RACIAL DISCRIMINATION AGAINST THE MAJORITY IN HIRING PRACTICES: COURTS' MISGUIDED ATTEMPTS TO MAKE RACE-CONSCIOUS LAW COLOR BLIND

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INTRODUCTION

This country begins the twenty-first century with the legal presumption that everyone is entitled to equal opportunities to gain access to the workplace.[1] Yet, numerous sectors of the workplace remain dominated by a single group.[2] Disparities in the workplace are ever present.[3] However, some courts now apply the very statute that entitled minorities to an equal opportunity to compete in a way that ensures employers will not be permitted to make decisions in recognition of this country's past insidious treatment of economically disfavored groups.[4] Because courts have closed their eyes to the

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Although it may have seemed as though this endeavor preoccupied my thoughts and challenged my sanity, my mind, body, and soul never strayed from the one who continues to inspire me to advance beyond what is merely expected of me. I would like to recognize my parents, who have been there for me every step of the way and who are truly responsible for paving the steps I now take. And I would like to recognize my grandmother, who has always uplifted my spirits and proven that true scholars are not always found in the classroom. I love all of you.

1. *See* Derrick Bell, *Race, Racism and American Law* § 1.3, 7 (3d ed., Little, Brown & Co. 1991) (determining that although there is a legal presumption of equality, "beyond the ebb and flow of racial progress lies the still viable and widely accepted (though seldom expressed) belief that America is a white country and blacks, particularly blacks as a group, are not entitled to the concern, resources, or even empathy that would be extended to similarly situated whites"). In fact, even great thinkers such as Benjamin Franklin wanted to preserve this Nation for whites by sending away all the blacks. *Id*.

2. *Id*. at § 9.1, 806 (explaining that economic disparities between blacks and whites were actually increasing as the 1990s began); Christopher Edley, Jr., *Not All Black and White: Affirmative Action, Race, and American Values* 42–43 (Hill & Wang 1996) (noting that the annual income for black males is thirty percent less than for white males).

3. Bell, *supra* n. 1, at § 9.1.1, 806.

4. *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991) (determining that white males are a protected class, and, therefore, they should be treated no differently than any other class when bringing a Title VII case).

underlying intent of Title VII, they have relieved the employer[5] of its duty to strive for equality within the workplace.[6]

To effectuate the competing interests of Title VII, courts must fashion a test that does not punish employers for acknowledging disparities in the workplace, which they played a predominant role in creating.[7] Courts should determine that when an employer hires a qualified minority over a qualified majority member plaintiff, the employer should be required to present only evidence sufficient to establish that the minority hired was qualified for the position and the employer followed its own hiring procedures.[8] This standard acknowledges the history of Title VII and requires an employer to demonstrate that it followed its own hiring procedures and hired someone who fit the qualifications of the position.[9] To demonstrate why a different standard should apply to a majority member bringing a Title VII claim, this Comment will examine the historical background of Title VII and the Supreme Court's varied interpretations of the Civil Rights Act of 1964 (Act), as amended.

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5. An employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." 42 U.S.C. § 2000e(b) (1994).

6. *See* Bell, *supra* n. 1, at § 9.11.3, 882 (noting that employers can adopt voluntary race-conscious programs in a good faith response to societal discrimination).

7. The development of anti-discrimination law is a continuing process. Alan Freeman, *Foundations of Employment Discrimination Law* 43 (John J. Donohue, III ed., Oxford U. Press 1997). Because there is a "concrete historical reality of oppression" against minorities, the law allows for deviations in procedure so that those who have been foreclosed from opportunities in the workplace may enter the workplace through affirmative action. *Id*. at 43–44.

8. *Infra* nn. 229–237 and accompanying text.

9. *Infra* nn. 226–237 and accompanying text. Some have argued that there should not be a different standard created based on who brings the Title VII case. Scott Black, *McDonnell Douglas' Prima Facie Case and the Non-minority Plaintiff: Is Modification Required*?, 1994 Annual Surv. Am. L. 309, 352 (1995) (recognizing that the goal of Title VII is to protect all individuals from discrimination). However, the standard the courts apply now was created with a particular class of plaintiffs (minorities) in mind. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Therefore, although there can be a legitimate disagreement over any new standard created, there is a need either to develop a standard that does not account for any particular class of plaintiffs or to develop a standard that acknowledges the differences between all classes of plaintiffs. The Author has chosen the latter approach. *Infra* nn. 226–232 and accompanying text.

Title VII prohibits discrimination in hiring practices[10] based on an individual's race.[11] However, because the underlying reason Congress enacted Title VII was to combat discrimination against socially disfavored minorities,[12] courts have struggled to determine under what circumstance a majority member plaintiff (white male) can establish a case for racial discrimination in hiring practices under Title VII.[13] The United States Supreme Court created the confusion when it established a four-prong test that required plaintiffs, without direct evidence of an employer's intent to discriminate, first to show they are members of a racial minority as part of a prima facie case[14] of racial discrimination.[15] As a result, three different standards attempting to determine what evidence will establish a majority member's prima facie case have developed from the courts of appeals' efforts to satisfy the Supreme Court's requirement in *McDonnell Douglas Corporation v. Green*.[16] The first standard requires majority member plaintiffs to prove background circumstances demonstrating that the employer who failed to hire the plaintiff is the "unusual employer who discriminates against the majority" before the plaintiff can establish a prima facie case of racial discrimination.[17] Those courts have reasoned that "it makes little sense, within the historical context of the Act, to infer discrimination against [the majority] in the same way that discrimination is inferred against [minorities]."[18]

The second standard, which will be referred to as the cumulative evidence test, permits majority member plaintiffs to prove a prima facie case by offering evidence "sufficient to support a

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10. This Comment will address disparate treatment. Disparate treatment means the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Intl. Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335 n. 15 (1977).

11. 42 U.S.C. § 2000e-2(a)(1).

12. *Griggs v. Duke Power Co*., 401 U.S. 424, 431 (1971).

13. *See Mills v. Health Care Servs. Corp*., 171 F.3d 450, 457 (7th Cir. 1999) (offering three alternative standards for majority member plaintiffs bringing a Title VII case, while noting the various courts of appeals' interpretations of a majority member's ability to establish a prima facie case for employment discrimination based on race).

14. A prima facie case "serves to screen out cases 'where the [Title VII] plaintiff fails to distinguish his or her case from the ordinary, legitimate kind of adverse personnel decision.'" *Id*. (citing *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134 (7th Cir. 1985)).

15. *McDonnell Douglas*, 411 U.S. at 802.

16. 411 U.S. 792 (1973).

17. *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

18. *Wallick v. AT&T Commun., Inc.*, 1991 WL 635610 at *5 (D.N.J. July 23, 1991) (citing *Bhandari v. AT&T Commun., Inc.*, Civ. No. 85-1753, slip op. at 11 (D.N.J. Feb. 14, 1990)).

reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff."[19] The courts applying this standard have determined that a case brought by a majority member plaintiff should be treated differently than a case brought by a minority plaintiff.[20] However, majority member plaintiffs should not be precluded from suit merely because they cannot establish that the employer has a pattern of discrimination against majority members.[21]

Finally, the third standard allows a majority member plaintiff to establish a prima facie case for racial discrimination by showing that the plaintiff is a member of a protected class.[22] Courts applying this standard have explained that majority members are a protected class under Title VII; therefore, they should not be forced to make an additional showing not required of similarly situated minorities.[23]

This Comment will demonstrate that the three standards offered by the courts of appeals have failed to accommodate the competing interests of Title VII and will offer a new standard that meets the goals of Title VII. Part I describes the history of Title VII and the *McDonnell Douglas* burden-shifting test and details the courts of appeals' struggle to determine how a majority member plaintiff can establish a prima facie case for racial discrimination. Part II discusses the Eleventh Circuit's approach to racial discrimination cases brought by majority member plaintiffs. Part III demonstrates how courts should treat a majority member discrimination case. Part IV indicates why the same standard is not applicable to minorities. Finally, Part V offers employers assistance in avoiding racial discrimination suits brought by majority member plaintiffs.

Hypothetical Fact Pattern

Two twenty-two-year-old males who recently graduated from State University are currently seeking employment. Both were engineering majors and roommates for five years in a University dorm. Bo, a Caucasian who grew up in the suburbs, enjoyed a "free

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19. *Notari v. Denver Water Dept.*, 971 F.2d 585, 590 (10th Cir. 1992).
20. *Id.* at 590–591.
21. *Id.* at 590.
22. *Young v. City of Houston*, 906 F.2d 177, 180 (5th Cir. 1990); *Wilson*, 934 F.2d at 304.
23. Peter Gene Baroni, *Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims under Title VII*, 39 How. L.J. 797, 803 (1996).

ride" to college, because he earned a scholarship based on his grades in high school. Bo's mother, father, and two siblings attended and graduated from college. John, an African-American who grew up in the inner city near State University, did not receive a scholarship after he graduated from high school and, as a result, had to work his way though all five years of school. John was the first member of his family to graduate from college.

Both Bo and John received roughly the same grades in school and were ranked in the top third of their graduating class. Bo and John are both interested in becoming civil engineers and have sent their résumés to the same firms. Neither Bo nor John has any experience in civil engineering besides the experience they both received in school. The firms to which Bo and John sent résumés are located in the following federal circuits: (1) District of Columbia Circuit, (2) Third Circuit, (3) Eleventh Circuit, and (4) Thirteenth Circuit.[24] To their surprise, both were granted interviews to the same four firms, one in each of the respective circuits. Bo and John interviewed with each of the firms, and all four firms offered John an associate position, while none of the firms extended an offer to Bo. Bo believes that he was not hired because of his race and wants to bring a Title VII discrimination suit against each firm.

The problems associated with each circuit's evaluation of a majority member discrimination case will be shown in Bo's attempt to bring a Title VII case, as this Comment traces the varied requirements placed on a majority member bringing a case for discriminatory hiring practices. A final hypothetical situation will demonstrate how the Author's proposed standard for evaluating a majority member discrimination case avoids the difficulties associated with majority member discrimination cases.

I. HISTORY OF THE PRIMA FACIE CASE IN DISCRIMINATION SUITS

A. Title VII of the Civil Rights Act of 1964

As this country entered the 1960s, racial equality was a growing concern.[25] Minorities had been relegated to inferior jobs, lacked education, and had no opportunity to compete for desirable employ-

24. The Thirteenth Circuit is used by the Author as a hypothetical jurisdiction.

25. Alfred W. Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* 41 (U. Wis. Press 1993).

ment.[26] Through sit-ins, freedom rides, and other demonstrations, minorities began to gain sympathy for their plight, thus forcing Congress into action.[27] In early 1963 President John F. Kennedy presented a weak civil rights bill to Congress.[28] Following the aftermath of civil rights demonstrations in Birmingham, Alabama,[29] however, President Kennedy felt pressure to present stronger legislation; thus, he sent a bill requiring, among other things, equality in employment and nondiscrimination in federally assisted programs.[30] As Congress debated and revised civil rights legislation, it took notice of unemployment rate tables that showed African-Americans suffered from an unemployment rate twice that of Caucasians and that African-American employment was concentrated in semiskilled and unskilled labor.[31] Thus, Congress enacted Title VII to prohibit discrimination in the workplace, allowing every person an equal opportunity to compete for employment.[32] Title VII provides, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race."[33] The Act's primary goal is to ensure that all individuals are given an evenhanded opportunity for employment on the basis of ability and qualification, without regard to race.[34] The original intent of the Act was to combat insidious discrimination against

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26. *Id*. at 42.

27. *Id*. at 41.

28. Kathanne W. Greene, *Affirmative Action and Principles of Justice* 22 (Paul L. Murphy ed., Greenwood Press 1989).

29. *Infra* n. 252.

30. Greene, *supra* n. 28, at 22.

31. *Id*. at 31.

32. *Griggs*, 401 U.S. at 431 (determining that Title VII required the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification").

33. 42 U.S.C. § 2000e-2(a)(1). Many factors contributed to Congress's enactment of the Civil Rights Act of 1964. Blumrosen, *supra* n. 25, at 44. Before the enactment of Title VII, President Lyndon B. Johnson pushed for a comprehensive law that "included a prohibition on employment discrimination." *Id*. During the legislative process, opponents of the bill attempted to sabotage it with amendments that would ensure it would not receive enough votes to pass. *Id*. at 45.

34. D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. Cal. L. Rev. 733, 750 (1987) (explaining that Title VII requires the removal of artificial barriers to employment that previously have prevented minorities from entering into the workplace).

socially disfavored minority groups.[35] Therefore, the Supreme Court has upheld affirmative action[36] programs recognizing past discrimination against minorities.[37] In *United Steelworkers of America v. Weber*,[38] Justice William J. Brennan, Jr., writing for the majority, reasoned,

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[39]

Affirmative action cases have recognized that, even absent discrimination, minorities are underrepresented in the workplace.[40] Therefore, when the employer fails to hire minorities, there is a presumption that the employer discriminated against qualified minorities.[41] This presumption and minority underrepresentation in the workplace have roots in this country's history of discrimination against minorities.[42] However, the main intent of affirmative action is to allow minorities access to employment opportunities previously

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35. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979) (determining that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy'").

36. Affirmative action "encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future." Lincoln Caplan, *Up against the Law: Affirmative Action and the Supreme Court* 18 (20th Cent. Found. Press 1997) (quoting the United States Commission on Civil Rights).

37. *Weber*, 443 U.S. at 209 (concluding that private sector adoption of voluntary affirmative action programs is consistent with the purpose of Title VII).

38. 443 U.S. 193 (1979).

39. *Id*. at 204 (quoting the remarks of Senator Hubert Humphrey, 110 Cong. Rec. 6552 (1964) (citation omitted)).

40. *Johnson v. Transp. Agency*, 480 U.S. 616, 628–629, 630 (1987) (explaining that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts").

41. *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (reasoning that the establishment of the prima facie case raises a presumption of discrimination "based on the consideration of impermissible factors" absent explanation of the employer's actions).

42. *See generally* Reginald Wilson, *Affirmative Action: Catalyst or Albatross?* 9 (S.N. Colamery ed., Nova Sci. Publishers 1998) (explaining that slavery, peonage, and racism have been societal barriers deeply rooted in America).

inaccessible.[43] Voluntary affirmative action programs fall "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[44]

Although Title VII attempts to protect everyone equally, the protection it should afford to majority members bringing a racial discrimination claim has remained unclear. Congress enacted Title VII in response to insidious discrimination against minorities,[45] not in response to any discrimination of which majority members may have been victims in the workplace. Further, the Supreme Court has remained unclear about how courts should interpret Title VII. On one end of the spectrum, the Court has said that Title VII should be interpreted neutrally to protect all employees from discrimination.[46] On the other end of the spectrum, the Court has upheld affirmative action programs, allowing limited preferential treatment of minorities, determining that a neutral interpretation of Title VII would violate the "spirit" of the Act.[47]

B. The *McDonnell Douglas* Prima Facie Case

To determine how courts should treat a Title VII case brought by a majority member, Supreme Court precedent must first be examined to demonstrate how the Court has treated a traditional Title VII case brought by a minority. Title VII cases brought by any plaintiff consist primarily of circumstantial evidence of the employer's intent to discriminate, as an employer will almost never announce a discriminatory purpose or provide direct evidence of discriminatory intent.[48] In *McDonnell Douglas*, the Supreme Court confronted for the first time the issue of how a plaintiff can bring a

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43. Chris Engels, *Voluntary Affirmative Action in Employment for Women and Minorities under Title VII of the Civil Rights Act: Extending Possibilities for Employers to Engage in Preferential Treatment to Achieve Equal Employment Opportunity*, 24 John Marshall L. Rev. 731, 807 (1991) (reasoning that "[t]he purpose of Title VII is to eliminate the last vestiges of employment discrimination, and to establish a race- and sex-neutral employment decision making process upon reaching this goal").

44. *Weber*, 443 U.S. at 209.

45. *Id.* at 202.

46. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976).

47. *Weber*, 443 U.S. at 209.

48. *U.S. Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711, 716 (1983) (determining that a plaintiff likely will not have direct evidence of the employer's intent); *McDonnell Douglas*, 411 U.S. at 802.

Title VII case for racial discrimination with only circumstantial evidence of the employer's intent.[49]

In *McDonnell Douglas*, the employer laid off a black civil rights advocate in accordance with a general reduction in the workforce.[50] The employee claimed that the discharge was racially motivated and subsequently organized and participated in protests against the employer.[51] Although the former employee engaged in illegal and disruptive activity toward his former employer, he applied for re-employment when the employer sought applications for job openings.[52] The employer rejected the former employee, who claimed that the employer failed to hire him because of his race and involvement with the civil rights activities directed toward the employer.[53] When the case reached the Supreme Court, Justice Lewis F. Powell, Jr., writing for the unanimous Court, had to determine the order and allocation of proof in a private action alleging employment discrimination when there was only indirect evidence of discrimination.[54] Under the analysis created by this case, the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."[55] Therefore, the plaintiff must satisfy a four-prong test created in this case that allows the plaintiff to bring a Title VII case without direct evidence of the employer's intent.[56] Under the four-prong test, the plaintiff must prove

> [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

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49. *McDonnell Douglas*, 411 U.S. at 800, 802.

50. *Id.*

51. *Id*. The former employee participated in a "stall in," in which he and other protesters parked their cars in the middle of a main access road to the employer's premises. *Id*. The former employee remained in his car until the police arrived; he subsequently was arrested for obstructing traffic. *Id*. at 795.

52. *Id*. at 796.

53. *Id*.

54. *Id*. at 800. The Court also noted, "The facts necessarily will vary in Title VII cases, and the [four-prong test] of the prima facie proof required from [employee] is not necessarily applicable in every respect to differing factual situations." *Id*. at 802 n. 13.

55. *Id*. at 802.

56. *Id.*

> the employer continued to seek applicants from persons of complainant's qualifications.[57]

Once a plaintiff has satisfied the test, the employer's discriminatory intent is presumed, and it now must articulate a legitimate, nondiscriminatory reason for its actions.[58] If an employer is able to articulate a legitimate, nondiscriminatory reason for not hiring the plaintiff, the burden shifts back to the plaintiff to show that the employer's stated reasons are a pretext for intentional discrimination.[59] The plaintiff must be given a fair opportunity to show that the presumptively valid reasons for the employer's actions were a cover-up for discrimination.[60] To show that an employer's stated reasons were pretextual, a plaintiff can offer evidence demonstrating the employer's adverse treatment of minorities, which can be shown through statistics of the employer's policies and practices toward the hiring of minorities.[61] Also, an employee may offer evidence showing that the employer treated a similarly situated majority member employee differently than the adversely affected minority plaintiff.[62]

The unanimous Court held that the employee was able to establish a prima facie case for discrimination.[63] However, the Court determined that the employer's desire not to hire someone who engaged in illegal and disruptive conduct targeted toward it was a legitimate, nondiscriminatory reason for its actions.[64] Thus, the Court remanded the case, allowing the employee the opportunity to offer evidence demonstrating that the employer's stated reasons were merely a pretext for intentional discrimination.[65]

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57. *Id*. The Court further explained that the standard is not inflexible, because "[t]he 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." *Id*. at 802 n. 13.

58. *Id*. at 802.

59. *Id*. at 804. The Court noted, "While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by [Title VII]." *Id*.

60. *Id.*

61. *Id*. at 804–805.

62. *Id*. at 804.

63. *Id*. at 807. The Court held that the former employee was able to establish a prima facie case against his former employer although he engaged in illegal conduct directed at his former employer. *Id*.

64. *Id*.

65. *Id*.

Although a plaintiff may be able to establish a prima facie case of racial discrimination applying the *McDonnell Douglas* test, that "showing is not the equivalent of a factual finding of discrimination."[66] In *Furnco Construction Corporation v. Waters*,[67] the Court further explained that there is a difference between a finding that the plaintiff established a prima facie case for discrimination and the ultimate finding of fact regarding the employer's discriminatory refusal to hire.[68] Once a minority plaintiff establishes a prima facie case under Title VII, the employer is required only to produce evidence of a legitimate, nondiscriminatory reason for its decision.[69]

In *Texas Department of Community Affairs v. Burdine*,[70] the unanimous Court explained the flexibility of the *McDonnell Douglas* test.[71] Justice Powell, writing for the Court, held that when a Title VII plaintiff establishes a prima facie case, the employer's burden requires it only to explain the nondiscriminatory reasons for its actions clearly.[72] The *McDonnell Douglas* prima facie case "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."[73] "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee."[74] The employer "need not persuade the court that it was actually motivated by the proffered reasons."[75] The employer is required to produce only admissible evidence that raises a genuine issue of fact regarding

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66. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978).

67. 438 U.S. 567 (1978).

68. *Id*. at 577.

69. *Id*. In *Furnco Construction Corporation*, the employer's legitimate reason for rejecting the plaintiffs was the employer's desire to hire only people who were experienced fire bricklayers. *Id*. at 570–571. The employer was not required to change its qualifications to ensure a greater number of minorities were hired. *Id*. at 577–578.

70. 450 U.S. 248 (1981).

71. *Id*. at 253–254.

72. *Id*. at 260. The Court also reasoned that Title VII does not require the employer to choose an equally qualified minority over a majority member. *Id*. at 259.

> [T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose [it] to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

Id.

73. *Id.* at 254 (citing *Furnco Constr. Corp.*, 438 U.S. at 577).

74. *Id.*

75. *Id*.

whether the employer discriminated against the plaintiff.[76] The evidence must be legally sufficient, entitling the employer to judgment.[77] If the employer carries its burden, the presumption that it discriminated against the plaintiff is rebutted, and the plaintiff, who retains the burden of proof,[78] now has the opportunity to show that the proffered reason was not the reason for the employer's actions.[79]

In *St. Mary's Honor Center v. Hicks*,[80] the Court clarified what plaintiffs must prove after they show that all of the defendant's stated reasons for an adverse employment decision merely were pretextual.[81] In *Hicks*, Justice Antonin Scalia, writing for the majority, determined that the employer, by producing evidence of nondiscriminatory reasons, sustains its burden of production and therefore is entitled to judgment if the employee cannot offer evidence of the employer's discriminatory intent.[82] Although the employer's reasons for its adverse action may not be credible, the court does not determine the credibility of the employer's stated reasons.[83] Once the employer offers nondiscriminatory reasons for its actions, the presumption of discrimination created by the

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76. *Id.*

77. *Id.*

78. Although the plaintiff has the burden of persuasion, after the plaintiff establishes a prima facie case, the defendant has the burden of production, which is intended in Title VII cases "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id*. at 255 n. 8.

79. *Id*. at 256; *McDonnell Douglas*, 411 U.S. at 802.

80. 509 U.S. 502 (1993).

81. *Id*. at 507–508.

82. *Id*. at 507. The Court recently reinterpreted what an employee must show once the employee has rebutted an employer's nondiscriminatory reasons for an adverse employment decision in the context of an Age Discrimination in Employment Act case. *Reeves v. Sanderson Plumbing Prods., Inc*., 120 S. Ct. 2097 (2000). Justice Sandra Day O'Connor, writing for the Court, determined that

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id. at 2109. Justice O'Connor reasoned that a plaintiff is not always required to introduce additional evidence of discrimination once the plaintiff has rebutted the defendant's offering of its legitimate, nondiscriminatory reasons for its adverse employment actions. *Id.*

83. *Hicks*, 509 U.S. at 519. This analysis commonly is referred to as "pretext plus." Robert B. Fitzpatrick & Marlissa S. Briggett, *Review of Significant U.S. Supreme Court and Appellate Decisions* *4 (ALI-ABA Course of Study Series No. C932, July 21, 1994) (available in WL, in ALI-ABA database); Janice C. Whiteside, Student Author, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 Ind. L. Rev. 413, 420 (1998).

McDonnell Douglas[84] test drops from the case, and the plaintiff must now prove that the employer intentionally discriminated against him.[85]

Although the Supreme Court has determined that Title VII prohibits discrimination in employment against all races,[86] the Court has demonstrated that it will not read Title VII literally if a literal reading of the Act prohibits employers' attempts to rectify past discrimination.[87] Therefore, the Court, in *Weber*, reasoned that Title VII does not prohibit private employers from voluntarily establishing race-conscious affirmative action programs with the purpose of eliminating racial imbalance in the workplace.[88] In *Weber*, a collective bargaining agreement contained an affirmative action program.[89] Pursuant to the agreement, the private employer established a training program in which fifty percent of the new trainees would be minorities to increase the number of minorities in higher-level positions.[90] Although employees were selected according to seniority, the employer would continue to ensure that fifty percent of the trainees were minorities until the percentage of skilled workers in the employer's plant approximated the percentage of minorities in the local labor force.[91] Majority member employees sued, claiming that the minorities brought into the training program had less seniority than their majority member counterparts.[92] Therefore, the plaintiffs argued that the affirmative action program resulted in junior minority employees receiving training in preference of senior majority member employees in violation of Title VII.[93]

The question before the Court was "whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the

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84. The Court noted that "the *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production." *Hicks*, 509 U.S at 521.

85. *Id*. at 523. The Court reasoned that Title VII does not award damages to plaintiffs even though the employer cannot prove a nondiscriminatory reason for its actions. *Id*. Courts should award damages only against employers that base an employment decision on a prohibited factor such as race. *Id*. at 523–524.

86. *McDonald*, 427 U.S. at 282.

87. *Weber*, 443 U.S. at 209.

88. *Id.*

89. *Id.* at 198.

90. *Id*.

91. *Id*. at 199.

92. *Id*.

93. *Id*.

manner and for the purpose provided" by the employer and union's plan.[94] Although the majority member plaintiffs argued that Congress intended Title VII to prohibit all race-conscious affirmative action plans, Justice Brennan, writing for the majority, determined that the argument overlooked the fact that the affirmative action program was adopted voluntarily to eliminate traditional patterns of discrimination against minorities.[95] Although a literal reading of Title VII could prohibit race-conscious affirmative action plans, the "spirit" of the Act allowed the Court to uphold plans that would combat this country's past discriminatory treatment of minorities.[96] In reaching this conclusion, Justice Brennan heavily relied on the legislative history of Title VII and noted that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'"[97]

II. LOWER COURTS' STRUGGLE TO DETERMINE THE SUPREME COURT'S INTERPRETATION OF TITLE VII

McDonnell Douglas firmly established a minority's right to bring a Title VII case for racial discrimination without direct evidence.[98] However, because the *McDonnell Douglas* prima facie case required a plaintiff first to establish membership in a racial minority,[99] courts of appeals have struggled to determine how majority member plaintiffs can establish a prima facie case applying the *McDonnell Douglas* framework.[100]

In the leading case on majority member discrimination,[101] *Parker v. Baltimore and Ohio Railroad*,[102] the District of Columbia Circuit concluded that a majority member plaintiff bringing a Title

94. *Id*. at 200.
95. *Id*. at 201.
96. *Id*.
97. *Id*. at 202.
98. 411 U.S. at 802.
99. *Id*.
100. Whiteside, *supra* n. 83, at 419 (noting that most courts apply the *McDonnell Douglas* test in majority member discrimination cases, although the courts do not agree on how the test should be used).
101. Douglas L. Williams, *Updates to Developments in Race and Age Discrimination* *111 (ALI-ABA Course of Study Series No. SC63, Apr. 23, 1998) (available in WL, in ALI-ABA database) (recognizing that *Parker* established the burden of proof for majority plaintiffs attempting to establish a prima facie case for racial discrimination).
102. 652 F.2d 1012 (D.C. Cir. 1981).

VII action against an employer will first have to offer evidence suggesting "background circumstances support[ing] the suspicion that the defendant is that unusual employer who discriminates against the majority."[103] Judge Abner J. Mikva, relying on *McDonnell Douglas*, determined that a majority member could not prove membership in a racial minority as required by the first prong of the *McDonnell Douglas* prima facie case test.[104] Therefore, a majority member plaintiff cannot establish a prima facie case by applying the *McDonnell Douglas* test if he cannot offer any additional evidence of discrimination.[105] Judge Mikva explained that

> [m]embership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can it be stated as a general rule that the "light of common experience" would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society.[106]

Recognizing the delicate balance between private affirmative action programs upheld in *Weber* and unlawful discrimination against majority members, Judge Mikva remanded the case.[107] The trial court was directed to determine whether the majority member plaintiff could establish background circumstances supporting the inference that the employer is the unusual employer who discriminates against the majority, sufficient to establish a prima facie case for racial discrimination.[108]

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103. *Id*. at 1017.
104. *Id*.
105. *Id*.
106. *Id*.
107. *Id*. at 1020–1021.
108. *Id*. at 1020. The *Parker* court has been criticized for creating a standard that makes it virtually impossible for majority members to establish a Title VII case based solely on indirect evidence of discrimination. Black, *supra* n. 9, at 352. Those who have argued against the background circumstances test have explained that the burden it places on majority member plaintiffs is simply "unfair." *Id*.

Twelve years later in *Harding v. Gray*,[109] the District of Columbia Circuit determined that a plaintiff who can demonstrate superior qualifications satisfies the requirements of the background circumstances test.[110] The background circumstances test is not designed to impair majority member plaintiffs, who are entitled to Title VII protection.[111] Instead, the test is a substitute for the minority plaintiff's burden of showing he or she is a member of a racial minority.[112] Both the background circumstances test and the *McDonnell Douglas* prima facie test create an "inference of discrimination."[113] Background circumstances evidence can consist of evidence showing that the employer had some reason or inclination to discriminate against the majority or allegations of superior qualifications.[114]

The background circumstances test first articulated in the District of Columbia Circuit by Judge Mikva represents a valid attempt to accommodate both the underlying intent of Title VII and the needs of plaintiffs who employers have discriminated against. However, the test is not the proper test to apply in majority member discrimination cases.[115] Therefore, for four reasons, courts should not require majority member plaintiffs to show background circumstances as part of the prima facie case.

First, the background circumstance test fails because it, like the *McDonnell Douglas* test, focuses on whether the employer has discriminated against a particular group in the past, not whether the employer is discriminating against the plaintiff bringing suit.[116]

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109. 9 F.3d 150, 153 (D.C. Cir. 1993) (determining that "[i]nvidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant").

110. *Id*. at 154.

111. *Id*. at 153.

112. *Id*.

113. *Id*.

114. *Id*. When plaintiffs are able to demonstrate that their qualifications for the job are superior to those of the minority hired, the court will then presume discrimination. *Id*. at 154. Courts applying the background circumstances test look at whether the evidence indicates "that there is something 'fishy' about the facts of the case." *Mills*, 171 F.3d at 455. "Fishy" evidence can include schemes to fix performance ratings, hiring systems that work toward a majority member plaintiff's detriment, and departing from hiring procedures in an unprecedented fashion. *Id*.

115. 42 U.S.C. § 2000e-2(a)(2) (providing that Title VII proscribes discrimination in employment against any individual based on race).

116. Critics have called for the disposal of the *McDonnell Douglas* test in cases involving discrimination against the majority. Denny Chin & Jodi Golinsky, *Moving beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L.

The only issue that should be considered is whether the defendant employer discriminated against the majority plaintiff, not whether the employer has discriminated against members of the plaintiff's class in the past.[117] Evidence suggesting that the employer has discriminated against majority members in the past could be used circumstantially to show that it was likely that the employer discriminated against the plaintiff, but lack of that evidence at the prima facie case stage should not bar a plaintiff from establishing a prima facie case.[118]

Second, the background circumstances test fails because it is applied in the wrong stage of litigation.[119] When a plaintiff establishes a prima facie case, employers are required only to defend their actions.[120] The Court fashioned the prima facie case to assist plaintiffs who did not have direct evidence of the employer's discriminatory intent.[121] Although the Court fashioned the prima facie case for a "racial minority," its fundamental principle, that a plaintiff usually will not have direct evidence of the employer's intent, is still valid when the test is applied to majority members.[122] Therefore, a requirement that a plaintiff must show evidence indicating the employer's intent at the prima facie stage violates the *McDonnell Douglas* test.

The stage at which the background circumstances test should be considered is after the employer proffered legitimate, nondiscriminatory reasons for its actions.[123] At this point, the plaintiff has the ability to rebut the employer's legitimate reasons with a showing of a pattern or history of discrimination against the majority, which would be equivalent to the showing required by the background

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Rev. 659, 671–672 (1998). They have reasoned that the *McDonnell Douglas* test does not address the issue of whether a plaintiff has demonstrated that the employer's adverse employment decision was based on a prohibited factor such as race. *Id*. at 671.

117. *Furnco Constr. Corp.*, 438 U.S. at 579 (stating that the only obligation imposed on employers by Title VII is ensure that everyone, regardless of race, has an equal opportunity to compete in the workplace); *see* Black, *supra* n. 9, at 335 (reasoning that it is illogical to use historical rationale to justify the background circumstances test).

118. *See* Whiteside, *supra* n. 83, at 429 (explaining that the background circumstances test undermines the purposes of the presumptions created by the Court).

119. *Id*.

120. *Hicks*, 509 U.S. at 507. The employer must bring forth only admissible evidence of its legitimate, nondiscriminatory reason for its actions. *Id*.

121. *Id*.

122. See *infra* note 148 for a discussion of the evidentiary difficulties that majority member plaintiffs face in reverse discrimination cases.

123. See *infra* notes 243 to 255 and accompanying text for a discussion of the background circumstances test and its application.

circumstances test at the prima facie stage.[124] This is where background circumstances should be considered, because plaintiffs have the ability to rebut the employer's present hiring decision, which should always be the only issue in a case in which a majority member brings a Title VII action.[125] When a minority brings a Title VII case, the past treatment of minorities is a valid concern that the court should consider when determining whether the employer presently discriminated against the minority. However, the establishment of a prima facie case by a majority member plaintiff should require a court to focus only on the issue of the case, whether the employer discriminated against the plaintiff.[126]

Fourth, the courts of appeals have not been able to articulate successfully what evidence will be sufficient to establish background circumstances;[127] therefore, the courts failed to provide majority member plaintiffs any guidelines on how to establish a prima facie case for discriminatory hiring practices. Although a plaintiff's allegation of superior qualifications may establish background circumstances,[128] a plaintiff should not have to prove that he was the most qualified person for the job to establish that the employer discriminated against him. The plaintiff should be required to demonstrate only that the employer considered his race when it decided not to hire him.[129]

Courts of appeals have articulated further that the background circumstances test places a "heightened burden" on majority member plaintiffs,[130] which is not required of similarly situated minority counterparts.[131] However, this criticism is misplaced because majority members and minorities are not similarly situated within the workplace.[132] If these groups were similarly situated, affirmative action programs would not exist. Although two persons

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124. *Burdine*, 450 U.S. at 256–257.

125. Baroni, *supra* n. 23, at 816–817 (stating that the background circumstances test respects the Congressional intent of Title VII). The background circumstances test also may be considered a remedial measure to combat past discrimination. *Id*.

126. *See Burdine*, 450 U.S. at 254 (maintaining that a presumption as to the issue of discrimination arises when a plaintiff establishes a prima facie case).

127. *Iadimarco v. Runyon*, 190 F.3d 151, 162–163 (3d Cir. 1999).

128. *Harding*, 9 F.3d at 154.

129. *Furnco Constr. Corp.*, 438 U.S. at 579.

130. *Iadimarco*, 190 F.3d at 160.

131. *Notari*, 971 F.2d at 590; 45A Am. Jur. 2d *Job Discrimination* § 130 (1993) (noting that one criticism of the background circumstances test is that it adds an unwarranted burden on majority member plaintiffs).

132. Edley, *supra* n. 2, at 42–43.

with similar qualifications may be applying for the same job, that does not mean those persons will be treated equally.[133] Congress enacted Title VII with the recognition that employers have not treated similarly qualified persons equally.[134]

Establishing a prima facie case under the traditional *McDonnell Douglas* test creates a presumption that the employer discriminated against the minority plaintiff.[135] The minority is required to show only that he is a minority, that he applied for the job, that he was qualified for the job, and the employer hired a majority member, as there is a presumption that the employer has discriminated against the minority based on past discrimination against minorities.[136] The background circumstances test is applied as a substitute for the minority's ability to point to this country's history of insidious discrimination against his race.[137] Therefore, under the background circumstances test, if the majority member plaintiff can point to the current employer's discrimination against majority members, the majority member plaintiff, like a minority plaintiff, will be entitled to a presumption of discrimination.[138] Thus, the background circumstances test is not an additional burden; it is a substitute for the burden that all minorities can meet because of past discrimination.[139]

However, by focusing on the prima facie stage of litigation, courts applying the background circumstances test have not been successful at reconciling the historical intent of Title VII with the

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133. *Johnson*, 480 U.S. at 632–633 (recognizing that affirmative action programs are valid because they encourage employers to hire qualified minority applicants).

134. *Griggs*, 401 U.S. at 431.

135. 411 U.S. at 802.

136. *Id*.

137. *Parker*, 652 F.2d at 1017.

138. *Pierce v. Cmmw. Life Ins. Co.*, 40 F.3d 796, 801, 801 n. 7 (6th Cir. 1994) (applying the background circumstances test, but first remarking that it had "serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts").

139. *Murray v. Thistledown Racing Club*, 770 F.2d 63, 68 (6th Cir. 1985) (reasoning that the majority member could not establish a prima facie case because she submitted no evidence that the employer was the unusual employer who discriminates against the majority); *Mills*, 171 F.3d at 457 (deciding to adopt formally the background circumstances test because majority members must point to some situation that creates an inference of discrimination); *Duffy v. Wolle*, 123 F.3d 1026, 1037 (8th Cir. 1997) (determining that a majority member established a prima facie case for employment discrimination because he satisfied the background circumstances test); *Harding*, 9 F.3d at 153; *Olenick v. N.Y. Tel.*, 881 F. Supp. 113, 114 (S.D.N.Y. 1995) (stating that "[b]ecause plaintiff is not a member of a racial minority," her claims are subject to an altered analysis under the background circumstances test).

relevant issue of whether the employer discriminated against the current plaintiff because of his race.[140] Also, the courts applying the background circumstances test have struggled to overcome the Supreme Court's pronouncement in *McDonnell Douglas* that establishment of a prima facie case is not an onerous burden.[141] Therefore, some courts of appeals have either rejected the background circumstances test or allowed majority member plaintiffs other avenues for establishing a case based on racial discrimination.[142]

To demonstrate the problems created by the background circumstances test, a return to the hypothetical situation is appropriate. The firm to which Bo and John sent applications in the District of Columbia Circuit is a newly established firm, and the firm is making its initial hire of associates. The senior partner of the firm sent a memorandum to the hiring partner emphasizing that the firm should consider diversity when making hiring decisions, and the associates of the firm should reflect the population of the community. Although the partners have not "announced" a desire to discriminate, there is an underlying understanding that a minority will be hired instead of a majority member if their qualifications are roughly equal.

Although Bo may be able to discover evidence demonstrating the firm's discriminatory intent, he will never have the opportunity, as he cannot show that the firm is the unusual employer who discriminates against the majority or that he has superior qualifications. Therefore, when applying the background circumstances test, the firm, because it is a new firm and therefore has not discriminated against majority members in the past, does not even have to justify its employment decision. By never announcing its discriminatory intent, the firm ensures that it will not have to defend its employment decision by having to produce any evidence indicating it had a legitimate, nondiscriminatory reason for its actions. Thus, Bo will be precluded from successfully bringing a Title VII claim,

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140. *Pierce*, 40 F.3d at 801 n. 7.

141. *Umansky v. Masterpiece Intl. Ltd.*, 1998 WL 433779 at *3 n. 3 (S.D.N.Y. 1998) (determining that although the burden of establishing a prima facie case is not onerous, a Caucasian woman, who is a member of a protected class under Title VII, cannot establish a prima facie case without proving background circumstances).

142. *Eastridge v. R.I. College*, 996 F. Supp. 161, 166 (D.R.I. 1998) (recognizing the need for courts to establish an alternative avenue for majority member plaintiffs because compliance with the traditional *McDonnell Douglas* test virtually would preclude such a plaintiff from bringing a Title VII case).

although the employer based its hiring decision on a prohibited factor.

Rejection of the Background Circumstances Test

The Third and Tenth Circuits have held that majority members should not be precluded from bringing a Title VII case when they cannot offer background circumstances.[143] While acknowledging that the Supreme Court's prima facie four-prong test first required proof of membership in a racial minority, these circuits have noted that the *McDonnell Douglas* test should be applied with flexibility.[144] In rejecting the background circumstances test, the Third and Tenth Circuits relied heavily on the Court's decision in *McDonald v. Santa Fe Trail Transportation Company*,[145] which allowed a majority member to bring a Title VII action based on race.[146] In *McDonald*, Justice Thurgood Marshall, writing for the majority, determined whether two white employees charged with misappropriating property from their employer and subsequently discharged from their employment stated a claim under Title VII when a similarly charged black employee was not dismissed.[147] Because the discharged employees were able to demonstrate that the employer treated a similarly situated minority employee differently when it did not discharge him, the discharged employees had sufficient evidence to demonstrate the employer's discriminatory intent.[148] Justice Marshall concluded that Title VII prohibits the discharge of any individual because of that individual's race; thus, the majority member plaintiffs could bring a Title VII case for racial discrimination.[149]

Relying on the Court's determination in *McDonald*, the Tenth Circuit in *Notari v. Denver Water Department*[150] concluded that when majority member plaintiffs cannot establish background

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143. *Iadimarco*, 190 F.3d at 163; *Notari*, 971 F.2d at 591.

144. *Notari*, 971 F.2d at 591.

145. 427 U.S. 273 (1976).

146. *Id*. at 295–296; *see Mills*, 171 F.3d at 454 (citing *McDonald* in a reverse discrimination case for the proposition that the Supreme Court has allowed these plaintiffs to bring a Title VII action and noting that it is unsettled how a majority member can bring a case).

147. 427 U.S. at 273.

148. *Id*. Because *McDonald* dealt with similarly situated employees, its application is difficult in cases involving adverse hiring situations, which lack similarly situated individuals.

149. *Id.* at 296.

150. 971 F.2d 585 (10th Cir. 1992).

circumstances, they still can establish a prima facie case for racial discrimination by presenting direct evidence of discrimination or cumulative evidence "sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff."[151] In *Notari*, a white male applied for a promotion with his employer.[152] The employer denied the employee the promotion, and, subsequently, the employer hired a woman.[153] The plaintiff brought a Title VII action for sex discrimination, alleging he was more qualified than the woman hired and that the employer therefore violated his rights under Title VII.[154] After determining that the *McDonnell Douglas* test should be modified for "reverse discrimination" plaintiffs, Judge Deanell Reese Tacha, writing for the court, decided that the plaintiff would not be able to establish background circumstances demonstrating that the employer was the "unusual employer who discriminates against the majority."[155] Therefore, the plaintiff may not rely on the *McDonnell Douglas* test to establish a prima facie case.[156] The court determined, however, that majority member plaintiffs should not be precluded from establishing a prima facie case, because they cannot establish background circumstances, as the result would be "untenable and inconsistent with the goals of Title VII."[157] An employer can discriminate against a majority member in favor of a minority with no direct evidence that it favors persons from the historically disadvantaged groups.[158] Majority members should not be precluded from suing for failing to offer background circumstances because minorities historically were able to establish a case two different ways — either by direct evidence or by establishing a

151. *Id*. at 590.

152. *Id*. at 586.

153. *Id*.

154. *Id.* at 587. When the employer initially interviewed the employee for the promotion, the interviewers determined that the employee was the best qualified for the job. *Id*. at 586.

155. *Id*. at 589.

156. *Id.* The court noted that a number of courts have required modification of the *McDonnell Douglas* test for a "reverse discrimination claim." *Id*. at 588. Although the court found the reasoning that the *McDonnell Douglas* test must be modified when a majority member brings a racial discrimination case, it concluded that a new standard must be contemplated for majority members. *Id*. at 589.

157. *Id*. at 590. The court noted that "[t]he claims of two similarly situated victims of intentional discrimination should not be subjected to such dissimilar dispositions. Just because a reverse discrimination claimant cannot show the background circumstances necessary to trigger the *McDonnell Douglas* presumption does not inexorably mean that his employer has not intentionally discriminated against *him*." *Id.*

158. *Id*.

prima facie case.[159] Thus, majority member plaintiffs should have more than one way of establishing a discrimination case.[160]

In 1999 the Third Circuit formally rejected the background circumstances test.[161] Judge Theodore A. McKee, writing for the court, reasoned that majority member plaintiffs should not be held to a higher burden and that they should be required only to present sufficient facts allowing the fact finder to conclude that the employer improperly considered race when making the adverse employment decision.[162] In *Iadimarco v. Runyon*,[163] a majority member brought a Title VII suit after his employer failed to promote him and hired a minority female who had not been through the same interview process as the plaintiff.[164] The majority member plaintiff argued that he was not promoted because of his race and that the employer hired the minority because it was trying to diversify the workplace.[165] In rejecting the requirement that a majority member plaintiff must first prove background circumstances, Judge McKee determined that the only inquiry in a Title VII case is whether the employer treated some groups less favorably than others because of race.[166] Judge McKee concluded that

> rather than require "background circumstances" about the uniqueness of the defendant employer, a plaintiff who brings a "reverse discrimination" suit under Title VII should be able to establish a prima facie case in the absence of direct evidence of discrimination by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the

159. *Id*. at 589.

160. *Id*. Under the standard set out in *Notari*, a majority member who cannot prove background circumstances can establish a prima facie case for discrimination if he can show a nexus between the alleged discriminatory conduct (for example, racist comments) and the employer's adverse employment decision. Brenda D. Diluigi, *The Notari Alternative: A Better Approach to the Square-Peg-Round-Hole Problem Found in Reverse Discrimination Cases*, 64 Brook. L. Rev. 353, 376 (1998).

161. *Iadimarco*, 190 F.3d at 163.

162. *Id*.; *see Eastridge*, 996 F. Supp. at 167 (determining that the background circumstances test is an onerous burden and deciding to look only to whether an inference can be drawn from the facts as to whether the plaintiff was treated less favorably because of his race).

163. 190 F.3d 151 (3d Cir. 1999).

164. *Id*. at 155. The employer had a rating system that it used to determine whether a potential employee was "the right person for the job." *Id*. at 157. The plaintiff received a ranking of "superior," but the employee hired was not evaluated under the rating system. *Id*. at 154.

165. *Id*. at 154–155.

166. *Id*. at 163.

> circumstances) that the defendant treated plaintiff "less favorably than others because of [his] race."[167]

Under the court's interpretation, the background circumstances test is flawed, because the test is "crammed" into a Title VII suit at the prima facie case stage.[168] Background circumstances requires the plaintiff to bring forth evidence that would not be relevant until after the prima facie stage, therefore, resulting in a "heightened burden."[169]

Although the language of the cumulative evidence test may seem similar to the language employed by courts applying the background circumstances test, there is a key distinction. The background circumstances test requires plaintiffs to offer evidence establishing a pattern of discrimination against majority members in the past.[170] However, the cumulative evidence test requires a plaintiff only to bring forth evidence indicating that the employer was discriminating against the plaintiff.[171] Although the cumulative evidence test focuses on the proper issue, the test, like the background circumstances test, also fails to establish a proper standard for majority members bringing a Title VII case.[172]

The Supreme Court recognized that a plaintiff usually does not possess evidence indicating the employer's intent.[173] Therefore, the Court fashioned the *McDonnell Douglas* test to help plaintiffs establish a prima facie case and require employers to defend their actions.[174] The ultimate question in any discrimination case is whether the employer engaged in unlawful discrimination, and plaintiffs always have the burden of proving that the employer intentionally discriminated against them.[175] Therefore, all plaintiffs bringing Title VII claims have the same ultimate burden.[176]

Although majority member plaintiffs applying the cumulative evidence test have the same ultimate burden as minorities bringing

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167. *Id*. (citations omitted).
168. *Id*.
169. *Id.*
170. *Parker*, 652 F.2d at 1018.
171. *Iadimarco*, 190 F.3d at 163.
172. *See Mills*, 171 F.3d at 457 (noting that if majority member plaintiffs have to show less to prove a prima facie case than minorities, then employers will lose the screening out process that the prima facie case originally provided).
173. *McDonnell Douglas*, 411 U.S. at 802.
174. *Id*.
175. *Id*.
176. *Burdine*, 450 U.S. at 256.

a Title VII action, the cumulative evidence test presents three problems in Title VII cases. The first problem is that the cumulative evidence test, like the background circumstances test, requires some proof of discrimination early in the suit.[177] Therefore, those plaintiffs who cannot produce evidence of the employer's discriminatory intent early in litigation will be precluded from continuing their suit.[178] An employer likely will not announce its discriminatory intent,[179] thus, plaintiffs' suits will not be successful if the employers simply remain quiet.[180] When a plaintiff establishes a prima facie case, the employer must defend its actions.[181] If the employer is able to defend its actions, the plaintiff then has the chance to demonstrate that the employer's stated reasons were a pretext for its unlawful discrimination.[182] Through this process, plaintiffs may be able to gather evidence demonstrating the employer's intent and establishing a question for a fact finder to decide.[183] However, if a plaintiff is required to offer evidence early in litigation, a plaintiff who through the burden-shifting process could have established the discriminatory intent of the employer will be precluded from so doing.[184]

The second and potentially more troubling problem of the cumulative evidence test is that it encourages a court to put itself in the place of the employer, allowing it to scrutinize ordinary employment decisions.[185] The court's intrusiveness into decisions under this standard is exemplified in *Iadimarco*.[186] Applying the cumulative evidence test, the *Iadimarco* court looked at the hiring process to determine whether there was any evidence to support the proposition that the plaintiff would have been hired but for his

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177. *Notari*, 971 F.2d at 590 (requiring a plaintiff to show facts that are sufficient to support an inference that the employer discriminated against the plaintiff based on race).

178. *Id*. Under the cumulative evidence standard, it is not enough to allege the majority member plaintiff was qualified and a minority was hired instead of the majority member. *Id*.

179. *Aikens*, 460 U.S. at 716.

180. *Id*. (stating that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.").

181. *Id*. (explaining that the plaintiff retains the burden of proof once the employer has offered an explanation for its decision).

182. *Id*. at 716 n. 5.

183. *Hicks*, 509 U.S. at 507.

184. *Id*. (stating that once the employer offers a legitimate explanation for its decision, the plaintiff may offer evidence showing that the employer's explanation was not the true reason for its discrimination).

185. *Iadimarco*, 190 F.3d at 164–167 (scrutinizing the employer's decision to hire a minority female instead of the majority member plaintiff).

186. *Id*.

race.[187] Therefore, in *Iadimarco*, Judge McKee found that the employer's hiring of a black female, who did not have an engineering degree, could satisfy the cumulative evidence test when the plaintiff alleged he was told that an engineering degree was necessary for the position.[188] The employee hired was qualified for the position and exhibited attributes in the interviewing process that the employer determined would be beneficial for the position.[189] However, under the cumulative evidence standard, the employer who considers unique attributes it previously has not required risks a suit if the employer hires the applicant who impresses the interviewer with diverse skills.[190] Thus, employers actually are discouraged from considering the unique attributes applicants possess if the employers previously have not made it clear that they are looking for those skills.[191]

The Third Circuit has placed employers in a position to justify every decision made by considering evidence at the prima facie case stage that headquarters distributed a "diversity memo" encouraging the hiring of managers who better reflected the composition of the workforce. Not only did the court reason that the "diversity" evidence was enough to establish a prima facie case for discrimination, it reasoned that the evidence was sufficient to rebut the employer's legitimate reason for its hiring decision as a pretext to discrimination.[192] Thus, the case was remanded for jury determination.[193] The decision in *Iadimarco* does not just encourage the status quo, it awards employers who do not make any attempts to diversify the workplace by allowing them to hide behind the "fear of litigation argument" any time the composition of their workforce is questioned.

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187. *Id*. The court also found it significant that the hiring employee denied that he even interviewed the majority member plaintiff. *Id*. at 164. The hiring employee said that he had only talked with the plaintiff. *Id*. The court concluded that the controversy over whether the plaintiff was ever officially interviewed created an issue of material fact. *Id*. at 164–165.

188. *Id*. Iadimarco had an engineering degree. *Id*. at 164.

189. *Id*. at 157. The employer stated the minority hired was "the right person for the job." *Id.* However, because the employer could show only that the employee was "the right person for the job," that showing was not enough to serve a race-neutral explanation for rejecting the plaintiff. *Id*. at 167.

190. *Id*. at 157.

191. Discouraging diversity is contrary to Title VII, because Congress did not enact Title VII to serve as a roadblock to employers' attempts to reconcile inequality in the workplace. *Weber*, 443 U.S. at 217–218.

192. *Iadimarco*, 190 F.3d at 167.

193. *Id*.

Although the cumulative evidence test allows courts to scrutinize the employer's hiring decision, the employer may be able to avoid scrutiny if it clearly followed hiring procedures and had a concise job description, which requires foresight by the employer to know exactly what it is looking for before a potential employee walks in the door.[194] If the employer can demonstrate that the person hired fit the employer's job parameters, courts will be less likely to challenge the employment decision.[195] However, if the employer has not been clear about what it is looking for in an applicant, then the court will be forced to examine more closely the position the plaintiff sought and whether the employer made its final determination based on an impermissible factor such as race.[196]

Third, the most disastrous effect of the cumulative evidence test is the ramifications it can have on legal attempts to diversify the workplace.[197] Any time an equally qualified minority and majority member apply for the same position, if the employer hires the minority, the employer will expose itself to suit if there is any evidence suggesting that the employer hired him to diversify the workplace.[198] Because of the possible exposure to suit and a majority member plaintiff's ability to produce enough evidence for a jury determination, employers likely will not make conscious attempts to rectify imbalances that remain in the workplace, although the Supreme Court in *Weber* upheld voluntary affirmative action programs.[199] Thus, the courts applying the cumulative evidence test permit majority member plaintiffs to bring suit when the employer

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194. *Infra* nn. 262–272 and accompanying text.

195. *Infra* nn. 257–272 and accompanying text.

196. *Iadimarco*, 190 F.3d at 164 (explaining that the majority member plaintiff was told that an engineering degree, which he had, was a prerequisite for the position sought; however, the employer hired a minority who did not have an engineering degree. Therefore, the employer's subsequent reliance on the hired minority's human relations skills did not explain why the employer abandoned its focus on engineering backgrounds.).

197. The "diversity" memorandum in question in *Iadimarco* provided that

> [a]s we proceed to fill vacancies, I want to ensure that very serious consideration is given to the issue of diversity—I cannot emphasize this point more strongly. The management teams in our plants should reflect the composition of our workforce and communities if we are to benefit from the contributions that minorities, women, and ethnic groups can bring to our decision making processes and the social harmony that this will instill in our work environment. Your personal commitment is needed—if there are any questions on this matter, please feel free to contact me.

Id. at 155.

198. *See* Baroni, *supra* n. 23, at 817 (explaining that judicial efforts such as the background circumstances test insulate employers who may otherwise be exposed to suit if courts treated all plaintiffs the same without regard to their dissimilar history).

199. 443 U.S. at 209.

engages in activities Congress desired to encourage when it enacted Title VII.

The employer's disincentive to diversify the workplace can be demonstrated in the hypothetical fact pattern. The Third Circuit firm has been in existence since the beginning of the century. Because the surrounding community consists mostly of majority members, the firm's associates have been majority members almost without exception. To alleviate the lack of diversity in the firm, the firm's hiring committee circulated a memorandum encouraging recruiters to seek qualified minority applicants. Pursuant to this request, a recruiter participating in a minority job fair at State University met with John and encouraged him to submit a résumé to the firm. The firm usually only recruits through a process by which it first accepts résumés and then makes a determination of whom to interview based on the résumé. However, the hiring partner thought the job fair would be an ideal opportunity for the firm to gain exposure to students who may not have been considering submitting résumés to the firm. When the hiring partner met with John, she knew that John would make a great engineer and would have hired him irrespective of his race. When asked why she hired John, she stated that he was the right person for the job.

Although the firm did not have any intent to discriminate against Bo when it failed to hire him, he can bring a Title VII case successfully, enabling a jury to determine whether there was intentional discrimination merely by pointing to the firm's attempts to diversify the workplace, demonstrating that it did not follow its normal procedure. Also, Bo will bring forth as evidence the hiring partner's inability to justify why John was preferred over Bo. Because no discriminatory intent exists, a jury may find for the firm. However, the firm now has a clear incentive to follow the status quo and avoid any activities that may demonstrate that the firm is attempting to hire persons who reflect the population of the surrounding community.

III. THE ELEVENTH CIRCUIT APPROACH TO MAJORITY DISCRIMINATION CASES

The Eleventh Circuit has taken yet another approach to majority discrimination cases by departing from one of the traditional

requirements of proof in the *McDonnell Douglas* prima facie case.[200] In *Wilson v. Bailey*,[201] Judge Frank M. Johnson, Jr., writing for the court, determined that a plaintiff bringing a discrimination suit must establish the *McDonnell Douglas* prima facie case.[202] However, the majority member plaintiff bringing a Title VII suit is only required to prove that he was a member of a class, which every person can establish,[203] instead of proving that he is a member of a racial minority as originally required as the first prong of the *McDonnell Douglas* four-prong test.[204] Therefore, Judge Johnson reasoned that a white male could establish a prima facie case for racial discrimination.[205]

By effectively eliminating the first prong of the prima facie case, the Eleventh Circuit ignored the history of Title VII.[206] When a plaintiff bringing a discrimination suit establishes a prima facie case, discrimination is presumed and the plaintiff is entitled to judgment if the employer offers no reason for its actions.[207] Courts presume that the employer based its decision on an impermissible factor such as race.[208] Courts make this presumption because there has been a long history of discrimination against minorities.[209] However, it is impossible to make this presumption when a majority member brings a case based on racial discrimination, as there is no history of discrimination against the majority.[210] Because a majority

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200. *Wilson*, 934 F.2d at 304 (deciding that a majority member plaintiff does not have to prove he is a member of a racial minority).

201. 934 F.2d 301 (11th Cir. 1991).

202. *Id.*

203. Because everyone can establish membership in a class, the first prong of the Eleventh Circuit interpretation of the *McDonnell Douglas* prima facie case is meaningless. E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 Conn. L. Rev. 441, 463 (1998) (reasoning that membership in a protected class is not a prerequisite to a discrimination claim; therefore, the court should look only to whether the employer based its decision on a prohibited factor, not on the group to which the plaintiff belongs.).

204. *Wilson*, 934 F.2d at 304; *Douglas v. Evans*, 916 F. Supp. 1539, 1552 n. 7 (M.D. Ala. 1996) (stating that the Eleventh Circuit has repeatedly explained that a strict formulation of the prima facie four-prong test should be avoided because the only inquiry is whether an ordinary person would reasonably infer discrimination from the facts of the current case).

205. *Wilson*, 934 F.2d at 304.

206. *Supra* nn. 25–47 and accompanying text (discussing the history of Title VII).

207. *Furnco Constr. Corp.*, 438 U.S. at 577.

208. *Id*.

209. *Id*.

210. *Harding*, 9 F.3d at 153. Simply, there is nothing inherently suspicious when an employer decides not to hire a majority member even if the employer decides instead to hire a minority. *Id*. When an employer hires a majority member instead of a minority, it makes

member plaintiff can establish a prima facie case and utilize the burden-shifting analysis in the identical fashion employed by a minority, the Eleventh Circuit allows majority member plaintiffs to benefit from the history of discrimination against minorities.[211] Majority members benefit from the history of discrimination against minorities, because the court will presume that the employer discriminated against the majority member just as it would presume that the employer discriminated against a minority.[212] By not requiring any modification to the prima facie case or burden-shifting analysis, the Eleventh Circuit engages in a truly neutral reading of Title VII as if Moses descended from the mountaintop carrying the Act along with the Ten Commandments. Although on its face Title VII protects everyone equally, Congress did not intend Title VII to be a justification for courts to blind themselves to ever-present social and economic disparities.[213] Congress did not enact a statute directing employers to stop discriminating against a particular group.[214] However, Congress also did not enact Title VII as an excuse for courts to allow the same group responsible for inequality in the workplace to use the Act as a weapon against employers making conscious efforts to eliminate inequality in the workplace.[215]

Courts of appeals deciding majority member discrimination cases properly have recognized that intentional discrimination against any person based on his or her race is prohibited.[216] However, circuits like the Eleventh Circuit, which effectively

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sense to reason that the qualified minority had been discriminated against, however, that same presumption is not appropriate when the employer hires the minority instead of the majority member. *Parker*, 652 F.2d at 1017.

211. *Mills*, 171 F.3d at 457 (determining that requiring majority member plaintiffs to prove only membership in a protected class allows them to prove less than a minority who has suffered from employment discrimination historically).

212. *Supra* n. 172 and accompanying text (discussing how majority member plaintiffs benefit from a presumption of discrimination).

213. *Weber*, 443 U.S. at 202. Before the enactment of Title VII, the position of African-Americans in the workplace was steadily worsening. *Id*. The Court noted that the unemployment rate of African-Americans was rising consistently compared to the unemployment rate of majority members; therefore, the enactment of Title VII was a necessity to cure ever-present disparities. *Id*. However, even after the enactment of the statute that created equality of opportunity in the workplace, unemployment rates among African-Americans far exceeded that of majority members. Edley, *supra* n. 2, at 42.

214. 42 U.S.C. § 2000e-2(a)(1).

215. *See Weber*, 443 U.S. at 202 (noting that Congress enacted Title VII because it was concerned with the disadvantages African-Americans faced in our economy).

216. *McDonald*, 427 U.S. at 278. Although the applicability of tests applied to vindicate the rights of Title VII may be questioned, clearly Title VII protects all races in some fashion. *Id*. at 280.

eliminated the first prong of the prima facie case, have failed to demonstrate why there should be a presumption that the employer discriminated against the majority member plaintiff.[217] Courts cannot make the same presumptions with the group that created the playing field. It is understandable that courts want to protect everyone equally. However, because the Supreme Court has developed its standards to help certain groups, courts now cannot determine that everyone should benefit by using the tools that have been used to level the playing field.

Under the Eleventh Circuit rule, if an employer is faced with the decision whether to hire one qualified applicant who happens to be white and one who happens to be black, the employer must, at a minimum, defend its employment decision in a summary judgment motion if either applicant brings suit.[218] In the Eleventh Circuit's desire to treat everyone equally, the court forgot that Title VII was created because this country never treated everyone equally.[219] Voluntary affirmative action programs are inconsistent with Title VII if it is read literally; however, the Court has realized that employers have not treated minorities equally.[220] Therefore, the Court fashioned tests and presumptions to assist those who have been discriminated against in the past to bring light to present discriminatory practices.[221] Those presumptions, even if characterized as mere burden-shifting, should not be available to the same extent to plaintiffs who do not have a history of being discriminated against.[222]

The inadequacies of the Eleventh Circuit's approach to a majority member bringing a Title VII claim can be magnified by use

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217. *Supra* n. 203 and accompanying text.

218. *Compare Wilson*, 934 F.2d at 303 (allowing a majority member to establish a prima facie case by demonstrating that he is a member of a class) *with Turnes v. Amsouth Bank*, 36 F.3d 1057, 1061 n. 7 (11th Cir. 1994) (allowing a minority member to establish a prima facie case by showing that he is a member of a racial minority). The Eleventh Circuit seems to have embraced the colorblind approach when addressing Title VII racial discrimination cases; however, that approach seems to ignore the fact that our Nation has a track record allowing color to be a justification for obscene decisions. Blumrosen, *supra* n. 25, at 231.

219. Blumrosen, *supra* n. 25, at 231 (remembering that this country had slavery).

220. *Weber*, 443 U.S. at 208.

221. *Furnco Constr. Corp.*, 438 U.S. at 577.

222. *See* Phillip L. Fetzer, *Reverse Discrimination: The Political Use of Language*, 12 Natl. Black L.J. 212, 216 (1993) (noting that "[t]he most popular use of the term 'reverse discrimination,' suggests that it is the same as traditional discrimination. Use of the term in this way focuses upon a particular act which provides a preference for persons disfavored by reason of race or gender. If this definition is accepted, then actions taken to benefit members of groups historically disadvantaged are themselves discriminatory.").

of the hypothetical fact pattern. The Eleventh Circuit firm is a firm in transition. The majority of the firm's associates and some of the partners, including the hiring partner, have left to start a new firm. Therefore, the firm has an immediate need for associates. The firm decided to grant interviews to all who submitted a résumé, including Bo and John. Although equally qualified, interviews demonstrate John is a much better fit at the firm than Bo. Thus, the firm hires John.

The Eleventh Circuit firm did not have any intent to discriminate against Bo; it merely believed that John possessed intangible attributes that would serve as a stabilizing factor at the firm and could result in John one day becoming the new managing partner. Therefore, the firm did not have a specific reason, other than chemistry, for why it preferred John. However, because the firm cannot bring forth admissible evidence why it preferred John, a jury question is established. Thus, although the firm did not consider Bo's race, the firm will have to defend its actions in front of a jury.

How Courts Should Treat Majority Member Plaintiffs Bringing a Racial Discrimination Suit

As barriers to education break down, a more highly qualified pool of applicants will emerge.[223] However, the potential for minority under-representation in the workplace still will exist. Therefore, courts should fashion a test that still recognizes the history of discrimination against minorities, but also will ensure that majority members who have been discriminated against based on race have their day in court.

Because, in the employment context, majority members have a dissimilar history from minorities, the courts should extract two propositions from the Supreme Court's holding in *McDonnell Douglas*. First, discrimination cases are hard to prove, as plaintiffs normally will not have direct evidence indicating the discriminatory intent of the employer.[224] Second, the court will presume that an employer, without further explanation, has discriminated against a

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223. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in *Critical Race Theory: The Key Writings that Formed the Movement* 5, 18 (Kimberlé Williams Crenshaw et al. eds., New Press 1995) (explaining that enforcement mechanisms need to be in place that will ensure minorities receive a proper education).

224. *Aikens*, 460 U.S. at 716.

qualified minority it failed to hire because of this country's history of discrimination.[225]

The first proposition applies when a majority member brings a Title VII racial discrimination case, as he, like a minority, probably does not have direct evidence of the employer's intent.[226] However, the second proposition is not applicable to a majority member. Although it is possible to discriminate against the majority, there is no history of discrimination against the majority that should provide them with a presumption of discrimination.[227] Therefore, a majority member should be able to take advantage of the *McDonnell Douglas* test when he does not have direct evidence of discrimination, but should not be afforded a presumption of discrimination without other evidence indicating the employer's intent to discriminate against the plaintiff.[228]

Although Title VII prohibits discrimination based on race, its purpose is to ensure that only qualified persons have the same opportunities to obtain employment.[229] Therefore, in cases in which a majority member brings suit claiming that he was not hired because of his race, the first question should be whether the person hired is qualified for the position sought by the plaintiff. If an employer hires a qualified minority, courts should not challenge the appropriateness of that decision, absent the majority member plaintiff's ability to demonstrate that the employer failed to follow its own hiring procedures or hired someone who was not qualified for the position.[230] The Supreme Court properly recognized that Congress did not intend for Title VII to "guarantee a job to every person regardless of qualifications."[231] Therefore, the employer has the ultimate ability to determine who is and is not qualified for its positions.[232] Because the employer has this ability, courts have erred

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225. *Hicks*, 509 U.S. at 506.

226. *Id*. at 507–508 (explaining that plaintiffs who have established a prima facie case can demonstrate through the presentation of their case and cross-examination of the employer's witnesses that the proffered reason for the employer's action was not the true reason for its actions).

227. *Harding*, 9 F.3d at 153.

228. Although a presumption of discrimination arises when a plaintiff establishes a prima facie case, the presumption should be given less weight when the plaintiff is a majority member.

229. 42 U.S.C. § 2000e-2(a)(2).

230. Courts should recognize that if the status quo is maintained, racial inequality will be bequeathed to the next generation. Edley, *supra* n. 2, at 46.

231. *Griggs*, 401 U.S. at 430.

232. *Id*. at 431 (noting that Title VII requires only the removal of arbitrary obstacles to employment).

in treating majority member plaintiffs similarly to minority plaintiffs. Although some courts have determined that majority member plaintiffs must offer some additional evidence of discrimination,[233] they have failed to offer a standard that both accommodates majority member plaintiffs who have been the victims of discrimination and recognizes that the Supreme Court has and still does treat minorities differently in the context of employment opportunities.[234] In upholding the employer's decision to select applicants based on their race, the Court found that taking race into account was consistent with the "spirit" of Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy."[235]

When majority member plaintiffs bring a Title VII case based on racial discrimination, they still should be able to benefit from the *McDonnell Douglas* burden-shifting test.[236] However, after majority member plaintiffs establish a prima facie case, employers should be required only to offer evidence demonstrating that they followed their hiring procedures and hired someone who fit within the job qualifications. Because the *McDonnell Douglas* Court determined that the prima facie case test can be applied flexibly depending on the case,[237] courts of appeals should modify the test for majority member plaintiffs.

Thus, under the Court's *Burdine* analysis,[238] the main inquiry is whether the employer can offer admissible evidence demonstrating the employer's nondiscriminatory reason for its decision.[239] However, before courts will consider whether the employer can offer evidence of its nondiscriminatory reason, the court must determine whether the plaintiff can establish a prima facie case.[240] Because *McDonnell Douglas* and *Burdine* determined that the prima facie case should be applied with flexibility depending on the individual case, courts have the power to modify the test when a majority

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233. *Parker*, 652 F.2d at 1017.

234. *Weber*, 443 U.S. at 201 (quoting *Holy Trinity Church v. U.S.*, 143 U.S. 457, 459 (1892)) (reasoning that "a thing may be within the letter of the statute and yet not within the statute, because [it is] not within [the statute's] spirit, nor within the intention of its makers").

235. *Id*. at 208.

236. *McDonald*, 427 U.S. at 278, 280 n. 6 (explaining that Title VII protects everyone and the *McDonnell Douglas* test should be applied with flexibility).

237. 411 U.S. at 802 n. 13.

238. *Supra* nn. 70–79 and accompanying text (discussing the *Burdine* analysis).

239. 450 U.S. at 255.

240. *McDonnell Douglas*, 411 U.S at 802.

member brings a case.[241] Therefore, the courts should remove the first prong of the prima facie test that requires proof of membership in a racial minority.[242]

To establish a prima facie case, a majority member plaintiff should be required to prove the following:

(1) that he applied and was qualified for the position for which the employer sought applicants;

(2) despite his qualifications, he was rejected; and

(3) the employer hired a minority.

After the majority member establishes a prima facie case, the employer will now have to justify its employment decision merely by offering admissible evidence of a legitimate, nondiscriminatory reason for its actions.[243] However, at this stage of the Title VII litigation, a distinction has to be drawn between a majority member plaintiff establishing a prima facie case and a minority establishing a prima facie case. *Burdine* demonstrates that an employer merely has to offer admissible evidence of its nondiscriminatory, legitimate decision, but does not mandate what evidence is sufficient to rebut the plaintiff's case.[244] When an employer hires a qualified minority instead of the qualified majority member plaintiff, the majority member should not be able to rebut the employer's articulated reasons for its decision just by a showing that it may have considered the lack of diversity in the workplace when it made its decision, as was allowed in *Iadimarco*.[245] Employers may not have evidence

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241. *Id.* at 802 n. 13 (reasoning that courts should apply the prima facie case with flexibility depending on the factual situation).

242. *Cf. McDonald*, 427 U.S. at 281–282 (citing *McDonnell Douglas* for the proposition that a majority member plaintiff can successfully bring a Title VII case). The courts should not require plaintiffs to prove membership in a protected class because everyone belongs in some protected class; therefore, the court should not require a showing that anyone can make. *See* Cunningham, *supra* n. 203, at 463; 45A Am. Jur. 2d *Job Discrimination* § 130 (noting that the prima facie case may be glossed over when a majority member brings a Title VII case).

243. *Burdine*, 450 U.S. at 254. Another approach would be to require majority member plaintiffs to prove that the minority hired was not qualified as part of prong three in the prima facie case. However, although the employer hired a qualified person, this does not mean that discrimination against the plaintiff has not occurred. Therefore, a plaintiff must have some minimal ability to encourage an employer to justify its employment decision. Through this process, the plaintiff has the ability to show that even though the employer hired a qualified employee, it still discriminated against the majority member plaintiff.

244. *Id*. at 255. The evidence submitted by the employer does not even have to be credible or true. *Hicks*, 509 U.S. at 519.

245. The ability to rebut the majority member plaintiff's prima facie case will depend on the job the plaintiff sought. If the position is an unskilled labor position, for example, the employer's reliance on its job qualifications will not go far in rebutting the plaintiff's prima facie case. Further, after the employer proffers legitimate, nondiscriminatory reasons for its

of a legitimate, nondiscriminatory reason for preferring a minority; however, under the historical context of Title VII litigation, it is inconsistent with the "spirit" of the Act to require employers to defend their actions when they hired a minority instead of a majority.

Courts can draw a distinction between majority members and minorities bringing a Title VII case, because once the employer offers a legitimate, nondiscriminatory reason for its decision, the presumptions drop from the case and the only inquiry is whether the plaintiff can offer evidence demonstrating the employer's intentional discrimination.[246] At this point, courts have the ability to determine what evidence offered by the plaintiff is sufficient to rebut the employer's evidence as pretext to discrimination.[247]

A new standard can be contemplated that both encourages employers to remain faithful to the "spirit" of Title VII and protects majority members from discrimination in hiring practices prohibited by the Act. Although majority members can establish a prima facie case and should be afforded the presumption of discrimination the *McDonnell Douglas* test allows, courts should give little weight to the plaintiff's prima facie case and presumption of discrimination when an employer proffers evidence of its legitimate reasons for its actions. When an employer demonstrates that its decision related to a legitimate effort to combat past discrimination, evidence offered by the plaintiff merely suggesting that the employer sought to diversify the workplace should not be enough to show intentional discrimination that would create a jury question as contemplated in *Hicks*.[248] Therefore, this standard is a limitation on the circumstantial evidence the fact finder considers when determining whether the plaintiff has submitted enough evidence, requiring final determination. If an employer makes statements indicating a desire to hire minorities, the employer should not be required to defend that decision. But, when a majority member can demonstrate that the employer did not follow any hiring procedures or failed to follow

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decisions, like diversity in the workplace, the plaintiff will have the chance to show a pattern or history of discrimination by the defendant employer.

246. *Hicks*, 509 U.S. at 507.

247. *Id*.

248. This standard does change the evidentiary burden on employers slightly at the stage where they rebut the plaintiff's establishment of the prima facie case. As will be demonstrated, it requires employers to show only that the minority it hired was hired pursuant to its written hiring procedures and was qualified for the position in accordance with the employer's written qualifications. *Supra* nn. 266–280 and accompanying text.

its own hiring procedures, then the majority member will be able to rebut the employer's legitimate reason as pretextual, sustaining his burden of showing intentional discrimination.[249]

Courts should realize that an employer's chief goal when making a hiring decision is to hire the most qualified person for the job.[250] Therefore, when an employer hires a minority not qualified for the position for which it sought applications, it is proper to presume that the employer discriminated against the qualified majority member plaintiff it failed to hire.[251] That presumption is appropriate, because the court presumes that there is a reason for the employer's decision.[252] Because the employer hired the less qualified applicant, the court logically can presume the employer based its decision on a prohibited factor such as race.[253] When a majority member plaintiff can demonstrate that the employer did not hire a qualified person, through evidence that the employer failed to follow its hiring procedures, the majority member plaintiff will be able to rebut the employer's legitimate, nondiscriminatory reason as a pretext to discrimination. Therefore, the ultimate question of whether the employer discriminated against the plaintiff based on race will go to the fact finder for a final determination.

This standard protects against the use of "diversity" evidence allowed in *Iadimarco* to create a jury question and encourages employers to establish stringent hiring procedures. When a majority member plaintiff merely can point to evidence that the employer sought applicants from outside the normal applicant pool, distributed a memorandum encouraging managers to hire persons who reflect the workforce, or considered many attributes displayed by the applicant, that evidence should not be enough to establish a jury question. However, when the plaintiff can point to evidence that the

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249. *See Iadimarco*, 190 F.3d at 166 (relying on the fact the employer could only offer evidence that the person hired, instead of the plaintiff, was the "right person for the job"). This standard does not allow majority member plaintiffs the same ability to rebut the employer's legitimate, nondiscriminatory reason for its action. It concentrates on whether the employee hired was qualified for the position and only allows majority member plaintiffs to rebut the employer's legitimate reason if the plaintiff can show the employer has not followed its own hiring procedures or has intentionally discriminated against the majority.

250. *See* Mary Greenwood, *Hiring, Supervising, and Firing Employees: An Employer's Guide to Discrimination Laws* § 3:01, 42 (Callaghan & Co. 1987) (determining that "[t]he first step in [the] hiring [process] is to evaluate the qualifications of the job").

251. *Harding*, 9 F.3d at 153–154.

252. *Id*. at 153.

253. *Id*. at 154; *see Furnco Constr. Corp.*, 438 U.S. at 577 (stating that "we know from our experience that more often that not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting").

employer did not follow its own hiring procedures or hired someone who did not fit within the employer's qualifications, the court logically should presume that the employer had a discriminatory motive, thus creating a jury question.[254]

The hypothetical fact pattern can demonstrate how the Author's standard accommodates Title VII's competing interests. The Thirteenth Circuit firm has been in existence for five years. Those who have applied to the firm have been mostly majority members; therefore, the firm is composed mostly of majority members. Recognizing a need for a workplace that is a reflection of the surrounding community, the firm aggressively participates in activities designed to encourage more minorities to submit their résumés. Through a hiring committee, the firm has developed a written job description for the position of "civil engineer associate." The committee also developed a position statement describing the qualifications for the position. When the members of the hiring committee interview a candidate, they have a checklist of attributes they expect the applicant to display. Both Bo and John interviewed for the position of civil engineer associate, and the firm followed its prescribed interviewing process. Through the interviewing process, the hiring committee determined that John would be the best person to fill the firm's vacant position, because he fit the job description and displayed all of the desired attributes during the interviewing process.

Believing that the firm did not hire him because of his race, Bo brought a Title VII case against the firm. Bo was able to establish a prima facie case, and the firm had to defend its actions. To demonstrate a legitimate, nondiscriminatory reason for its decision, the firm offered as admissible evidence its job qualifications and hiring procedure. The firm brought forth the written records of Bo's and John's interviews with each member of the hiring committee. Because the firm was able to show that it followed its hiring procedure and hired someone who fit within its job qualifications, Bo will be precluded from rebutting the firm's adverse decision, because Bo can only point to evidence that the firm actively sought to diversify the workplace. Thus, the firm can continue its attempts to have a workplace that reflects the surrounding population by

254. *Lewis-Webb v. Qualico Steel Co.*, 929 F. Supp. 385, 391 (M.D. Ala. 1996) (stating that "an employer may refuse to hire an employee for good reasons, bad reasons, reasons based on erroneous facts, or for no reason at all, as long as its actions are not based on discriminatory purposes").

following a set hiring procedure and hiring someone who fits within its job description.

IV. SHOULD THE SAME STANDARD APPLY TO MINORITIES?

Although a standard that requires an employer to demonstrate only that it followed its hiring procedures and hired someone who fit its job description seems like it treats all potential plaintiffs equally, it cannot be applied to cases brought by minorities. Some may argue that everyone should be treated the same, and when an employer hires a qualified person, that decision should be left alone, absent direct evidence of discrimination. We have come a long way, but not that far.[255] The Supreme Court has limited affirmative action programs in the public employment context,[256] and there are attempts to end quotas in higher education presently.[257]

However, the Court likely is not ready to concede that the letter of Title VII only should be followed without considering the "spirit" of the Act.[258] We cannot dismiss easily our history.[259] The Court must remember that Congress enacted Title VII in response to one of the most violent eras in this country's history.[260] Those searching for equality embarked on a journey to inform this country that racial repression will no longer be tolerated.[261] Although civil rights advocates endured opposition from violent mobs, their plight was

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255. *See* Edley, *supra* n. 2, at 43 (stating that the median annual income for African-American males is thirty percent less than for Caucasian males, the poverty rate for Caucasians is nearly one-third lower than for African-Americans, Caucasians are twice as likely to have a college degree, and Caucasian "males hold 97 percent of senior management positions in Fortune 1000 industrial and Fortune 500 service corporations").

256. *Johnson*, 480 U.S. at 639–640.

257. Andrea Robinson, *Hearing on Florida Initiative to Abolish Racial Hiring Changes*, Miami Herald 1 (Feb. 2, 2000) (describing the public's response to Florida Governor Jeb Bush's plan to end quotas in the state's public university system).

258. "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity." Caplan, *supra* n. 36, at 17 (quoting Lyndon Johnson).

259. Although employers may be applying equal standards in the workplace presently, a "company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier . . . discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it." *Intl. Bhd. of Teamsters*, 431 U.S. at 341–342.

260. Robert D. Loevy, *The Civil Rights Act of 1964: The Passage of the Law that Ended Racial Segregation* 38–39 (Robert D. Loevy ed., St. U.N.Y. Press 1997).

261. *Id*.

televised, and the civil rights movement attracted widespread and sympathetic media coverage, focusing the country on their endeavors.[262] Not only did civil rights demonstrations spark violence, civil rights advocates were killed to prevent passage of the Act.[263]

Some may now reason that equal treatment is inherent in the law and is a concept that will be followed by all, so why did beatings, riots, and murders take place to prevent Congress from merely making a formal recognition that the law should treat everyone equally? It was not too long ago when minorities needed personal protection from United States marshals against large mobs, because they merely desired an equal education.[264]

However, as the years pass, Title VII's "spirit" will become weaker and a conscious decision will have to be made that this country is ready to treat everyone equally.[265] Some may not like the results, but at least the law itself will be colorblind. The question remaining will be whether the people who follow, enforce, and interpret the laws can be colorblind as well.

V. HOW AN EMPLOYER CAN AVOID A SUIT FOR MAJORITY DISCRIMINATION IN HIRING PRACTICES

An elementary approach to avoid a racial discrimination suit is not to discriminate against a potential employee. However, when an

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262. *Id*. at 42. One of the most significant civil rights protests occurred in Birmingham, Alabama. Greene, *supra* n. 28, at 21. African-Americans of all ages boycotted Birmingham merchants. *Id*. Although many of the protesters were jailed, Birmingham officials still could not control the large numbers of people protesting; thus, led by Police Chief "Bull" Conner, police countered the protests with attack dogs and fire hoses. *Id*. Following the Birmingham protests, 200,000 people, black and white, peacefully marched on Washington, D.C., demanding laws prohibiting discrimination. *Id*. at 21–22. By 1963, civil rights was placed on the congressional agenda and several hundred civil rights bills were introduced in Congress, laying the foundation for the Civil Rights Act of 1964. *Id*. at 22.

263. Loevy, *supra* n. 260, at 40.

264. *Id*. at 39.

> Laws and customs helped to create "races" out of a broad range of human traits. In the process of creating races, the categories came to be filled with meaning: whites were characterized one way and associated with normatively positive characteristics, whereas blacks were characterized another way and became associated with the subordinate, even aberrational characteristics.

Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *Critical Race Theory: The Key Writings that Formed the Movement* 103, 113 (Kimberlé Williams Crenshaw et al. eds., New Press 1995).

265. *See* David McConnell, *Title VII at Twenty — The Unsettled Dilemma of 'Reverse' Discrimination*, 19 Wake Forest L. Rev. 1073, 1102 (1983) (noting that some day Congress must resolve the problems spawned by the enactment of Title VII).

employer chooses one potential employee over others, it is discriminating against the other applicants.[266] Also, when an employer faces a decision whether to hire a majority member or minority and both have the same or similar qualifications, the employer could face a lawsuit for either decision. Therefore, the courts should adopt the standard suggested, which allows an employer to defend its hiring decision with evidence indicating it followed its own hiring procedures.[267] Employers always have the ability to determine who is best for the job, which should never be of interest to the courts.[268] Thus, the employer must hire someone who is qualified.[269] When an employer hires someone who is qualified, the employer must be able to present evidence demonstrating the qualifications of the job and that the person hired fit within those qualifications.[270]

Therefore, an employer should have a written job description for the open position, and the employer should have written qualifications for the position.[271] The qualifications do not have to be rigid, unless called for, but should be related to the position.[272] The Court recognizes that the goal of Title VII is to ensure that qualified individuals have an evenhanded opportunity to gain employment.[273] Thus, the employer should consider only qualified individuals when deciding whom to hire.[274] If the employer has a written procedure and written qualifications for its hiring process, courts are less likely to scrutinize its decision.[275] However, when the employer

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266. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (stating that "[r]ace and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion").

267. If the hiring procedures display a bias, courts can weigh that in their decision determining whether the majority member can rebut the employer's evidence of a legitimate, nondiscriminatory reason for its employment decision.

268. *See Furnco Constr. Corp.*, 438 U.S. at 577 (stating that Title VII does not mandate that an employer adopt any particular hiring procedure).

269. *Id*. The court will presume that the employer does not act in an arbitrary manner, especially in the business setting. *Id*.

270. *See* Greenwood, *supra* n. 250, at § 3:01, 42 (suggesting that an employer should evaluate the qualifications for the position and draft a written description of those qualifications).

271. *Id*.

272. *Id.*

273. 42 U.S.C. § 2000e-2(a)(2).

274. *See McDonnell Douglas*, 411 U.S. at 802 (determining that a plaintiff must show he was qualified for the job).

275. *Iadimarco*, 190 F.3d at 166 (explaining that "an employer cannot successfully defend a hiring decision against a Title VII challenge merely by asserting that the responsible hiring official selected the man or woman who was 'the right person for the job'").

makes decisions based on factors that are not readily apparent, the court may presume the employer based its decisions on an impermissible factor such as race.[276] Therefore, an employer has to be open about what it is looking for in an applicant and hire an employee with those attributes.[277] If practical, the employer should have a hiring committee that meets to discuss openly what the employer is looking for in candidates. Employers should have several different people interview each candidate and each interviewer's assessment should be considered equally. It will be more difficult for the court to challenge the combined decision of multiple decision-makers than the decision of one single hiring partner. If the employer wants a candidate who displays certain traits during the interviewing process, those traits should be listed in a checklist that every interviewer has during an interview session.[278] The employer should avoid, if possible, the temptation to make a decision based solely on the hiring partner's "gut feeling" that she likes one candidate the best.[279] The employer should always be able to justify its decision based on attributes the candidate possessed, which the employer expressed in writing.

There should not be a requirement that employers cannot deviate from their own criteria, because it is unlikely that there will be a "perfect applicant," and employers may not know exactly what they are looking for until they see it. There is no law forbidding employers from making poor hiring decisions.[280] However, when employers deviate from their own standards, the employers will know that the deviation might result in the employer having to defend its actions in a Title VII suit if there are other qualified applicants. Although employers might be opening the doors to possible litigation, employers will realize that they are the ones opening the door, therefore giving them the ability to make their own decisions to take calculated risks.

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276. *See id*. (determining that a plaintiff must show such weaknesses in the employer's proffered explanation that a reasonable fact finder could find them unbelievable).

277. Eric Matusewitch, *Courts Split on Standard for Evaluating 'Reverse' Discrimination Claims*, 13 Andrews Empl. Litig. Rep. 3 (1999) (noting that because the legal standards for determining a majority member's claim when bringing a Title VII case are unsettled, "employers . . . should apply their employment policies evenhandedly to all employees").

278. Greenwood, *supra* n. 250, at § 3:22, 55.

279. *Shealy v. City of Albany*, 89 F.3d 804, 805–806 (11th Cir. 1996) (determining that consideration of subjective criteria alone is not discrimination per se, but subjective criteria tends to show that the decision was based on impermissible factors).

280. *See* Greenwood, *supra* n. 250, at § 3:02, 42 (stating that the only way an employer can legally exclude minorities is by showing that national origin is required for the position).

CONCLUSION

Because an employer's intent to discriminate cannot be easily demonstrated,[281] majority members should be able to establish a prima facie case for discrimination under Title VII. However, once majority member plaintiffs establish a prima facie case, courts should recognize the dissimilar history between the majority member plaintiff and a minority bringing forth a Title VII claim.[282]

In upholding voluntary affirmative action plans entered into by private employers, the Supreme Court recognized that Congress's main intent in enacting Title VII was to combat this country's discriminatory history against minorities.[283] The presumption created by the establishment of a prima facie case was created in recognition of discriminatory treatment of minorities.[284] Therefore, courts should not allow majorities to benefit in the same regard as minorities when majority members establish a prima facie case.

The proper analysis in which a court should engage after majority member plaintiffs establish a prima facie case for discrimination is whether the employer followed its own hiring procedures and hired an employee according to the employer's written qualifications. This is not judicial affirmative action. It is merely a standard that allows private employers the opportunity affirmatively to pursue goals of equality in the workplace with the recognition that there are still not equal opportunities within that workplace.

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281. *Aikens*, 460 U.S. at 716.

282. *Supra* nn. 25–47 and accompanying text (discussing the history of discrimination against minorities).

283. *Supra* n. 97 and accompanying text.

284. *See supra* n. 25–47 and accompanying text (discussing the history of the prima facie case in discrimination actions).