy; (2) responds to a manifest racial imbalance; (3) does not unnecessarily trammel the interests of white employees; and (4) is a temporary measure.[29]

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[25]*See generally* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Reverse discrimination disputes are typically brought under the disparate treatment theory of employment discrimination. Accordingly, the remainder of this Note will focus on the traditional standard of proof necessary for a disparate treatment claim based upon race discrimination and the adjustments made to this standard in order to encompass reverse race discrimination claims.

[26]Section 703(j) [42 U.S.C. Section 2000e-2(j)] provides:

> Nothing contained in [Title VII] shall be interpreted to *require* any employer … to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer … in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. (emphasis added).

[27]443 U.S. 193, 206 (1979). In holding that affirmative action programs are not prohibited by Title VII, the Court noted that the main concern of Congress in enacting Title VII was to "relieve the plight of the Negro in our economy." *Id.* at 202 (quoting 110 CONG. REC. 6548 (statement of Senator Humphrey)). Accordingly, the Court refused to agree that a private employer could not take "effective steps to accomplish the goal that Congress designed Title VII to achieve." *Id.* at 204. Looking to the precise language of Section 703(j), the Court held that if Congress had sought to prohibit all race-conscious efforts by employers, it could have stated that: "nothing in Title VII shall be interpreted to *permit* voluntary affirmative efforts to correct racial imbalances." *Id.* at 206 (emphasis added).

[28]*Id.* at 208.

[29]*Weber*, 443 U.S. at 208. A lengthy dissent by Justice Rehnquist strongly disputed the majority's interpretation of Section 703(j). While acknowledging that "the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII," Justice Rehnquist argued that "this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons." *Id.* at 229.

Equipped with ambiguous guidelines, lower federal courts attempted to reconcile reverse discrimination disputes with the proclaimed legitimacy of race-conscious programs. The compromise achieved by some circuit courts was an adjustment to the traditional disparate treatment evidentiary framework in cases of race discrimination claims brought by non-minority plaintiffs.

B. Applying Title VII Protection – The McDonnell Douglas "Burden Shifting" Analysis

To establish a traditional case of intentional discrimination under the disparate treatment theory, plaintiffs may rely upon either direct evidence of discriminatory intent or circumstantial evidence from which a fact-finder can infer discriminatory intent.[30] Recognizing that employers rarely leave direct "smoking gun" evidence of discrimination, the Supreme Court established a framework for determining the existence of prohibited discrimination on the basis of indirect evidence.[31] Under this framework, an inference of discriminatory intent will arise in a racial discrimination dispute when a plaintiff establishes: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants

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(Rehnquist, J., dissenting). Predicting the quandary of reverse discrimination, Justice Rehnquist concluded his dissent by noting that "[b]y going not merely beyond, but directly against Title VII's language and legislative history, the Court has sown the wind … [l]ater courts will face the impossible task of reaping the whirlwind." *Id.* at 255 (Rehnquist, J., dissenting).

[30]United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983).

[31]*See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff in *McDonnell Douglas* was a black male who worked for the defendant – an aerospace and aircraft manufacturer – for eight years as a mechanic and laboratory technician until he was laid off during the course of a general work-force reduction. *Id.* at 794. A long-time activist in the civil rights movement, the plaintiff protested that his discharge, as well as the defendant's general hiring practice, was racially motivated. *Id.* As part of his protest, the plaintiff and other members of the Congress on Racial Equality ("CORE") illegally stalled their cars on the main roads leading to the defendant's plant specifically for the purpose of blocking access to it during the morning shift change. *Id.* After the police were called and the plaintiff refused to move his car voluntarily, his car was towed and he was arrested and fined for obstructing traffic. *Id.* at 795. Sometime after the "stall-in," a "lock-in" also took place at the plant whereby a chain and padlock was placed on the front door of one of defendant's buildings, preventing the employees from leaving. *McDonnell Douglas*, 411 U.S. at 795. Although the extent of the plaintiff's involvement in the "lock-in" was uncertain, he apparently knew beforehand of the plans. *Id.* Three weeks after this event, the defendant publicly advertised for qualified mechanics and plaintiff promptly applied for re-employment. *Id.* at 796. The defendant rejected the plaintiff's application, basing its decision on the plaintiff's participation in the "stall-in" and "lock-in." *Id.* Shortly thereafter, the plaintiff filed a formal complaint with the Equal Opportunity Employment Commission, alleging that the defendant's refusal to rehire him was based on his race and his involvement in the civil rights movement. *Id.* After the EEOC unsuccessfully attempted to resolve the dispute, the plaintiff initiated a civil action in federal court. *McDonnell Douglas*, 411 U.S. at 797. The Court of Appeals reversed the dismissal of the district court based upon a standard of proof different than that applied by the district court and the Supreme Court granted certiorari. *Id.* at 797-98.

from persons of his qualifications.[32] The relatively relaxed standard of indirect evidence required at the prima facie stage of litigation in a disparate treatment case is specifically designed to enable the plaintiff to proceed past the summary judgment stage, while providing the plaintiff with time in which to gather the necessary evidence of discriminatory intent.[33]

By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable presumption that the employer unlawfully discriminated against the plaintiff.[34] An employer can overcome this presumption by articulating a "legitimate, non-discriminatory reason" for its rejection of the plaintiff.[35] Following the employer's articulation of a legitimate, non-discriminatory reason for its actions, the plaintiff is afforded a fair opportunity to prove that the employer's reasons are merely a "pretext" for discrimination.[36] To prove that an employer's proffered reason is a pretext for racial discrimination, the plaintiff must do more than simply refute the employer's reason – the plaintiff must also present evidence of discriminatory intent.[37] This may be established through (1) direct evidence of racial animus (such as statements that the plaintiff is being fired because of his race or other statements revealing racial bias); (2) comparative evidence that persons of a different race than plaintiff but with similar employment records were retained while plaintiff was not; or, (3) statistical evidence showing that the employer has a pattern or practice of discrimination against persons of plaintiff's race.[38]

Applying the *McDonnell Douglas* burden-shifting paradigm to a "traditional" race discrimination case reveals that a claimant in such a case is not required to prove an employer's discriminatory animus at the prima facie stage of litigation. Rather, evidence that would suffice to establish intent to discriminate is reserved for

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[32]*Id.* at 802.

[33]*See* Transworld Airlines v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.").

[34]Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (a "prima facie case [under McDonnell Douglas] raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors".).

[35]*McDonnell Douglas*, 411 U.S. at 802. The employer's articulation of a legitimate, non-discriminatory reason is part of the "burden shifting" process outlined in *McDonnell Douglas* which begins with the plaintiff establishing a prima facie case of discrimination. The employer's evidentiary burden of articulating a legitimate, non-discriminatory reason is a burden of production, not one of persuasion – the only requirement being that evidence must be admissible. *Burdine*, 450 U.S. at 255.

[36]*McDonnell Douglas,* 411 U.S. at 804. The plaintiff's evidentiary burden of showing "pretext" is a burden of persuasion rather than one of production and the plaintiff carries the ultimate burden of persuading the fact-finder that he was the victim of discrimination. *Burdine*, 450 U.S. at 255-56.

[37]*Burdine*, 450 U.S. at 257.

[38]Bailey v. MCI Telecommunications, 1982 WL 31073, *2 (D. D.C.); *see also McDonnell Douglas*, 411 U.S. at 804; *Teamsters*, 431 U.S. at 334-36.

the "pretext" stage of litigation. Until the rise of reverse discrimination claims, lower federal courts assumed that the rationale behind the "presumption" of racial discrimination at the prima facie stage of litigation was based upon the claimant's status as a racial "minority."[39]

III. THE RISE OF REVERSE DISCRIMINATION

A. Modification of the McDonnell Douglas Paradigm – The Burden of Background Circumstances

Under a literal reading of the burden-shifting analysis of *McDonnell Douglas*, a white plaintiff could never avail himself of Title VII race protection, since he could never meet the first element of the prima facie case – namely, "that he belongs to a racial minority."[40] Accordingly, the solution for some federal courts was to modify the traditional *McDonnell Douglas* prima facie standard in cases of reverse racial discrimination.[41]

Courts that support a modified prima facie standard for majority plaintiffs do so based upon language contained in *McDonnell Douglas* which implied that the prima facie criteria for evaluating claims of discrimination should be flexibly applied to accommodate the facts of the particular case at hand.[42] Thus, while *McDonnell*

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[39]The United States Court of Appeals for the District of Columbia Circuit was the first federal court to articulate this rationale in the reverse discrimination context in the seminal case of *Parker v. The Baltimore and Ohio R.R. Co*., 652 F.2d 1012 (D.C. Cir. 1981). In stating that "membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated," the court held that "the light of common experience" would only permit a fact-finder to infer racial discrimination where the plaintiff belongs to a racial minority. *Id.* at 1017. The Supreme Court, however, has never articulated this rationale. The "light of common experience" language quoted in *Parker* was based upon that court's interpretation of a general statement found in *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978), wherein the Supreme Court stated that "[a] prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *See Parker*, 652 F.2d at 1017. However, the Supreme Court's language in *Furnco* was not meant to be limited to any particular racial group. Rather, the Court was emphasizing how, in a business setting, people do not act in a totally arbitrary manner and without any underlying reasons. *Furnco*, 438 U.S. at 577. Therefore, the Court held that when all legitimate reasons for rejecting an applicant have been eliminated, it is more likely than not that the employer, who is generally assumed to act only with some reason, based his decision on an impermissible consideration such as race. *Id.*

[40]*McDonnell Douglas*, 411 U.S. at 802.

[41]*See infra* notes 64-70 and accompanying text for a detailed analysis of this modified standard.

[42]*See McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."); *see also Furnco*, 438 U.S. at 577 ("The method suggested in *McDonnell Douglas* for pursuing this inquiry … was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

Douglas was a "refusal to hire" claim based on race discrimination, the second, third and fourth prongs of the prima facie standard have been adjusted to accommodate cases of discriminatory demotions,[43] discharges,[44] and refusals to promote.[45] Similarly, the first prong and second prongs have been adjusted to accommodate sexual discrimination claims, requiring that a female plaintiff demonstrate only that she is a qualified woman.[46]

These adjustments clearly reflect judicial recognition that alteration of the *McDonnell Douglas* prima facie case is necessary as a means of accommodating varying factual situations in the workplace. Less clear, however, is an acknowledgment that the *McDonnell Douglas* standard should be altered to allow for different treatment of racial groups merely because the particular plaintiff in *McDonnell Douglas* happened to be identified as a member of a racial minority. Nevertheless, many federal courts embraced the idea that the racial status of the plaintiff would determine the appropriate standard of proof.[47]

The District of Columbia Circuit has been the leading adherent for the imposition of a different burden of proof for plaintiffs who are white or male than for their non-white or female counterparts.[48] In *Parker v. The Baltimore and Ohio Railroad Company*[49] – the leading case on reverse discrimination – the court articulated a newly minted "background circumstances" requirement for cases of reverse discrimination.[50] This test requires the plaintiff to provide evidence at the prima facie stage of litigation that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority."[51]

In *Parker*, the plaintiff was a white male employed as a conductor and trainman on the Baltimore and Ohio Railroad.[52] From 1975 to 1978, he actively sought a transfer or a promotion to the position of locomotive fireman.[53] After minorities and women were repeatedly transferred to the position under a preferential "Seniority Modification Agreement,"[54] the plaintiff filed a race and gender discrimination

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[43]*See generally* Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992).

[44]*See generally* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[45]*See generally* Smith v. Horner, 839 F.2d 1530 (11th Cir. 1988).

[46]*Burdine*, 450 U.S. at 254 n.6.

[47]*See infra* notes 100-141 and accompanying text for a breakdown of the positions taken by each of the federal circuits.

[48]Douglas L. Williams, *Update to Developments in Race and Age Discrimination*, SC63 ALI-ABA 109, 111 (1998).

[49]652 F.2d 1012 (D.C. Cir. 1981).

[50]*Id.* at 1017.

[51]*Id.*

[52]*Id.* at 1013.

[53]*Id.*

[54]The "Seniority Modification Agreement" was an agreement between the defendant employer and unions representing its employees which permitted preferential transfers for eligible minorities and women without any corresponding loss of seniority. *Parker*, 652 F.2d at 1015.

lawsuit.[55] In support of his claims, the plaintiff relied upon an affidavit by his employer acknowledging that the company "has engaged in affirmative action … to overcome the under-utilization of minorities and women in various jobs."[56] At the time that Parker instituted his action, the Supreme Court had yet to issue a ruling on the legitimacy of affirmative action.[57] However, during discovery proceedings the Supreme Court issued its decision in *United Steelworkers of America v. Weber*[58] and the plaintiff was permitted to file an amended complaint challenging the validity of the defendant employer's alleged affirmative action plan.[59]

After finding that the district court improperly granted summary judgment to the defendant employer on the basis of conclusory statements regarding the existence of an affirmative action plan, the Court of Appeals proceeded to analyze the employer's hiring decision from the context of the *McDonnell Douglas* prima facie standard.[60] Discussing the "four-prong" test for a traditional prima facie showing of race discrimination,[61] the court theorized that the minimal requirements under *McDonnell Douglas* were not designed to be "an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination."[62] On the basis of this reasoning, as well as the court's analysis of what the *McDonnell Douglas* presumption of discrimination was predicated upon,[63] the *Parker* court decided that the first element of the *McDonnell Douglas* test required modification in cases of reverse discrimination.[64] Under this modification, Mr. Parker was required to show "background circumstances that the defendant is that unusual employer who discriminates against the majority" in lieu of the traditional requirement of membership in a minority group.[65]

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[55]*Id.* at 1013.

[56]*Id.* at 1015.

[57]*Id.* at 1013. However, the Supreme Court's ruling in *McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273 (1976), was issued five years prior to the *Parker* decision and confirmed that Title VII protects white persons from discrimination under the same standards employed to protect non-whites. *See infra* notes 88-98 and accompanying text for a detailed discussion of this ruling.

[58]443 U.S. 193 (1979). *See supra* note 29 and accompanying text for an outline of the factors the Court considers when evaluating the legitimacy of affirmative action plans.

[59]*Parker*, 652 F.2d at 1013.

[60]*Id.* at 1016.

[61]*See supra* note 32 and accompanying text for the *McDonnell Douglas* "four-prong" standard.

[62]*Parker*, 652 F.2d at 1017.

[63]*See supra* note 39.

[64]*Parker*, 652 F.2d at 1017. *See also supra* note 42 (outlining the authority the court relied upon in determining that the *McDonnell Douglas* standard was intended to be modified in order to accommodate different fact situations).

[65]The court recognized that the Supreme Court's decision in *McDonald* made it indisputable that whites were also a protected group under Title VII; however, the court believed that "it defied common sense to suggest that the promotion of a black employee

Twelve years later, the court was called upon to clarify the *Parker* standard of background circumstances in *Harding v. Gray*.[66] After stating that the background circumstances test was not designed to disadvantage white plaintiffs,[67] the *Harding* court nevertheless required additional "suspicious" evidence from majority plaintiffs other than race, qualification, and rejection – the three factors that a minority plaintiff would be required to show.[68] The court then surveyed the evidence it had found in the past to constitute background circumstances and specified two distinct categories of evidence necessary for majority plaintiffs to meet their prima facie case. The first is evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites.[69] The second is evidence indicating that there is something "fishy" about the facts of the case at hand that raises an inference of discrimination.[70] In Mr. Harding's case, his allegations of superior qualifications granted him a stay from the district court's summary judgment ruling on the condition that, on remand, the court would be satisfied that there was a genuine issue of fact as to whether Mr. Harding's qualifications were in fact superior to those of the minority promotee.[71]

Both the *Parker* and *Harding* courts recognized that background circumstances sufficient to give rise to an inference of discrimination could include proof that the defendant company has unlawfully considered race as a factor in its employment and promotion decisions in the past[72] and that the majority plaintiff has superior qualifications.[73] However, the *Harding* court's insistence that the background circumstances requirement is not an additional hurdle for white plaintiffs[74] resonates as an ill-conceived effort to disguise the infirmities of the standard.

The most obvious problem with the background circumstances test is that it creates a standard of proof that is undeniably higher for one group of persons as opposed to another – a result directly opposed to the "equal treatment" purpose

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justifies an inference of prejudice against white co-workers in our present society." *Parker*, 652 F.2d at 1017.

[66]9 F.3d 150 (1993).

[67]*Id.* at 153.

[68]*Id.*

[69]*Id.* The court cited previous cases in the District of Columbia Circuit to illustrate what types of evidence would satisfy this category. Examples included: over-representation of minority promotees; minority supervisors and a proposed affirmative action plan (along with other factors); or pressure on the hiring authority to hire minorities and a proposed affirmative action plan.

[70]*Id.* Examples of evidence which would satisfy this category included: allegations of a "scheme" to fix performance ratings; a majority plaintiff who is given little or no consideration for a promotion and a supervisor who never fully reviewed the qualifications of a minority promotee; or a minority promotee who is less qualified than several majority candidates yet is promoted over their heads in an unprecedented fashion.

[71]*Harding*, 9 F.3d at 154.

[72]*Parker*, 652 F.2d at 1018.

[73]*Harding*, 9 F.3d at 153-54.

[74]*Id.* at 154.

underlying Title VII.[75] Majority plaintiffs must make an affirmative showing at the outset of litigation to establish an inference of discrimination, whereas minority plaintiffs need only point to their status as minorities. Requiring majority plaintiffs to provide strong evidence of background circumstances of an employer's discriminatory practices at the early stage of litigation ignores the fact that a *McDonnell Douglas* prima facie showing does not establish discrimination.[76] Rather, it was designed merely to be a tool to help the aggrieved plaintiff who lacks direct evidence of discriminatory intent. The burden of persuasion rests at all times with the plaintiff, who must ultimately prove intentional discrimination in order to prevail.[77] Imposition of the background circumstances test requires the majority plaintiff to justify the *McDonnell Douglas* inference of discrimination by adducing facts at the prima facie stage of litigation that normally are not required until the "pretext" stage of litigation.[78] His minority counterpart on the other hand, does not have to justify his receipt of the *McDonnell Douglas* inference.

Although created against the backdrop of affirmative action legislation, the background circumstances test strays too far afield in its protection of the "equal opportunity" rationale of Title VII.[79] Race-conscious programs, when validly created, are effectively safeguarded even in the absence of a background circumstances test because the existence of such a program provides the employer with a legitimate, non-discriminatory reason for its actions.[80] If such a plan is articulated as the basis for the employer's decision, the burden then shifts to the majority plaintiff to prove that the employer's justification is pretextual and that the plan is invalid. If the plaintiff does not carry this burden, his suit will be dismissed.[81] In light of the difficulty a majority plaintiff encounters when attempting to prove the invalidity of an affirmative action program, the additional burden of a modified prima facie standard effectively forecloses the majority plaintiff from exercising legitimate rights under Title VII.

The *Harding* court's statement that the background circumstances test does not impose a more onerous burden upon majority plaintiffs than that imposed upon their minority counterparts fails to take into account how the same evidence produced by each group will render different results.[82] For instance, the *Harding* court recognized that a majority plaintiff's allegation of superior qualifications would be a sufficient showing of background circumstances to support an inference of discrimination.[83] However, under the third prong of the *McDonnell Douglas* test, minority plaintiffs

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[75]*See supra* note 16 and accompanying text.

[76]*See generally* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

[77]*Id.* at 511.

[78]*See supra* notes 36-38 and accompanying text.

[79]*See supra* notes 17-18 and accompanying text.

[80]Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 626 (1987).

[81]*Id.*

[82]*Harding*, 9 F.3d at 154.

[83]*Id.* at 153-54.

merely have to show that they were qualified for the position, not that their qualifications were superior to those of the person who received the position.

Under the *Parker* court's reasoning, proof that the defendant employer has unlawfully considered race as a factor in its past employment and promotion decisions can raise an inference of discrimination for the majority plaintiff.[84] Aside from the vagueness of this standard, it imposes a burden upon majority plaintiffs in much the same way as the "superior qualifications" standard does. Not only is the sufficiency of the factual showing uncertain, majority plaintiffs are required to show a pattern of discrimination against other majority class members in order to satisfy the background circumstances standard. Conversely, minority plaintiffs merely have to point to their status as a minority to raise an inference of individual discriminatory treatment – evidence of past discrimination against other minority class members merely strengthens the inference.

To justify this burden on majority plaintiffs, courts must believe that Title VII only protects whites and males as a group rather than as individuals – a result inconsistent with the language of Title VII, which prohibits discrimination against an individual "because of" a protected trait.[85] Title VII clearly recognizes that an individual plaintiff can be a victim of discrimination even though the defendant employer has not discriminated against members of his class in the past.[86] The background circumstances test fails to account for this possibility.

B. Recognizing the Rights of Majority Plaintiffs – McDonald v. Santa Fe Trail Transportation Company

When the District of Columbia Circuit developed the background circumstances test in 1981, strong statements from the Supreme Court admonishing discriminatory preferences for any racial group were already on record.[87] The Court also had the opportunity to analyze Title VII in the context of a reverse discrimination claim prior to the *Parker* decision. In *McDonald v. Santa Fe Trail Transportation Company*,[88] the Court emphasized its belief that while the legislative history of Title VII underscored the need to provide increased employment opportunities to minority persons, the neutral language of the statute revealed that the scope of the Act was intended to reach persons of all races, including non-minorities.[89]

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[84]*Parker*, 652 F.2d at 1018.

[85]*See supra* note 21.

[86]*See*, *e.g.*, Connecticut v. Teal, 457 U.S. 440, 453-55 (1982) (finding that, in enacting Title VII, Congress did not intend to allow discrimination against some employees on the basis of race or gender merely because the employer treated other members of the same group favorably. "The principle focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.").

[87]*See*, *e.g.*, Furnco Constr. Co. v. Waters, 438 U.S. 567, 579 (1978) ("It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race and without regard to whether members of the applicant's race are already proportionately represented in the work force."); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").

[88]427 U.S. 273 (1976).

[89]*Id.* at 278-80.

In *McDonald*, two white employees and a black employee were charged with misappropriating cargo that their employer was carrying for a customer.[90] Six days later, the white employees were fired; however, the black employee was retained.[91] After union grievance proceedings secured no relief, the employees filed complaints with the Equal Employment Opportunity Commission, charging their employer with discrimination on the basis of race.[92] Upon reaching the Supreme Court, the Court held that the language in Title VII prohibiting the discharge of "any individual" because of "such individual's race," was not meant to be limited to discrimination against any one particular race.[93] Rather, the plain meaning of the language, as interpreted by the EEOC, proscribes racial discrimination against whites on the same terms as racial discrimination against non-whites.[94]

Because the defendant employer did not contend that its actions were based upon an affirmative action plan, the Court did not have to address the permissibility of such a plan. However, the Court clearly rejected the defendant employer's arguments that "discrimination [in favor of minorities] in isolated cases which cannot reasonably be said to burden whites as a class unduly … may be acceptable."[95] In addition to quoting language from its previous decision in *Griggs v. Duke Power Company*,[96] the Court stated that the EEOC, whose interpretations of Title VII were afforded great deference, has consistently held that failure to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against non-whites would "constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."[97] The Court then permitted the reverse discrimination plaintiffs to utilize the *McDonnell Douglas* burden-shifting analysis to prove their claims.

As evidence that the application of the *McDonnell Douglas* prima facie standard was appropriate in cases of reverse discrimination, the Court stated that the requirement in *McDonnell Douglas* that the plaintiff belong to a racial minority was set out only to demonstrate the *racial character* of the case, and not as an indication of any substantive limitation on Title VII's prohibition of racial discrimination.[98] Thus, the Court clearly indicated that the sole purpose of the first prong of the *McDonnell Douglas* prima facie case was to establish that the claim was based on race rather than sex, religion, or national origin.

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[90] *Id.* at 276.

[91] *Id.*

[92] *Id.*

[93] *McDonald*, 427 U.S. at 279.

[94] *Id.*

[95] *Id.* at 280.

[96] 401 U.S. 424, 431 (1971) (stating that the Act prohibits discriminatory preference for any racial group, minority or majority).

[97] *McDonald*, 427 U.S. at 279-80 (quoting EEOC Decision No. 74-31).

[98] *Id.* at 279 n.6.

Because the other three prongs of the prima facie case address the most common reasons for an employer's actions – lack of qualifications or lack of an open position – a majority plaintiff who eliminates these reasons should be entitled to the same inference of discrimination as his minority counterpart. However, courts that apply a modified *McDonnell Douglas* standard assume that satisfaction of the first prong of the prima facie case is what raises the inference of discrimination. Under this application, however, the other elements of the prima facie case are rendered meaningless because the requirement of showing background circumstances is really a requirement that the plaintiff make an affirmative showing on the ultimate issue – intentional discrimination.[99]

IV. REVERSE DISCRIMINATION IN THE CIRCUIT COURTS[100]

A. Modified Version of McDonnell Douglas Applied

Despite the flaws in the background circumstances standard, it continues to be followed in the District of Columbia Circuit,[101] the Sixth Circuit,[102] and the Eighth Circuit Court of Appeals.[103] However, support from these courts seems to be

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[99]*See* Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1321 (D. MO. 1990).

[100]There are two circuits that have yet to directly address the issue as to the proper standard of proof necessary to establish a prima facie case of reverse discrimination – the Fourth Circuit and the Ninth Circuit. In "traditional" race discrimination cases, the Fourth Circuit has adopted a "but for the plaintiff's race, the plaintiff would have been promoted" test as an alternative to the McDonnell Douglas prima facie standard. *See generally* Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986). However, it has specifically declined to decide whether a higher burden of proof applies in cases of reverse discrimination. *See* Lucas v. Dole, 835 F.2d 532, 534 (4th Cir. 1987) (applying the *Holmes* standard and stating that "[a]lthough the D.C. Circuit has imposed a higher prima facie burden on majority plaintiffs, we expressly decline to decide at this time whether a higher burden applies."); *accord* Weeks v. Union Camp Corp., 215 F.3d 1323 (4th Cir. 2000). Notably, a recent district court within the Fourth Circuit adopted the "background circumstances" test, citing two other district court decisions from the Fourth Circuit in support of its conclusion but failing to mention the fact that the Fourth Circuit has not affirmatively adopted the test. *See* Youmans v. Manna Inc., 33 F. Supp. 2d 462 (D. S.C. 1998), *aff'd*, 166 F.3d 337 (4th Cir.). The Ninth Circuit has repeatedly avoided addressing the issue by dismissing several cases of reverse discrimination on other grounds. *See*, *e.g.*, Teehee v. Board of Educ., 116 F.3d 486 (9th Cir. 1997); Frederick v. City of Portland, 98 F.3d 1345 (9th Cir. 1996). *But see* Lemnitzer v. Philippine Airlines, Inc., 816 F. Supp. 1441, 1448 (D. Cal. 1992) (applying the traditional *McDonnell Douglas* standard because the Ninth Circuit had not explicitly adopted a modified test by which to measure reverse discrimination claims).

[101]Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993); Bishopp v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986); Parker v. The Baltimore and Ohio R.R. Co., 652 F.2d 1012 (D.C. Cir. 1981).

[102]Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985).

[103]The Eighth Circuit has not actually applied the "background circumstances" test to a Title VII action. Rather, in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997), the court was presented with the question of whether or not a *McDonnell Douglas* analysis could be applied to a Bivens action for gender discrimination against the federal government. *Id.* at 1036. In holding that a *McDonnell Douglas* standard was applicable to such a case, the court proceeded

diminishing as exemplified by a recent Sixth Circuit decision which applied the test while expressing serious doubts about its continued vitality.[104]

In *Murray v. Thistledown Racing Club, Inc.*,[105] a white female plaintiff filed a reverse racial discrimination claim against her employer alleging she was constructively discharged from her position as a clerk at the defendant employer's racetrack.[106] After aggregating excessive shortages, the defendant employer insisted that the plaintiff sign a "shortage statement."[107] After being given the choice of complying with Racetrack policy or forfeiting her right to work, the plaintiff refused to sign the statement and never returned to work.[108] In filing a reverse racial discrimination suit based on constructive discharge, the plaintiff alleged that several black clerks with similar shortages were not asked to sign "shortage statements" because the employer feared that the black employees would claim they were targets of discrimination.[109]

In assessing the plaintiff's claims, the Sixth Circuit applied the background circumstances requirement to the first prong of the *McDonnell Douglas* prima facie case; however, it also modified the remaining three prongs by requiring that a reverse discrimination plaintiff also show "that the employer treated differently employees who were similarly situated but not members of the protected group."[110] The court's rationale for applying this two-prong test of background circumstances and different treatment was its belief that "the primary purpose of Title VII is to assure equality of employment opportunities and to eliminate those discriminating practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[111]

Nine years later, the Sixth Circuit confirmed that the background circumstances standard continued to exist within the circuit, yet expressed "serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs

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to find that the male plaintiff had established a prima facie case of gender discrimination because he had alleged several "background circumstances" sufficient to support the suspicion that the employer was the unusual one who discriminated against the majority. *Id.* at 1037. While *Duffy* was not a Title VII reverse discrimination case, previous district court decisions within the Eighth Circuit had repeatedly rejected the "background circumstances" test in cases of reverse discrimination under Title VII. *See, e.g.,* Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1320-21 (D. Mo. 1990) (noting that research revealed no cases in the Eighth Circuit which followed *Parker* or its progeny and that the case law from the circuit was inconsistent with the *Parker* decision).

[104]*See* Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994).

[105]770 F.2d 63 (6th Cir. 1985).

[106]*Id.* at 64.

[107]*Id.* at 65. The shortage statement acknowledged that the employee had been previously notified and warned of chronic shortages and that further shortages would clearly define incompetence to be employed and would result in immediate dismissal.

[108]*Id.*

[109]*Id.* at 66.

[110]*Murray*, 770 F.2d at 67.

[111]*Id.* at 67 (quoting *McDonnell Douglas*, 411 U.S. 792 (1973)).

who are white or male than for their non-white or female counterparts."[112] However, the court was able to specifically avoid overruling the use of the background circumstances standard by stating that its doubts about the test did not affect the disposition of the case because the plaintiff had failed to meet the second prong of different treatment for similarly situated persons.[113]

A major point of contention among the courts that apply the modified *McDonnell Douglas* standard and those that do not is the assumption underlying the *McDonnell Douglas* framework.[114] The circuit courts that apply the background circumstances test believe that membership in a disfavored group is the entire assumption upon which the framework was established; therefore, modifications must be made for those individuals who are not perceived as "socially disfavored."[115] However, as noted by a district court in the Eighth Circuit, the application of the background circumstances test would necessarily require the courts "to take on the unseemly task of deciding which groups are socially favored and which ones are socially disfavored."[116] Ironically, the originator of the background circumstances test – the District of Columbia circuit – predicted this dilemma by noting that "whites are in the minority in the District of Columbia."[117]

Logically, if a racial "minority" constitutes a racial "majority" in a particular locality, the "traditionally disfavored" presumption should not be applicable. Under such circumstances, it becomes clear that a rigid application of differing standards of proof based upon such flexible concepts as "minority" or "majority" status produces inequitable results. Continuing to apply standards of proof based upon a concept such as which groups have been "traditionally disfavored" is equally dangerous in that it blinds society to the reality of which groups are currently experiencing unfavorable treatment.[118] This danger was recognized over 100 years ago by Justice Harlan, who stated that "when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be a special favorite of the laws."[119] Regardless of whether or not that day has arrived, permitting the imposition of a higher standard of proof for

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[112]Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994).

[113]*Id.*

[114]*See*, *e.g.*, Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1321 (D. Mo. 1990).

[115]*See supra* note 39.

[116]Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1322 (D. Mo. 1990).

[117]Bishopp v. District of Columbia, 788 F.2d 781, 786 n.5 (D.C. Cir. 1986) ("Of course whites are in the minority in the District of Columbia, but neither this court nor the Supreme Court has squarely addressed the issue whether minority status for purposes of a prima facie case could have a regional or local meaning.").

[118]*But see* Ronald Walters, *Affirmative Action and the Politics of Concept Appropriation*, 38 HOW. L.J. 587, 604 (1995) (asserting that there is no danger of white males becoming an oppressed class as they have suffered little from affirmative action while black socio-economic status remains worse than that of whites).

[119]United States v. Stanley, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting).

majority plaintiffs based upon their failure to be a "historically disfavored" group is an inequitable assumption about modern society.

In contrast, courts that refuse to apply the background circumstances test do so by recognizing that the *McDonnell Douglas* framework is a "procedural embodiment of the recognition that employment discrimination is difficult to prove with only circumstantial evidence."[120] According to this rationale, the entire *McDonnell Douglas* framework exists because plaintiffs rarely have direct evidence of discriminatory intent. If plaintiffs were forced to rely only upon circumstantial evidence, they would never receive a fair opportunity to obtain the protection that Title VII guarantees. To remedy this inequity, the *McDonnell Douglas* indirect evidence framework was designed as a means of creating a presumption of discrimination and forcing the employer to come forward with a legitimate explanation for his conduct.[121]

By eliminating the presumption for majority plaintiffs absent a showing of background circumstances, an employer is no longer forced to come forward with a legitimate justification for certain actions. This raises the danger that employers will become free to discriminate against individual majority plaintiffs if the employer has not discriminated against other persons similarly situated in the past and if the plaintiff is unable to come up with direct evidence of the discriminatory treatment. Rejecting the requirement of background circumstances not only comports with the true principles behind Title VII's protection of all individuals, it also benefits the employer by shifting the focus away from the employer's past conduct and concentrating on the individual case at hand.

B. Traditional McDonnell Douglas Framework Applied

Although the background circumstances test previously claimed a majority of the circuit courts, opposition to *Parker* and its progeny has continued to rise. Currently, the First,[122] Second,[123] Third,[124] Fifth,[125] and Eleventh Circuits[126] wholly reject the

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[120]*See*, *e.g.*, *Collins*, 727 F. Supp. at 1321 (referring to statements made by the Supreme Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)).

[121]*Id.* at 1322.

[122]*See*, *e.g.*, Carey v. Mt. Desert Island Hospital, 156 F.3d 31 (1st Cir. 1998) (where the court applied a "membership in a protected class" standard to the first prong of the *McDonnell Douglas* framework and found that a male plaintiff had established a prima facie case of reverse gender discrimination by showing that he had a satisfactory job performance record but was terminated and replaced by a woman – the plaintiff's status as a male constituted membership in the protected class of gender); *see also* Eastridge v. Rhode Island College, 996 F. Supp. 161, 166 (D. R.I. 1998).

> ("This court opts not to follow [the background circumstance] modification of the *McDonnell Douglas* prima facie elements for reverse discrimination cases, because requiring a reverse discrimination plaintiff to show that the specific employer has displayed a pattern of discrimination against the majority in the past imposes a more onerous burden on such a plaintiff as compared to any plaintiff from any protected group. This is antagonistic to the very purposes of Title VII itself.").

[123]*See* Vallone v. Lori's Natural Food Center, Inc., 1999 WL 1012668, *1 (2nd Cir.) ("This Court has applied the same burden-shifting to claims of "regular" discrimination — i.e., where the plaintiff is a member of a historically disfavored group — as well as to claims of reverse discrimination — i.e., where the plaintiff is not a member of a historically disfavored

Parker court's modification of the *McDonnell Douglas* standard. In doing so, these courts apply a standard consistent with the letter and intent of Title VII, requiring only that the plaintiff prove membership in a protected class – namely "race."

Although showing protected class membership rather than minority status is a modification to the first prong of the *McDonnell Douglas* standard, unlike the background circumstances modification it does not impose an additional burden upon majority plaintiffs. Rather, ensuring that a plaintiff is a member of a protected class equalizes the respective racial groups under Title VII; therefore, it is viewed as a "traditional" application of *McDonnell Douglas*. Ironically, the rationale behind applying the "protected class" element to the first prong of the *McDonnell Douglas* prima facie case is the same rationale that supported the background circumstances change – the Supreme Court's language in *McDonnell Douglas* regarding the flexibility of the prongs to accommodate different factual situations.[127]

The greatest damage to the background circumstances test came from a standard set forth within the Eleventh Circuit;[128] however, the Third Circuit Court of Appeals, with its September 1999 decision in *Iadimarco v. Runyon*,[129] outlined the most

group."); *see also* Ticali v. Roman Catholic Diocese of Brooklyn, 41 F. Supp. 2d 249, 261 (D. N.Y. 1999), *aff'd*, 201 F.3d 432 (2nd Cir.) (stating that the court will look to whether or not an inference can be drawn from the established facts that the employer treated the plaintiff less favorably *because of* his race) (emphasis added).

[124]*See generally* Iadimarco v. Runyon, 190 F.3d 151 (3rd Cir. 1999).

[125]*See generally* Young v. City of Houston, 906 F.2d 177 (5th Cir. 1990); Ulrich v. Exxon Co., 824 F. Supp. 677 (D. Tex. 1993). Although a recent decision from the Fifth Circuit Court of Appeals conclusively established that the standard within the circuit is the "protected class" approach, this was not always the case. In *Byers v. The Dallas Morning News, Inc*., 209 F.3d 419 (5th Cir. 2000), the court held that in order for a white male plaintiff to establish a prima facie case of reverse race discrimination, he must show that: (1) he is a member of a protected group; (2) he was qualified for the position held; (3) he was discharged from the position; and (4) he was replaced by someone outside of the protected group. *Id.* at 426. However, the court noted that previous Fifth Circuit cases were in conflict regarding the first prong. "Some Fifth Circuit cases require that a plaintiff be a member of a "racial minority within the company" … [o]ther cases require only that the plaintiff be a member of "a protected group," meaning a group protected under Title VII." *Id.* The defendant in *Byers* argued that the plaintiff failed to satisfy the first prong of the prima facie case because he was not part of a racial minority at his place of work since, throughout his employment, the majority of employees and managers were White. *Id.* However, the Court of Appeals chose to apply the "protected group" requirement to the first prong, stating that its decision in Singh v. Shoney's, Inc., 64 F.3d 217 (5th Cir. 1995), "marks a retreat from the "racial minority" requirement to the "protected group" requirement for cases of reverse discrimination." *Id.*

[126]*See generally* Shealy v. City of Albany, 89 F.3d 804 (11th Cir. 1996); Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991).

[127]*See supra* note 42 and accompanying text.

[128]*See* Shealy v. City of Albany, 89 F.3d 804, 805 (11th Cir. 1996) (stating that the *McDonnell Douglas* prima facie test in cases of reverse discrimination requires the plaintiff to prove merely: (1) that he belongs to a *class*; (2) that he applied for and was qualified for a job; (3) that he was rejected for the job; and (4) that the job was filled by a minority group member or a woman) (emphasis added); *accord* Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991).

[129]190 F.3d 151 (3rd Cir. 1999). *See supra* note 2 for an outline of the facts in *Iadimarco*.

logical test for analyzing reverse discrimination disputes. Referring to the background circumstances test as an attempt to "cram" reverse discrimination cases into the *McDonnell Douglas* framework,[130] the *Iadimarco* court refused to apply a standard it thought would initially force the plaintiff to present proof which would only become relevant to rebut the employer's explanation of the challenged conduct.[131] The court feared that the *Parker/Harding* modification would undermine the basic point of the McDonnell Douglas burden shifting regime – to make it easier for employees to bring claims that would otherwise be extraordinarily difficult to prove.[132] The court then chastised the background circumstances standard as being "irremediably vague and ill-defined."[133] Drawing upon language from the Supreme Court,[134] the *Iadimarco* court held that all that should be required to establish a prima facie case in the context of reverse discrimination is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people differently than others based upon a trait that it protected under Title VII.[135]

The *Iadimarco* decision unexpectedly strengthened the position of majority plaintiffs in that the court's commitment to equal treatment among all racial groups resulted in an abrogation of previous rulings within the Third Circuit.[136] Despite this

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[130]*Iadimarco*, 190 F.3d at 158.

[131]*Id.* at 161.

[132]*Id.*

[133]*Id.*

[134]The court quoted *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1980) ("the prima facie case under *McDonnell Douglas* merely states the basic allocations of burdens and order or presentation of proof under Title VII") and *Furnco Const. Co. v. Waters*, 438 U.S. 567, 577 (1978).

> ("it raises an inference of discrimination only because we presume these acts, if otherwise unexplained in the context of the prongs of the *McDonnell Douglas* prima facie case, are more likely than not based on the consideration of impermissible factors … [h]owever, the central focus of the inquiry is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin".). *Id.* at 160.

[135]*Iadimarco*, 190 F.3d at 161.

[136]Prior to the *Iadimarco* decision, district courts within the Third Circuit operated under the *Parker/Harding* premise that a plaintiff's burden of persuasion must be applied differently in suits alleging reverse discrimination. *See, e.g.*, Harel v. Rutgers, 5 F. Supp. 2d 246 (D. N.J. 1998) (applying the "background circumstances" test to a reverse gender discrimination suit brought by a male plaintiff); Davis v. Sheraton Soc'y Hill Hotel, 907 F. Supp. 896 (D. Pa. 1995) (same); Wallick v. AT&T Communications, Inc., 1991 WL 635610 (D. N.J.) (same). The *Parker/Harding* line of reasoning was applied by the district court in *Iadimarco*, resulting in a grant of summary judgment for the defendant. *Iadimarco*, 190 F.3d at 151. Prior to its analysis of the case, the Third Circuit Court of Appeals stated that "[t]he District Court correctly noted that we have not yet decided upon the proper expression of a prima facie case in "reverse discrimination" cases … [a]ccordingly, we take this opportunity to provide guidance for the trial courts in this Circuit." *Id.* at 157. The circuit court's subsequent rejection of the "background circumstances" test operated to reverse the grant of summary judgment and the case was remanded for further proceedings. *Id.* at 151.

intra-circuit turnaround, the standard enunciated in *Iadimarco* is entirely consistent with Title VII jurisprudence in that it recognizes that a Caucasian is covered under the Act based upon a trait specifically recognized – race. Like any other Title VII plaintiff, a majority plaintiff must still present sufficient evidence to allow a reasonable fact finder to conclude that the defendant treated the plaintiff less favorably than others "because of" his race, color, religion, sex, or national origin. However, the mere fact that the plaintiff's race is classified as "Caucasian," rather than some other racial classification, does not operate as an automatic bar to satisfying the prima facie case.

Although employers may fear that a blanket rejection of the background circumstances standard subjects them to instantaneous liability the moment they institute voluntary affirmative action programs, such fears are unfounded. Allowing a majority plaintiff to state a prima facie case by showing membership in a protected class will not discourage voluntary affirmative action programs any more than the passing of anti-discrimination legislation would prevent an employer from expanding its workforce. On the contrary, an unmodified *McDonnell Douglas* standard for majority plaintiffs fulfills the legacy of Title VII by ensuring that employers become conscious of the legitimacy of their actions. Provided an employer's voluntary affirmative action plan is undertaken based upon actual disparities in its workforce, the employer should not fear being held liable for reverse discrimination. While a majority plaintiff will be able to satisfy the *McDonnell Douglas* prima facie case in the same manner as his minority counterpart, he will still have the heavy burden of proving that the affirmative action plan was a pretext for invidious discrimination before he can prevail.

C. An Alternative Approach

Halfway between an application of the background circumstances test in cases of reverse discrimination and an application of the unmodified *McDonnell Douglas* prima facie standard is an approach advanced by the Tenth Circuit in *Notari v. Denver Water Department*.[137] Stating that the *McDonnell Douglas* presumption of discrimination is valid for a reverse discrimination claimant only where the requisite background circumstances exist; the *Notari* court went on to hold that a claimant's failure to meet this burden would not end the court's inquiry.[138] Admitting that a given employer may discriminate against an individual white worker even where no evidence demonstrates that the employer is the unusual one who discriminates against the majority, the court stated that an additional opportunity must be available to the reverse discrimination claimant in order to prevent a result "untenable and inconsistent with the goals of Title VII."[139] Under the "additional opportunity"

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[137]971 F.2d 585 (10th Cir. 1992). The *Notari* court adopted the causation-style standard articulated by the Fourth Circuit in "traditional" race discrimination cases. *See supra* note 100 and accompanying text.

[138]*Notari*, 971 F.2d at 589 ("We also must decide whether a reverse discrimination plaintiff's failure to allege background circumstances necessarily compels a conclusion that he has failed to state a prima facie case of intentional discrimination. . . . [w]e hold that it does not.").

[139]*Id.* at 590. In reaching this conclusion, the court hypothesized the existence of two similarly victimized employees, one black and one white, who only have persuasive indirect evidence to support their claims of racial discrimination. *Id.* at 589. The court stated that the

approach, a reverse discrimination plaintiff may establish a prima facie case of disparate treatment under Title VII "by direct evidence of discrimination or by indirect evidence sufficient to support a reasonable probability that, *but for the plaintiff's status*, the challenged employment decision would have favored the plaintiff."[140] However, the court was quick to emphasize that a reverse discrimination plaintiff who uses this method in place of the background circumstances test is still not entitled to rely upon the presumption of discrimination that is implicit in the traditional *McDonnell Douglas* analysis.[141]

The *Notari* approach has most recently been adopted by the Seventh Circuit in *Mills v. Health Care Service Corporation*,[142] a gender discrimination action brought by male plaintiffs. Echoing the sentiments of the *Parker* and *Harding* courts, the Seventh Circuit stated that the *Parker* and *Notari* approaches are not meant to foreclose pursuit of legitimate Title VII claims by white plaintiffs because nothing in the modified prima facie formulations alters the fact that a majority plaintiff can always use direct evidence of discrimination to defeat a summary judgment motion.[143] However, the court acknowledged that where the majority plaintiff has only indirect evidence of illegal discrimination and has failed to establish a prima facie case under the background circumstances approach, he would then be required to produce "other indirect evidence sufficient to support a reasonable probability that, but for his status as a white male, the challenged employment decision would not have occurred."[144]

Proponents of the *Notari* standard admit that the burden of proof for majority plaintiffs continues to be higher than that applied to their minority counterparts, yet assert that the effect of this alternative approach is to "ameliorate the inconsistencies" resulting from the elevated *Parker* standard.[145] However, it would be a daunting task to convince a majority plaintiff that he is placed in a better position under the *Notari* standard when he must twice attempt to adduce evidence, at the prima facie stage of litigation, that is only required of his minority counterparts at the "pretext" stage of litigation under a traditional *McDonnell Douglas* paradigm.

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black employee's lack of direct evidence would not be fatal to a Title VII discrimination claim because he could easily meet the requirements of a prima facie case under *McDonnell Douglas* by using his persuasive indirect evidence and creating an inference of discrimination. *Id.* In contrast, the white employee's lack of direct evidence automatically forecloses the use of the *McDonnell Douglas* standard unless the plaintiff can show the requisite "background circumstances." *Id*. at 590. The court then noted that a failure to satisfy this requirement would compel dismissal of the white employee's case. *Notari*, 971 F.2d at 590. "Unlike the black worker, [the white worker] will have no opportunity to use his strong indirect evidence to convince the fact finder about the validity of his claim." *Id.*

[140]*Id.* (emphasis added).

[141]*Id.*

[142]171 F.3d 450 (7th Cir. 1999).

[143]*Mills*, 171 F.3d at 456.

[144]*Id.*

[145]*See generally* Brenda D. Diluigi, Note, *The Notari Alternative: A Better Approach To The Square-Peg-Round-Hole Problem Found In Reverse Discrimination Cases*, 64 BROOK. L. REV. 353 (1998).

The *Notari* court clearly recognized that reverse discrimination plaintiffs were being treated inequitably under the background circumstances test. However, under its solution of a tort-style causation theory, the majority plaintiff fares no better.

V. A PLEA TO THE SUPREME COURT

While the Supreme Court has yet to directly address the issue regarding the proper standard of proof in cases of reverse employment discrimination, several decisions indicate an unwillingness to impose a higher burden of proof upon majority plaintiffs at the prima facie stage of litigation.[146]

Following its recognition that Title VII protects white workers in the same degree as black workers irrespective of the "isolated" nature of the discrimination,[147] the Court had the opportunity to alter the prima facie standard for majority plaintiffs in a case involving reverse gender discrimination but failed to do so. In *Johnson v. Transportation Agency, Santa Clara County*,[148] the Supreme Court specifically held that reverse discrimination disputes arising from affirmative action programs "fit readily within the analytical framework set forth in *McDonnell Douglas Corporation v. Green*."[149] The Court analyzed the majority plaintiff's claim under the traditional *McDonnell Douglas* framework, stating that once the plaintiff established a prima facie case that gender had been taken into account in the employer's decision, the burden shifted to the employer to articulate a non-discriminatory rationale for its decision.[150]

Rather than holding that the existence of an affirmative action program automatically burdens the majority plaintiff with a higher standard of prima facie proof, the Supreme Court stated that an affirmative action program merely provides the employer with the required non-discriminatory reason for its actions.[151] Once the employer shows that the adverse action taken against the plaintiff was the result of compliance with an affirmative action plan, the plaintiff carries the ultimate burden of invalidating the plan in order to prove the requisite "pretext" for intentional discrimination.[152]

By requiring reverse discrimination plaintiffs to "invalidate" race-conscious programs in order to prove intentional race discrimination, the Supreme Court clearly safeguarded minority plaintiffs' rights under affirmative action programs. However, the *Johnson* decision also carefully protected the right of majority plaintiffs to enjoy the same day in court as their minority counterparts by declining to modify the first prong of the *McDonnell Douglas* prima facie case. This restrictive view of preferences that are granted on the basis of race or gender is

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[146]*See generally* Adarand Constructors, Inc v. Pena, 515 U.S. 200 (1995); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[147]*McDonald*, 427 U.S. at 280 n.8.

[148]480 U.S. 616 (1987).

[149]*Johnson,* 480 U.S. at 626.

[150]*Id.*

[151]*Id.*

[152]*Id.*

further reflected in the decision of *Adarand Constructors, Incorporated v. Pena*,[153] whereby the Court subjected all federal, state and local governmental affirmative action programs to strict scrutiny.[154]

Although *Adarand* was a challenge to a federal affirmative action program brought under the Due Process Clause of the Fifth Amendment rather than a challenge to a private affirmative action program brought under Title VII,[155] much of the language contained in the majority and concurring opinions indicate that the Court is unlikely to make it more difficult for a majority claimant to prove discrimination under Title VII.[156] Quoting Justice Powell's plurality opinion in *Wygant v. Jackson Board of Education*,[157] the Court observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."[158] The Court's continued emphasis that societal discrimination is not an appropriate basis upon which the federal government can impose a racially classified remedy[159] indicates that the Court would be unlikely to endorse different treatment of plaintiffs under Title VII on the basis of societal status as a majority or

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[153]515 U.S. 200 (1995).

[154]*Adarand*, 515 U.S. at 227 ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

[155]In *Adarand*, a federal law required that a specific subcontracting clause be placed in federal agency contracts. One portion of the clause provided that additional compensation would be given to a prime contractor who hired a subcontractor that was certified as a small business controlled by "socially and economically disadvantaged individuals." *Id.* at 205. The law also required the clause to state that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities." *Id.* After the Central Federal Lands Highway Division of the United States Department of Transportation awarded a prime contract to Mountain Gravel & Construction Company for a highway project, Adarand Constructors submitted the low bid on a subcontract for guardrail work. *Id.* However, the subcontract was awarded to Gonzales Construction Company, which was certified as a small business controlled by "socially and economically disadvantaged individuals." *Id.* Adarand Constructors claimed that the federal government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," in addition to the government's use of race-based presumptions, discriminated on the basis of race in violation of the equal protection component of the Fifth Amendment's Due Process Clause. *Adarand*, 515 U.S. at 204. An affidavit submitted by Mountain Gravel's Chief Estimator stated that Mountain Gravel would have accepted Adarand's low bid had it not been for the additional payment it received by hiring Gonzales instead. *Id.* at 205.

[156]*See*, *e.g.*, *id.* at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

[157]476 U.S. 267 (1986).

[158]*Adarand*, 515 U.S. at 220 (quoting from *Wygant*, 476 U.S. at 273).

[159]*Id.*

minority.[160] The concurring opinions of Justices Scalia and Thomas reflect a concern that the use of racial paternalism by the government will operate as a federally mandated perpetuation of discrimination.[161]

The Supreme Court's heightened scrutiny of federal, state and local affirmative action programs and failure to alter the prima facie elements for claims of reverse discrimination further reflects the sentiments of *Furnco Construction Corporation v. Waters*, wherein the Court stated that "the central focus of the inquiry in a case such as this is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin."[162] When the Supreme Court finally attempts to resolve the issue regarding what standard of prima facie proof is required for cases of reverse discrimination under Title VII, the Court is likely to express the same misgivings as the Sixth Circuit about imposing any standard less than equal treatment for all protected groups.[163]

VI. CONCLUSION

The framework for a prima facie case of reverse employment discrimination was first articulated in 1981 by the United States Court of Appeals for the District of Columbia Circuit in the seminal case of *Parker v. The Baltimore and Ohio Railroad Company*[164] The standard of proof required by the District of Columbia modifies the traditional *McDonnell Douglas* circumstantial evidence paradigm and imposes upon majority plaintiffs the necessity of showing an employer's background circumstances of discrimination during the prima facie stage of litigation. Under this standard, the traditional inference of discrimination that arises for minority plaintiffs upon showing membership in a protected racial group does not apply to majority plaintiffs absent some other evidence explaining why an employer would discriminate against them. To reconcile this theory with Title VII, it must be assumed that Caucasians and males as a group continue to represent a favored "majority" in all areas of employment and that any historical preferences for this group continue to benefit individual members in the same manner and degree as the group. It must further be assumed that non-Caucasians and non-whites continue to represent disfavored "minorities" in all areas of employment and that historical patterns of disfavor toward the group continue to operate to the detriment of each individual minority applicant. Such presumptions directly conflict with the intent and purpose of laws mandating non-discrimination in employment decisions.

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[160] *See*, *e.g.*, *id.* at 224 ("If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently.").

[161] *See*, *e.g.*, *id.* at 239 ("To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the government, we are just one race here. It is American.) (Scalia, J., concurring); *Id.* at 240 ("Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.") (Thomas, J., concurring).

[162] 438 U.S. 567, 577 (1978) (quoting *Teamsters*, 431 U.S. at 335 n.15.).

[163] *See supra* note 6 and accompanying text.

[164] 652 F.2d 1012 (D.C. Cir. 1981).

Recognizing that Title VII is intended to protect every individual against workplace discrimination – even in the face of remedial measures adopted to balance racially stratified workplaces – a growing number of lower federal courts have rejected the District of Columbia's imposition of an altered prima facie showing for majority plaintiffs. Echoing the central theme of Title VII, these courts permit an inference of discrimination to arise after any claimant, majority or minority, presents sufficient evidence to allow a fact-finder to conclude that an employer is treating some people less favorably than others based upon a protected trait. Joining this splinter group, the Third Circuit Court of Appeals in *Iadimarco v. Runyon*[165] correctly reasoned that requiring evidence of background circumstances at the prima facie stage of litigation would effectively foreclose majority plaintiffs from their day in court – a result directly in conflict with the purpose of the *McDonnell Douglas* circumstantial evidence paradigm.

The conflict between the validity of voluntary, race-conscious programs and the rights of all individuals to enjoy equal protection from discrimination has been a source of perennial controversy for the Supreme Court. Imposing an additional requirement upon white, male plaintiffs who attempt to establish a prima facie case of reverse discrimination only perpetuates the controversy. While remedial programs may be laudable and necessary in the proper situation, when the interests at stake are balanced too heavily against those who are not beneficiaries of remedial programs there is a special danger that the favored "majority" plaintiffs will become the disfavored "minority" plaintiffs. Rather than equalizing employment opportunities among all protected classes, a higher standard of proof for one class of plaintiffs results in a never-ending need for remedial measures by continuously shifting the class in need of protection.

One of the primary functions of the law is to set reasonably consistent standards by which people can adjust their legal affairs. By imposing the uncertain requirement of background circumstances upon majority plaintiffs who claim discrimination, inconsistent protection and inconsistent liability results. Plaintiffs and employers are left wondering whether a judge will choose to find that the necessary factual showing has been satisfied – a factual showing which varies depending upon societal perceptions of discrimination. Regardless of how impartial judges may be, when faced with a standard such as background circumstances which permits broad discretionary power, it is difficult not to let the controversial nature of the subject matter affect the decision-making process.

The uncontested purpose of Title VII is to make it unlawful for an employer to discriminate against any individual based upon a trait protected under Title VII. Regardless of the "minority" or "majority" status of a plaintiff, when an employer treats one class of persons less favorably than another class, discrimination has occurred. To adequately balance the protective and remedial purposes of Title VII, the Supreme Court should adopt the reasoning set forth by the Third Circuit Court of Appeals and establish a single, prima facie case for all persons discriminated against based upon a trait protected under Title VII.

MARIA A. CITERONI

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[165] 190 F.3d 151 (3d Cir. 1999).