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Proof of Disparate Treatment under the Age Discrimination in Employment Act: Variations on a Title VII Theme

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PROOF OF DISPARATE TREATMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: VARIATIONS ON A TITLE VII THEME

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I. INTRODUCTION

The Age Discrimination in Employment Act (ADEA)[1] was enacted in 1967 and substantially amended in 1974 and 1978. Generally stated, the ADEA prohibits employer discrimination by public and private "employers" (persons having twenty or more employees), labor unions, and employment agencies. Protection against age discrimination is granted, however, only to employees and applicants between the ages of forty and seventy.[2] It is illegal to discriminate on the basis of age against persons within the forty-to-seventy age group regardless of whether the person favored by the discrimination is within or without the protected age group or is younger or older than the plaintiff.[3] The ADEA does provide as defenses age distinctions based on a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"[4] and age distinctions made pursuant to bona fide

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[1] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981)).

[2] 29 U.S.C. § 631(a) (Supp. V 1981). The Federal Government is not a defined "employer" but is required to take personnel actions "free from any discrimination based on age." *Id.* § 633a(a) (Supp. V 1981).

[3] *See* Smith v. World Book-Childcraft Int'l, Inc., 502 F. Supp. 96, 99-102 (N.D. Ill. 1980); 29 C.F.R. § 1625.2 (1982).

[4] 29 U.S.C. § 623(f)(1) (1976).

> [T]he burden is on the employer to show (1) that the bfoq [bona fide occupational qualification] which it invokes is reasonably necessary to the essence of its business . . . and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); *cf.* Hodgson v. Greyhound Lines, 499

seniority systems.[5] The Act also permits allocation of benefits according to bona fide retirement and insurance programs.[6] In addi-

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F.2d 859, 863 (7th Cir. 1974) (to extent hiring policy effectuates safety goals, it is necessary to the essence of operations), *cert. denied*, 419 U.S. 1122 (1975). As applied to mandatory age limit on hiring pilots, compare Smallwood v. United Air Lines, 661 F.2d 303, 307-08 (4th Cir. 1981) (BFOQ not established), *cert. denied*, 102 S. Ct. 2299 (1982), with Murnane v. American Airlines, 667 F.2d 98, 100 (D.C. Cir. 1981) (BFOQ established; age qualification valid), *cert. denied*, 102 S. Ct. 1770 (1982). As to mandatory retirement of pilots, compare Tuohy v. Ford Motor Co., 675 F.2d 842, 845-46 (6th Cir. 1982) (BFOQ for retirement at age 60 not established), with Air Line Pilots Ass'n v. TWA, 30 Empl. Prac. Dec. (CCH) ¶ 33,298 (S.D.N.Y. 1982), and Hollelman v. Conservation Dep't, 30 Fair Empl. Prac. Cas. (BNA) 1104 (W.D. Mo. 1982) (BFOQ established). As applied to firefighters, see Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir. 1983), and EEOC v. City of St. Paul, 671 F.2d 1162, 1167 (8th Cir. 1982). As applied to law enforcement, see EEOC v. County of Santa Barbara, 666 F.2d 373, 376-77 (9th Cir. 1982). *See generally* 29 C.F.R. § 1625.6 (1982); Player, *Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection and the 1978 Amendments*, 12 GA. L. REV. 747, 751-67 (1978).

[5] 29 U.S.C. § 623(f)(2) (Supp. V 1981); *see also* Morelock v. NCR Corp., 586 F.2d 1096, 1102-03 (6th Cir.), *cert. denied*, 441 U.S. 906 (1978); Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 227 (D. Minn. 1971); 29 C.F.R. § 1625.8 (1982); Player, *supra* note 4, at 779-81; *cf.* Pullman-Standard v. Swint, 102 S. Ct. 1781, 1784 (1982); California Brewers Ass'n v. Bryant, 444 U.S. 598, 605-09 (1980); International Bhd. of Teamsters v. United States, 431 U.S. 324, 343-56 (1977) (interpreting a similar provision under Title VII).

[6] 29 U.S.C. § 623(f)(2) (Supp. V 1981). This section specifically provides, however, that "no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual . . . ." *Id.* An exception to the prohibition on mandatory retirement is imposed upon bona fide executives over the age of 65 who received vested retirement of at least $27,000 annually. *Id.* § 631(c); *see* Zises v. Prudential Ins. Co., 30 Fair Empl. Prac. Cas. (BNA) 1218 (D. Mass. 1982). The prohibitions against involuntary retirement made pursuant to a plan were enacted through a 1978 amendment to the ADEA. *See* Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified as amended at 29 U.S.C. § 631(c) (Supp. V 1981)). This amendment was a reaction to United Air Lines v. McMann, 434 U.S. 192, 203 (1977), which had permitted such retirement. *See* H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 8 (1978).

Effective January 1, 1983, the following proviso was added to the ADEA to be codified as 29 U.S.C. § 623(g):

> (1) For purposes of this section, any employer must provide that any employee aged 65 through 69 shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee under age 65.
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> (2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of [the Internal Revenue Code of 1954].

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 116(a), 96 Stat. 324, 353 (1982) (codified at 29 U.S.C.A. § 623(g) (West 1982)).

For discussion of the permissible distinctions that may be made in employee benefit plans, see 29 C.F.R. § 860.120 (1982). Generally stated, *benefits* may be reduced on the basis of an employee's age so long as that reduction is based on actuarial costs. An employee cannot be compelled, however, to make greater contributions in order to retain the same benefits. 29 C.F.R. § 860.120(d)(4)(i) (1982); *see* Alford v. City of Lubbock, 664 F.2d 1263,

tion, the ADEA specifically permits employees to be disciplined for "good cause"[7] and permits distinctions based on "reasonable factors other than age."[8]

The ADEA has its legislative roots near those of Title VII of the Civil Rights Act of 1964.[9] Much of the operative, substantive language of the ADEA was drawn from that previously found in Title VII.[10] Because of this similarity the courts have indicated that as a general proposition Title VII and ADEA litigation should follow a parallel course.[11]

1267-71 (5th Cir.), *cert. denied*, 102 S. Ct. 2239 (1982); C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 11.5 (1980).

[7] 29 U.S.C. § 623(f)(3) (1976).

[8] *Id.* § 623(f)(1).

[9] 42 U.S.C. § 2000e to 2000e-17. In debating Title VII it was suggested that "age" be protected along with race, sex, national origin, and religion. That suggestion was rejected, but Congress in Title VII specifically directed the Secretary of Labor to study the problem of age discrimination in employment and to recommend legislative action. The report of the Secretary of Labor, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965), and the subsequent recommendation resulted in the ADEA. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 1-2, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2214. This history was documented in more detail in EEOC v. Wyoming, 103 S. Ct. 1054, 1057-59 (1983). *See generally* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (1981) [hereinafter cited as EEOC]. The Supreme Court has repeatedly noted the close relationship between Title VII and the ADEA. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Lorillard v. Pons, 434 U.S. 575, 583-84 (1978).

[10] *Compare* 42 U.S.C. § 2000e-2(a) (1976) *with* 29 U.S.C. § 623(a) (1976). Both sections proscribe certain employer practices. Title VII states:

> (a) It shall be an unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976). The ADEA states:

> (a) It shall be unlawful for an employer-
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> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
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> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1976).

[11] *E.g.*, Loeb v. Textron, Inc., 600 F.2d 1003, 1004-16 (1st Cir. 1979); *see also* EEOC v.

II. ESTABLISHING ILLEGAL DISCRIMINATION

A. *Adverse Impact: Violations Absent Illegal Motive*

Title VII litigation has evolved in two distinct classes of cases—"adverse impact"[12] and "disparate treatment."[13] Adverse-impact analysis requires the plaintiff initially to prove, usually through statistical data, that a particular rule or criterion used by the defendant to select employees disproportionately affects employment opportunities of a class of persons protected by the statute.[14] If, but only if, the plaintiff establishes the adverse impact of the rule on the plaintiff's class, the burden is shifted to the defendant to prove that the challenged rule is required by "business necessity." Failure of the defendant to prove the "necessity" of the rule in terms of the rule's "manifest relationship to the employment in question" will result in a judgment for the plaintiff.[15] That the defendant was motivated solely by business concerns and had no actual intent or motivation to harm plaintiff or the class to which plaintiff belongs is not a defense and does not entitle defendant to a judgment. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[16]

Wyoming, 103 S. Ct. 1054, 1057-59 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) (the Court in a Title VII case cited with approval the ADEA case of *Loeb v. Textron, Inc.*).

[12] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321-22 (11th Cir. 1982).

[13] *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). Adverse impact analysis will be utilized when a general rule is applied uniformly to a broad class of applicants or employees. It is usually an objective rule or criterion. Disparate treatment involves individualized evaluation of a particular individual. Judgments may often be made by utilizing variable criteria or individualized judgments and reasons. *See* EEOC v. Federal Reserve Bank, 698 F.2d 633, 639 (4th Cir. 1983); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773-74 (11th Cir. 1982); Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800 (5th Cir. 1982).

[14] Connecticut v. Teal, 102 S. Ct. 2525 (1982); New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979).

[15] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). This burden is one of persuasion, and not merely an evidentiary obligation to present evidence of "necessity." Wright v. Olin Corp., 697 F.2d 1172, 1190-91 (4th Cir. 1982); Contreras v. City of Los Angeles, 656 F.2d 1267, 1271, 1275 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

[16] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Actions arising under 42 U.S.C. §

Even if the rule having the adverse impact is proved to be "necessary," the plaintiff may still prove that the rule was imposed for the purpose of harming the plaintiff or his class. At this point illegal motivation is relevant and will establish a violation of the Act.[17]

Whether adverse-impact analysis developed under Title VII for race, sex, and national origin discrimination is applicable to ADEA actions is unclear.[18] That issue, albeit an important one, is beyond the scope of this Article.

B. *Disparate Treatment: Motivation and the Problem of Its Proof*

Disparate-treatment cases generally involve decisions to discharge, refuse to hire, or decline promotion to a single individual.[19] Some cases may also involve intentional imposition of differences in salary or working conditions.[20] Disparate treatment requires a

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1983 or § 1981, however, require that the plaintiff prove motivation. General Bldg. Contractors Ass'n v. Pennsylvania, 102 S. Ct. 3141 (1982); Washington v. Davis, 426 U.S. 229, 245 (1976).

[17] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[18] Language in the ADEA, not found in Title VII, that allows employers to utilize "reasonable factors other than age," 29 U.S.C. § 623(f)(1) (1976), suggests that impact analysis might not be appropriate. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1982), detail concepts of adverse impact and the validation of selection procedures. Expressly, these Guidelines do not apply to the ADEA. 29 C.F.R. § 1607.2D (1982). Further, former interpretative guidelines from the Department of Labor indicated only that rules falling disproportionately upon particular age groups would be "carefully scrutinized" for *improper motivation* but significantly omitted any requirement that such rules be manifestly related to particular job requirements. *See* 29 C.F.R. § 860.104(b) (1982). The EEOC, however, has taken the position that impact analysis is appropriate under the ADEA. The new guidelines provide:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

29 C.F.R. § 1625.7(d) (1982). A number of courts have held that impact analysis is appropriate under the ADEA. *See* Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321 (11th Cir. 1982); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); EEOC v. Borden's, Inc., 30 Fair Empl. Prac. Cas. (BNA) 933 (D. Ariz. 1982).

[19] EEOC v. Federal Reserve Bank, 698 F.2d 633, 638-39 (4th Cir. 1983); Pouncy v. Prudential Ins. Co., 668 F.2d 795, 802 (5th Cir. 1982).

[20] *See* County of Washington v. Gunther, 452 U.S. 161, 163-64 (1981) (female guards al-

showing that the plaintiff was treated differently because of his membership in a class protected by the statute. Disparate treatment may be apparent on the face of the classification itself. For example, refusal to hire women with preschool-aged children, without imposing the same limitation on male applicants, is an act of disparate treatment of women.[21] Discharging employees of one race for misconduct tolerated in employees of another race is another form of patent or facial disparate treatment.[22] A pension plan that requires females to pay more into the fund, or receive less of a periodic annuity upon retirement, is disparate treatment of female employees.[23] In these situations there is no need to inquire into the employer's motivation because the proscribed criteria are found on the face of the treatment itself.

Similar results are reached under ADEA. An employer who requires older workers to satisfy special physical or mental tests that are not required of other age groups is engaging in illegal disparate treatment on the basis of age.[24] Similarly, an employer may not pay workers different benefits based upon their age.[25] It is also illegal disparate treatment to discipline an older worker for misconduct tolerated in younger employees.[26] Note that the ADEA, however, unlike Title VII, provides that differentiation may be made on the basis of age pursuant to bona fide benefit plans such as retirement, pension, or insurance.[27]

When applicants or employees are denied opportunities not patently based on classifications proscribed by the statute, the issue evolves into one of the defendant's motivation for making the decision. Motivation, however, is a subtle element that is difficult to prove. The plaintiff may have little direct evidence of the defen-

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legedly received lower pay than male guards pursuant to intentionally discriminatory system; if intent is proved a Title VII violation will be established).

[21] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

[22] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282-83 (1976).

[23] *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

[24] Department of Labor Interpretations on Age Discrimination in Employment, 29 C.F.R. §§ 860.103(f)(1), .104(b) (1982).

[25] Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.) (denial of sick leave pay to retiring workers), *cert. denied,* 102 S. Ct. 2239 (1982).

[26] Walker v. Pettit Constr. Co., 605 F.2d 128, 131 (4th Cir. 1979).

[27] 29 U.S.C. § 623(f)(2) (Supp. V 1981). *See generally* Germann v. Levy, 553 F. Supp. 700, 703-04 (N.D. Ill. 1982) (existence of a bona fide insurance plan is a valid defense to a charge of age discrimination). The plan, however, may not be used to refuse employment or force retirement. *See* 29 U.S.C. § 623(f)(2) (Supp. V 1981).

dant's motivation, but as a member of a class traditionally subjected to discrimination, the plaintiff may believe that the decision was motivated by statutorily proscribed criteria (race, sex, religion, national origin, or age). The defendant, however, may deny that the proscribed criteria played any role in the treatment of the plaintiff and could present reasons for taking the particular action against the plaintiff. The issue is thereby joined: Was the defendant motivated by factors made illegal by the statute? The method under Title VII of addressing and resolving this issue was set forth in broad outline by the Supreme Court in *McDonnell Douglas Corp. v. Green.*[28]

III. THE TITLE VII MODEL

A. *The Basic Structure*

McDonnell Douglas Corp. v. Green created a flexible system of proof based upon the proposition that from the existence of certain objective facts inferences can be created that bear on the issue of motivation. Direct evidence of illegal motivation is not required. The initial burden is placed upon the plaintiff who can establish a prima facie case of illegally motivated action by proving the existence of six elements: (1) the plaintiff belongs to a class protected by the statute; (2) the defendant has a job vacancy and was seeking applicants; (3) the plaintiff was qualified to perform the job; (4) the plaintiff applied for the job; (5) the plaintiff was not hired; and (6) the defendant continued to seek applicants for the vacancy.[29] From this showing flows "an inference of discrimination . . . because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible

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[28] 411 U.S. 792 (1973). When direct evidence of improper motivation is presented, however, it is not necessary to utilize the *McDonnell Douglas* analysis. Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1180 (6th Cir. 1983); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982).

[29] *McDonnell Douglas*, 411 U.S. at 802. The Court actually listed four elements:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. Under the second factor the Court combined three distinct factual elements: (a) application, (b) qualification of plaintiff, and (c) vacancy. Yet each of those is a distinct element that must be separately established by plaintiff.

factors."[30]

The Court has indicated that these *McDonnell Douglas* elements of a prima facie case are guidelines and are not "intended to be rigid, mechanized, or ritualistic."[31] Consequently, these elements have been modified and adapted for use in cases involving discharges and the denial of transfers or promotions.[32] Since an application for promotion is essentially the same as a job application, cases that involve the denial of transfers and promotions will follow the *McDonnell Douglas* model. Discharge cases present somewhat different problems. In those cases the plaintiff generally must prove that she was a member of a class traditionally subjected to discrimination, was performing satisfactory work for the defendant, and was discharged and that the employer sought to fill the vacancy or utilized nonminority persons to perform the work.[33]

If the plaintiff establishes a prima facie case, the *McDonnell Douglas* decision teaches that the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[34] Mere denial of improper motivation will not suffice. Failure of the defendant to articulate a "reason" that is "legitimate" and "nondiscriminatory" will result in a judgment, as a matter of law, for the plaintiff.[35] This occurs because when "all legitimate reasons for rejecting an applicant have

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[30] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[31] *Id.*

[32] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 251-53 (1981). In *Burdine*, the plaintiff was denied a promotion and fired when her employer reorganized the plaintiff's department. The Court applied the *McDonnell Douglas* elements and concluded that the plaintiff had proved her prima facie case. *Id.* at 253 n.6; *see also* United States Postal Serv. v. Aikens, 51 U.S.L.W. 4354, 4355 (U.S. Apr. 4, 1983); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (promotion case accepting general principles of *McDonnell Douglas*); Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981).

[33] Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977). Some courts do not require any showing that the employer sought to fill the vacancy. *See* EEOC v. Brown & Root, Inc., 688 F.2d 338, 340-41 (5th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981).

[34] 411 U.S. at 802.

[35] There was some early suggestion that an unrefuted prima facie case merely *allowed* a finding on behalf of plaintiff but did not *require* the trial court to render a judgment for plaintiff. *See* Olson v. Philco-Ford, 531 F.2d 474, 478 (10th Cir. 1976). In *Burdine*, however, the Court held that an unrefuted prima facie showing required the trial court to enter judgment for the plaintiff. 450 U.S. at 254. The inference of illegal motive at this point is "mandatory" rather than "permissive." *See* Peters v. Lieuallen, 693 F.2d 966, 969 (9th Cir. 1982); Miller v. WFLI Radio, Inc., 687 F.2d 136, 138-39 (6th Cir. 1982).

been eliminated [or none articulated] . . . it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration."[36]

If the defendant fulfills the burden of "articulating" a "reason" that is "legitimate" and "nondiscriminatory," then the plaintiff bears the burden of presenting additional evidence of illegal motivation that goes beyond the bare objective elements necessary for the initial prima facie showing. The defendant will be entitled to a judgment, as a matter of law, if the plaintiff produces no such additional evidence.[37] *McDonnell Douglas* indicated that additional evidence of illegal motivation might consist of proof that the reason articulated was not uniformly applied, that the defendant had expressed specific prejudice against the plaintiff's class, or that the defendant's general employment practices show a discriminatory pattern.[38]

Should the plaintiff present additional evidence, over and above the prima facie elements, the ultimate factual issue of motivation is joined. The trial court must then examine all the evidence presented and determine whether the defendant was motivated by consideration made illegal by the statute.[39]

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[36] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis in original).

[37] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56; *cf.* Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.) (suggesting in ADEA case that defendant's articulation merely avoids a directed verdict for plaintiff, that a jury issue is framed by the reason, and that a jury verdict for the plaintiff will be affirmed even absent additional pretext evidence), *cert. denied,* 454 U.S. 860 (1981).

[38] 411 U.S. at 804-05. A formalistic "three-step minuet" with the plaintiff making a prima facie showing, followed by the defendant's presentation of legitimate reasons that in turn allows the plaintiff to present evidence of pretext, is one method of proceeding. Nevertheless, a trial court controls the order of proof. FED. R. EVID. 611. Thus, a court could require a plaintiff to present all of his evidence of illegal motivation at one time and permit rebuttal only for direct refutations of defendant's evidence. *See* Holden v. Commission Against Discrimination, 671 F.2d 30, 36 (1st Cir.), *cert. denied,* 103 S. Ct. 97 (1982); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977). In such a case the plaintiff might be required to combine steps one and three.

[39] *See* United States Postal Serv. v. Aikens, 51 U.S.L.W. 4354, 4356 (U.S. Apr. 4, 1983). The Court in *Aikens* held that even if a *McDonnell Douglas* showing of a prima facie case was not made, when direct or circumstantial evidence of illegal motivation was presented and defendant articulated a "legitimate, nondiscriminatory reason," the trial court should resolve the factual issue of motivation. *Id.* at 4355.

B. *Expanding the* McDonnell Douglas *Model*

1. "Burden to Articulate": Sweeney *and* Burdine. *McDonnell Douglas* indicated that upon a prima facie showing by the plaintiff the burden must shift to the employer to articulate some legitimate, nondiscriminatory reason. The Court failed, however, to explain the meaning of the defendant's "burden to articulate." On one hand, the term "burden" could suggest a burden of proof—a risk of nonpersuasion.[40] On the other hand, the term "articulate" could suggest nothing more onerous than a need "to state" or "to utter."[41] *Board of Trustees v. Sweeney*[42] resolved one aspect of this ambiguity. The Court held that the "burden" on the defendant imposed by the *McDonnell Douglas* model was not a burden to prove that the articulated reason actually motivated the employment action.[43] A prima facie showing did not shift the ultimate risk of nonpersuasion on the issue of motivation to the defendant. Rather the ultimate burden of proving motivation remained throughout with the plaintiff.[44]

Texas Department of Community Affairs v. Burdine further clarified the nature of the defendant's obligation by rejecting the alternative suggestion that the "burden to articulate" required no

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[40] *See* Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977).

The employer generally must prove the legitimate nondiscriminatory reasons by a preponderance of the evidence. *Id.* The *Turner* court rejected a standard that would require clear and convincing evidence. *Id.* The court also rejected the argument that simple articulation would carry the employer's burden because of the potentiality that she may articulate a fictitious but nonetheless nondiscriminatory explanation. If the burden were one of articulation, the plaintiff possibly could be forced to respond and prove that the articulated reason was merely a pretext for discrimination. The court stated that the plaintiff must be allowed to challenge the factual validity of the employer's proffered reasons. *Id.*

The distinction between articulation and proof was later questioned by Justice Stevens in Board of Trustees v. Sweeney, 439 U.S. 24, 28-29 (1978) (Stevens, J., dissenting). Justice Stevens argued that articulation was synonomous with proof, and therefore would regard the distinction made by the court in *Turner* to be "illusory." *Id.* at 28.

[41] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 124 (unabr. 1967): "To utter distinctly."

[42] 439 U.S. 24 (1978).

[43] *Id.* at 25.

[44] *Id.* at 29 (Stevens, J., dissenting). The Court thus rejected Professor Morgan's theory that a presumption flowing from a prima facie case shifts to the defendant a risk of nonpersuasion on the fact presumed. E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 80-81 (1956); *see* 9 J. WIGMORE, EVIDENCE § 2493 (J. Chadbourn rev. ed. 1981).

more than stating or pleading a reason.[45] The Court stated that "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant."[46] In a significant footnote the Court continued: "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel."[47]

Thus the defendant's immediate obligation in meeting a prima facie showing is not a burden of proving legal motivation, but rather it is an evidentiary obligation to "come forward" with evidence sufficient *to support* a finding that the articulated reason existed. If the articulated reason is found to exist, a factfinder may infer that the reason motivated the employment action.[48]

2. "Reasons That Are Legitimate": McDonnell Douglas, Furnco, *and* Burdine. The Court in *McDonnell Douglas* rejected the position of the plaintiff that a "reason" must rise to the level of a "business necessity" before it could be considered "legitimate."[49] A "reason" can be "legitimate" even in the absence of a close relationship between the "reason" and job performance. In *McDonnell Douglas* the reason given by the employer for not rehiring a black former employee was that the employee, while laid off, had engaged in an illegal trespass against the employer during a civil rights demonstration. The Supreme Court held that the employer was free not to "rehire one who has engaged in such deliberate, unlawful activity against it," even though the "reason" was not "necessary" for the job and did not directly relate to the plaintiff's job performance.[50]

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[45] 450 U.S. at 257.

[46] *Id.* at 255.

[47] *Id.* at 255 n.9.

[48] The defendant's burden is to establish the factual existence of the objective reason articulated. *See* Lanpear v. Prokop, 31 Empl. Prac. Dec. (CCH) ¶ 33,481 (D.C. Cir. 1983); Peters v. Lieuallen, 693 F.2d 966, 969-70 (9th Cir. 1982); Miller v. WFLI Radio, Inc., 687 F.2d 136, 138-39 (6th Cir. 1982). *Contra* Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist. No. 622, 663 F.2d 65, 67 (8th Cir. 1981) (en banc); Sanchez v. Texas Comm'n on Alcoholism, 660 F.2d 658, 662 (5th Cir. 1981).

[49] 411 U.S. at 803-04. The circuit court below, citing *Griggs*, had rejected the defendant's reason because it lacked the necessary "substantial relationship" to actual or projected job performance. Green v. McDonnell Douglas Corp., 463 F.2d 337, 344 (8th Cir. 1972). In reversing, the Supreme Court necessarily rejected the "business necessity" standard.

[50] 411 U.S. at 804.

In *Furnco Construction Corp. v. Waters* the Court expanded upon this proposition by holding that the existence of "better" devices or "lesser discriminatory alternatives" does not undercut the legitimacy of the reason articulated.[51] In *Furnco* the defendant articulated as its reason for not employing plaintiffs that they were "walk-on" applicants and unknown to the job superintendent.[52] The Supreme Court rejected the argument of plaintiff as lacking legitimacy because there were methods of selection other than the "no-walk-on" rule that would serve the employer's goals equally well, but would have less foreseeable adverse effect on minority applicants.[53] The Court stated:

> [T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration. . . . To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.[54]

The Court did not reject the relevance of factors such as "better methods" or "lesser discriminatory alternatives" but indicated that their relevance goes to the issue of pretext.[55]

Recently the Court indicated that prior refusals of lateral transfer offers that would have provided additional experience were a legitimate reason for not promoting a minority applicant.[56]

The *Texas Department of Community Affairs v. Burdine*[57] Court elaborated further on the concepts of "legitimacy." The Court of Appeals in *Burdine* had suggested that when the defendant's "reason" for rejecting the plaintiff was that another applicant had superior qualifications, a burden was upon the defendant to prove that the person selected was better qualified than the

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[51] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978).

[52] *Id.* at 571.

[53] *Id.* at 578.

[54] *Id.* at 577-78 (emphasis in original).

[55] *Id.* at 578.

[56] *See* United States Postal Serv. v. Aikens, 51 U.S.L.W. 4354, 4355 (U.S. Apr. 4, 1983).

[57] 450 U.S. 248 (1981).

plaintiff.[58] The Supreme Court reversed, holding that the defendant's burden to articulate a legitimate reason did not require proof that the plaintiff's objective qualifications were inferior to those of the person selected.[59] The Court stated that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."[60]

The holding in *Burdine* is ambiguous in that it did not totally discount the use of comparative evidence to disprove the legitimacy of the proffered reason. All the Court held was that an employer had the right to choose between *equally qualified* persons on other *legitimate grounds* and need not prove the *superiority* of the person who was selected over the plaintiff.[61] Thus, evidence proving that the person selected was actually *inferior* (not equal) to plaintiff in terms of posted qualifications *and* that defendant had no other reason for the selection of the "inferior" person still might be grounds for holding that the proffered reason lacked legitimacy. That issue remains unresolved.[62] The Court indicated,

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[58] Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563, 567 (5th Cir. 1979), *vacated*, 450 U.S. 248 (1981).

[59] 450 U.S. at 259-60.

[60] *Id.* at 259.

[61] *Id.* at 259-60.

[62] Some courts of appeals have held that even if it appears that plaintiff has qualifications superior to those of the person favored, this fact does not undercut the legitimacy of the defendant's articulated reason of relative qualifications. The defendant may still prevail. Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 663 F.2d 65 (8th Cir. 1981) (en banc); Sanchez v. Texas Comm'n on Alcoholism, 660 F.2d 658, 662 (5th Cir. 1981); St. Peter v. Secretary of the Army, 659 F.2d 1133, 1137 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). These holdings appear to ignore the statement in *Burdine* that defendant's evidence must be sufficient to "allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." 450 U.S. at 257. If the reason given by the defendant is the inferiority of the plaintiff's qualifications, but the evidence in fact convinces the factfinder of the superiority of plaintiff's qualifications, and no further justification is given, the evidence would not seem to be legally sufficient to "allow the trier of fact to conclude that the decision had not been motivated by discriminatory animus." From this evidence there is nothing upon which a factfinder could infer that the relative qualifications of the applicants, rather than illegal factors, motivated the decision.

Some authority appears to agree with this analysis by holding that when the defendant's "reason" was the plaintiff's relatively inferior qualifications, and the plaintiff establishes her superior qualifications as defined by the employer, this proof will destroy the legitimacy of defendant's articulated reason. Peters v. Lieuallen, 693 F.2d 966, 969-70 (9th Cir. 1982); *see also* Joshi v. Florida State Univ., 646 F.2d 981, 990 (5th Cir. 1981) (suggesting that defendant who relies on relative qualifications of the applicants must show that the employee selected over plaintiff was at least equally qualified), *cert. denied*, 102 S. Ct. 2233 (1982). Many courts have simply confused *Burdine*. *See, e.g.*, Perryman v. Johnson Prods. Co., 698

however, that evidence of comparative qualifications, regardless of the ultimate role of such evidence in determining the legitimacy of the defendant's articulated reason, was relevant to demonstrate the pretextual nature of the defendant's articulated reason.[63]

IV. THE *McDonnell Douglas* MODEL APPLIED TO THE ADEA

A. *Step One: The Plaintiff's Burden: The Basic Prima Facie Showing*

1. Generally: McDonnell Douglas *Stated and Restated: Survey of the Circuits.* The ADEA, unlike Title VII, provides for trial by jury.[64] The statutes are also somewhat different in language.[65] Despite these differences, courts agree that the model developed in Title VII nonjury, disparate treatment litigation should inspire and direct the obligations and order of proof in ADEA actions.[66] How

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F.2d 1138, 1142-43 (11th Cir. 1983); Ray v. Freeman, 626 F.2d 439, 443 (5th Cir. 1980), *cert. denied,* 450 U.S. 997 (1981).

[63] *Burdine,* 450 U.S. at 258; *see* Grano v. Department of Dev., 699 F.2d 836, 837 (6th Cir. 1983); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983); Burrus v. United Tel. Co., 683 F.2d 339, 342-43 (10th Cir.), *cert. denied,* 103 S. Ct. 491 (1982). If objective qualifications of the plaintiff are superior, it is very difficult to justify a choice utilizing subjective standards. Subjectivity in such a case strongly suggests pretext. Some courts have even suggested that if the employer articulates "superior qualifications of the person selected" as its reason, and plaintiff's qualifications are found to be in fact superior to those of the person selected, then the articulated reason is necessarily, as a matter of law, a pretext. *See* Mohammed v. Callaway, 698 F.2d 395, 399 (10th Cir. 1983); Chaline v. KCOH, Inc., 693 F.2d 477, 481-82 (5th Cir. 1982); Foster v. MCI Telecommunications Corp., 555 F. Supp. 330, 335-36 (D. Colo. 1983); Little v. Master-Bilt Prods., Inc., 513 F. Supp. 901, 903 (N.D. Miss. 1981). A holding that proof of superior qualifications establishes, as a matter of law, the pretextual use of the reason is tantamount to holding that proof of superior qualifications establishes the lack of legal sufficiency of defendant's articulated reason of "qualifications." In either case the same proof entitles the plaintiff to a judgment as a matter of law. *See generally* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice,* 34 VAND. L. REV. 1205, 1235-47 (1981).

[64] 29 U.S.C. § 626(c)(2) (Supp. V 1981). There is no right to a jury trial, however, in ADEA actions filed against federal employers. Lehman v. Nakshian, 453 U.S. 156, 168-69 (1981). In *Lehman* the Court held that when the United States consents to be sued, the plaintiffs have a right to a jury trial only if such a right was part of the consent. *Id.* at 160.

[65] *See supra* notes 9-10 and accompanying text.

[66] *See, e.g.,* Cuddy v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1223-24 (11th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981); Smithers v. Bailar, 629 F.2d 892, 894-95 (3d Cir. 1980); McCorstin v. United States Steel Corp., 621 F.2d 749, 752 (5th Cir. 1980); Smith v. Flax, 618 F.2d 1062, 1066 n.3 (4th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1014-15 (1st Cir. 1979); Schwager v. Sun Oil Co., 591 F.2d 58, 60 (10th Cir. 1979); Cova v. Coca-Cola Bottling Co.,

the prima facie case should be restated in the context of the ADEA, however, has divided the courts into three major blocks. The restatement that most precisely tracks the language of *McDonnell Douglas* is found in the Eighth Circuit:

> [A] plaintiff may establish a prima facie case . . . by showing (1) that he or she is within a protected age group, (2) that he or she met applicable job qualifications, (3) that despite these qualifications, he or she was discharged [or not hired], and [thereafter] the position remained open and the employer continued to seek applications from persons with similar qualifications.[67]

Similar, but simpler, is the standard used in the First and Fourth Circuits. In situations involving applications for a job opening under this standard, plaintiffs satisfy their burden of production if they show that they are members of a protected class and that they were rejected for job vacancies for which they were qualified.[68] Where the plaintiff was discharged, rather than denied employment, these courts revised the standard to reflect that difference. The plaintiff must show that he was within the protected age group of forty to seventy, that at the time of the discharge he was

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574 F.2d 958, 959 (8th Cir. 1978); *see also* Schmid v. Frosch, 680 F.2d 248, 251 n.8 (D.C. Cir. 1982) (standard for use of statistical data to prove discrimination is identical in Title VII and ADEA case); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1222 (7th Cir. 1980) (*McDonnell Douglas* criteria applied to ADEA action), *cert. denied*, 450 U.S. 959 (1981).

For many years the Sixth Circuit stood alone in refusing to accept the *McDonnell Douglas* model for establishing a prima facie showing of age motivation. The court demanded some direct evidence of motivation. *See* Sahadi v. Reynolds Chem., 636 F.2d 1116, 1118 n.3 (6th Cir. 1980); Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975). In Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982), the court continued to reject the *McDonnell Douglas* approach as "binding," but suggested that it could serve as a useful, nonbinding guide to analysis. *Id.* at 69-70. Finally, however, in Blackwell v. Sun Elec. Corp., 696 F.2d 1176 (6th Cir. 1983), the Sixth Circuit appeared to accept the basic structure of *McDonnell Douglas* as being applicable to ADEA cases. *Id.* at 1179. Although recognizing that *McDonnell Douglas* is obviously not the exclusive method of proving violations, the court did recognize that a prima facie case of age motivation can be established by proving the *McDonnell Douglas* elements, and, when proved, the employer will have the burden of articulating legitimate, nondiscriminatory reasons. *Id.* at 1180.

[67] Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978); *see* Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982).

[68] Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979); *see* Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981).

performing at the level of the employer's legitimate expectations, and that after dismissal the employer sought others to perform the same work.[69] An even further refinement was necessary when the plaintiff was discharged pursuant to a general reduction in force. In such cases no persons are being hired to replace anyone; thus no vacancies exist. Consequently, where a forty-to-seventy-year-old plaintiff is a victim of a force reduction, he need not show that the defendant sought others to fill the plaintiff's position. The fact that plaintiffs were laid off will suffice.[70] Note that a prima facie case in the First, Fourth, and Eighth Circuits need not include proof that persons younger than the plaintiffs were favored over the plaintiff or that there were favored persons outside the protected forty-to-seventy age group.

The Fifth and Eleventh Circuits employ two different standards that vary with the nature of the employer's action. In all cases except layoffs pursuant to a reduction in force, the Fifth and Eleventh Circuits utilize the *McDonnell Douglas* model but additionally require as part of a prima facie showing that the plaintiff prove that persons *outside the protected age group* were favored.[71] In refusal-to-hire cases the plaintiff must prove not only that she was in the protected age group, was qualified for a vacancy, and was rejected, but also that the employer hired a person who was *under the age of forty.*[72] In discharge cases the plaintiff must prove that she was performing satisfactorily, was discharged, and that her job was absorbed directly or indirectly[73] by persons *under*

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[69] Rodriguez v. Taylor, 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *see* Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982).

[70] *See* Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982); Mistretta v. Sandia Corp., 649 F.2d 1383, 1386 (10th Cir. 1981); McCorstin v. United States Steel Corp., 621 F.2d 749, 753-54 (5th Cir. 1980).

[71] *See* Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982); Williams v. General Motors Corp., 656 F.2d 120, 128-29 (5th Cir. 1981), *cert. denied,* 455 U.S. 943 (1982).

[72] *See* Harpring v. Continental Oil Co., 628 F.2d 406, 408 (5th Cir. 1980), *cert. denied,* 454 U.S. 819 (1981); Price v. Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977).

[73] *See* McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980). The court reasoned:

> Seldom will a sixty-year-old be replaced by a person in the twenties. Rather the sixty-year-old will be replaced by a fifty-five-year old, who, in turn, is succeeded by a [younger person]. Eventually, a person outside the protected class will be elevated but rarely to the position of the one fired.

Id.

forty.[74] In situations where the plaintiff's job has been eliminated pursuant to a reduction in force, the *McDonnell Douglas* approach is virtually abandoned. In that instance a prima facie case will be established by proving that: (1) the plaintiff was in the protected age group and was adversely affected by the employer action; (2) the plaintiff was qualified to assume another position at the time of the demotion or discharge; and (3) the plaintiff has circumstantial or direct evidence from which the factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision. To satisfy this final element, the evidence must lead the factfinder reasonably to conclude either a) that the defendant consciously refused to consider retaining or relocating plaintiff because of age, or b) that the defendant regarded age as a negative factor in such consideration.[75]

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[74] *See id.* at 752.

[75] *See* Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321 (11th Cir. 1982); Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

The course the Fifth Circuit followed in adopting this standard was both erratic and nonanalytical. The first case to address the issue of the applicability of *McDonnell Douglas* to ADEA cases was Wilson v. Sealtest Foods Div. of Kraftco Corp., 501 F.2d 84, 86 (5th Cir. 1974). The court applied the *McDonnell Douglas* model and held that the plaintiff had established a prima facie case of age discrimination by proving that he was in the protected age group, was doing satisfactory work, was terminated without adequate explanation, and was replaced by a younger person. *Id.* Significantly, the court did not require that the favored person be under age 40. Indeed the person who replaced plaintiff Wilson was aged 50. *Id.* The Fifth Circuit, in Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123, 1124 n.3 (5th Cir. 1977), placed *Wilson* in some doubt by suggesting that *McDonnell Douglas* might not be an appropriate model in ADEA cases. The court, however, did not address the elements necessary for a prima facie case. Later that year the court moved away from the *Lindsey* suggestion and reconfirmed *Wilson* by holding that *McDonnell Douglas* was an appropriate framework for analyzing ADEA complaints. Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977). The court then concluded that the plaintiff had established a prima facie case by proving that a person outside the protected age group was hired to replace him. Significantly, the court did not *require* proof of favoritism of persons outside the class; it merely confirmed that a prima facie case had been established and affirmed a lower court judgment for plaintiff. *Id.* at 736. The court cited *Wilson*, apparently with approval, which had clearly held that such proof was not necessary. *Id.* at 735. Shortly thereafter, in Price v. Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977), the court adopted the brief comment from *Marshall* to hold, for the first time, that a plaintiff was not entitled to a judgment because he failed to establish a prima facie case by proving that he was replaced by a person under age 40. There was no analysis of the significance of this requirement. As authority, the court cited *Wilson*, which had held to the contrary. *Id.* at 612 n.7. Without analysis or supporting authority, the *Price* court thus required a new element for plaintiff's prima facie case. This new requirement was subsequently utilized without significant analysis. *See* Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 371 (5th Cir. 1980); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 590 (5th Cir. 1978).

In the reduction-in-force situations the Fifth and Eleventh Cir-

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A break in the *Price* approach came with McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980). For the first time the court evaluated the significance of the elements of a prima facie case in establishing an inference of age motivation. The conclusion reached was that proof of favoritism toward younger persons was not necessary to create an inference of age motivation. *Id.* at 753-54. Language in *McCorstin* was sufficiently broad to suggest that the court was readopting the early *Wilson v. Sealtest* approach. The new approach seemed to be followed in Carter v. Maloney Trucking & Storage Inc., 631 F.2d 40 (5th Cir. 1980), where the court found that a middle-aged plaintiff who had been denied employment had established a prima facie case without any stated evidence that a person under 40 was hired to fill the employer's vacancy. *Id.* at 42. Another case similarly required proof that persons under 40 were favored over plaintiff, but this time the court cited both *McCorstin* and *Price* with no apparent recognition of the inconsistency between the two cases. Houser v. Sears, Roebuck & Co., 627 F.2d 756, 757 (5th Cir. 1980). Another case imposed the requirements of *Price* while noting with a "*but see*" the inconsistency of *McCorstin*. *See* Harpring v. Continental Oil Co., 628 F.2d 406, 408 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981). The early *Wilson* case, which was contrary, was long forgotten.

It was in Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), that the court attempted to reconcile the vacillating lines of authority. That reconciliation adopts the *Price* approach to hiring, promotion, and individual discharges by demanding proof that persons outside the protected age group be hired or retained in situations other than reductions in force. *Id.* at 128. The court rejected *Wilson* and the implications of *McCorstin* and ignored the overwhelming authority to the contrary from other circuits. In attempting to restate *McCorstin* in the factual context in which it arose—reduction in force—the court failed to appreciate the basic premises of the *McCorstin* analysis. Although replacement by younger persons is not required, direct evidence of age motivation is, and this is a rejection of both *McCorstin* and *McDonnell Douglas*.

The Fifth Circuit has shown no recent inclination to retract or refine its analysis. *See* Reeves v. General Foods Corp., 682 F.2d 515, 520 n.7 (5th Cir. 1982); Baldwin v. Sears, Roebuck & Co., 667 F.2d 458, 461 (5th Cir. 1982).

The story of the Eleventh Circuit is one of "follow the leader." The Eleventh Circuit was formed from the former Fifth Circuit and adopted as precedent the decisions from the former Fifth. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). It was this reason, rather than any independent analysis, that apparently prompted the Eleventh Circuit initially to adopt in toto the Fifth Circuit position in *Williams*. The first case in the circuit to address the issue of a prima facie showing under the ADEA was Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982). The court there stated, in passing, that a prima facie case of age-motivation discharge required the plaintiff to show that he was replaced by a younger person outside the protected age group. *Id.* at 1224. Significantly, however, the court supported this conclusion not with *Williams* but with the relatively obscure case of Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981), a case that predated *Williams* and noted the then existing inconsistency in the Fifth Circuit. *See Anderson*, 675 F.2d at 1224. More significantly the court repeatedly cited *McCorstin* for the general proposition that the requirements for a prima facie showing, established by prior cases, need not be rigidly followed. *Id.* at 1223-24. (It is interesting to note that Judge Kravitch was the author of both *McCorstin* and the Eleventh Circuit opinion in *Anderson*.) Finally, as the facts were presented to the court, the court ruled that the defendant had articulated a legitimate reason for its discharge of the plaintiff. Given the ambiguity of this decision, there was no reason for the Eleventh Circuit slavishly to follow *Williams*. At this point the stage was set for the Eleventh Circuit to adopt the *Wilson* and

cuits have thus turned away from the concept that age motivation can be inferred from the fact that younger persons are retained in their jobs while older plaintiffs, who perform similar work, are laid off. These Circuits did not make clear, however, why an inference of age motivation is weaker when the older worker is laid off than when the same worker is discharged or denied employment that is subsequently offered to a younger applicant. The practical result is that in many, if not most, layoff situations the plaintiff simply will be unable to establish a prima facie case because evidence of actual age animus is rarely available, and unless there is a significant number of persons laid off any statistical data may be inherently unreliable.[76] The defendant thus will not be required to articulate any reason for the treatment of the older plaintiff. Obviously, the absence of any articulated reason means that the laid-off older worker will be effectively deprived of any ability to focus the issue by challenging the existence, legitimacy, or uniform application of the reason. By forcing older victims of a layoff to present actual

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McCorstin line of authority. In Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321 (11th Cir. 1982), however, the court without significant independent reasoning unambiguously embraced Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), quoting at length from that opinion.

In Pace v. Southern Ry., 701 F.2d 1383 (11th Cir. 1983), however, the court appeared to retreat from the position that a prima facie case *required* proof that a person outside the protected age group be favored. The court, again through Judge Kravitch, noted that proof that a person outside the protected age group was favored established a prima facie case but held that this was not the only method by which a prima facie case could be created. *Id.* at 1386. The court again cited *McCorstin*, the opinion from the Fifth Circuit, authored by Judge Kravitch, for the position that such proof was not necessary in reduction-in-force situations. *Id.* at 1387. The court also cited with approval Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981), which found a prima facie case when a plaintiff was replaced by a younger person coupled with direct evidence of age-based distinctions. 701 F.2d at 1388. The court also noted without objection the Ninth Circuit approach that a prima facie case could be established by proof that plaintiff was replaced by a person "substantially younger." *Id.* at 1389-90. The court found, however, that in the case before it there was no direct or persuasive statistical evidence of age motivation and the person favored over plaintiff was 49 years old, only two years younger than the plaintiff. *Id.* at 1390. This the court held was insufficient to support an inference of age motivation. *Pace* thus reopens the possibility that when the court is presented with a factual pattern of a plaintiff being replaced by a substantially younger person, the court will be willing to abandon the Fifth Circuit approach and hold that such a plaintiff can establish a prima facie case.

[76] *See* Baldwin v. Sears, Roebuck & Co., 667 F.2d 458, 462 (5th Cir. 1982); Harpring v. Continental Oil Co., 628 F.2d 406, 410 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981); Harper v. TWA, Inc., 525 F.2d 409, 412 (8th Cir. 1975); Robinson v. City of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975).

evidence of age prejudice as part of a prima facie case, the Fifth and Eleventh Circuits have thrown into disarray the system of proof carefully constructed by the Supreme Court in the *McDonnell Douglas* line of cases. These Circuits have erected nearly insurmountable barriers that force laid-off older workers to establish that the favoritism shown younger workers was a violation of the ADEA.

In situations that involve hiring, promotion, and discharge, the Fifth and Eleventh Circuits have *not* abandoned the *McDonnell Douglas* model. They have transposed the model in such a way as to overlook the basic premises underlying *McDonnell Douglas*. As stated earlier, the Fifth and Eleventh Circuits restate *McDonnell Douglas* by holding that a prima facie case must include proof not only that the person favored in the hiring, discharge, or promotion was younger than plaintiff, but also that the favored person was under the age of forty. Thus, although the Fifth and Eleventh Circuits are willing to infer that an employer who selects an applicant aged thirty-nine over a fifty-year-old is more likely than not motivated by age, these courts are unwilling to allow such an inference when a forty-one-year-old applicant is selected over one who is fifty-two.[77] Such a distinction is absurd, since the age difference is the same. To illustrate further, a qualified but rejected fifty-year-old applicant for a vacancy will state a prima facie case by showing that a person thirty-nine years old was selected. Defendant would then have to articulate a legitimate nondiscriminatory reason for favoring the thirty-nine-year-old hiree over the fifty-year-old plaintiff. The age difference is only eleven years. On the other hand, if a person aged forty-one was awarded the job over a qualified sixty-eight-year-old applicant, no prima facie case would have been established, notwithstanding the twenty-seven-year age difference. The defendant in such a case would have no burden to articulate any reason for preferring the applicant who is twenty-seven years junior to the plaintiff. Absent direct evidence of age prejudice, the sixty-eight-year-old plaintiff would never reach the jury and would therefore lose as a matter of law. This result is hard to justify.

The requirement that the plaintiff prove that one under forty was selected probably was inspired by the notion, found in some

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[77] *See supra* note 71 and accompanying text.

Title VII cases, that if a black applicant is employed to fill the vacancy a black plaintiff will not establish a prima facie case of race discrimination.[78] Such a conclusion is defensible because if a black applicant is immediately employed to the vacancy it may be difficult to infer any racial motivation in the rejection of plaintiff. The logic in ADEA cases, however, in no way suggests that a prima facie showing should require proof that the favored person is under forty. The inference of race discrimination is created by different treatment accorded individuals of *different* races. Likewise, in age cases the *age difference* between the person selected and the plaintiff creates the inference that age was a motivating factor.

The error of the Fifth and Eleventh Circuits is attributable to their failure to recognize the fact that this inference of age motivation has nothing to do with whether the person favored by the employer would be entitled to complain if this favored person were the victim of age discrimination. The fact that whites are protected by Title VII against race discrimination,[79] and males against sex discrimination,[80] has never been relevant to the issue of whether a woman or a black has stated a prima facie case of illegally motivated action. Similarly, the fact that the favored person is over forty and thus could claim the protection of the ADEA is not relevant to the issue of motivation. Again, the inference of age motivation is a product of different treatment accorded to different age groups and not whether the favored person, if injured, could sue under the statute.

The end result of the approach of the Fifth and Eleventh Circuits is virtually to insulate the favorable treatment of employees or applicants over age forty from serious challenge. Regardless of the age differential between the plaintiff and the favored person over forty, the employer will be under no duty to articulate reasons

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[78] *See* Freeman v. Lewis, 675 F.2d 398, 400-01 (D.C. Cir. 1982); Jones v. Western Geophysical Co. of Am., 669 F.2d 280, 284-85 (5th Cir. 1982); De Vold v. Bailar, 568 F.2d 1162, 1164-65 (5th Cir. 1978) (race); Jones v. Public Defender Serv., 553 F. Supp. 1031, 1041-42 (D.D.C. 1983) (race); Carter v. Dialysis Clinic, 30 Fair Empl. Prac. Cas. (BNA) 1734 (N.D. Ga. 1981); Brazer v. St. Regis Paper Co., 498 F. Supp. 1092, 1097-98 (M.D. Fla. 1980) (race); *cf.* Keys v. Lutheran Family & Children's Servs., 668 F.2d 356, 358-59 (8th Cir. 1981) (in Title VII action black female established prima facie case notwithstanding that she was replaced by a black female).

[79] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

[80] Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

for its favorable treatment of the younger employee. This, it seems, is a corruption of both the letter and the spirit of the *McDonnell Douglas* model.

The Ninth Circuit has specifically rejected the requirement of the Fifth and Eleventh Circuits that plaintiff must show that persons outside the age group of forty-to-seventy were favored over plaintiff.[81] At the same time the court did not adopt the simple formula that merely required a showing that a qualified plaintiff was rejected and that the defendant sought to fill the vacancy.[82] Rather, the Ninth Circuit requires that the plaintiff prove that she is within the protected age group, that plaintiff was qualified, but did not receive the job, or was discharged, and that persons *"substantially younger"* than the plaintiff were employed or retained.[83] Also, the Ninth Circuit, unlike other courts, apparently has not made any fundamental distinction between cases involving hiring, firing, or reduction in force.[84] The Third, Tenth, and District of Columbia Circuits appear to have adopted a standard for a prima facie case, similar to that of the Ninth, that requires some showing that persons younger than the plaintiff were favored, but does not, however, require that the younger person be under age forty.[85]

The requirement of showing that a younger person was favored over the plaintiff may expand on the literal requirement of *McDonnell Douglas*. Nevertheless, as stated above, some Title VII case law has indicated that a plaintiff's prima facie case of race or

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[81] Douglas v. Anderson, 656 F.2d 528, 532-33 (9th Cir. 1981).

[82] *See supra* note 67 and accompanying text.

[83] Douglas v. Anderson, 656 F.2d 528, 532-33 (9th Cir. 1981) (emphasis added). At what point the favored person becomes "substantially younger" will be difficult to define. In *Douglas*, the plaintiff was age 54 and was replaced by a person age 49. The five-year age difference was deemed "substantial" enough to create a prima facie case. *Id.* at 533.

[84] *See* Naton v. Bank of Cal., 649 F.2d 691, 698 (9th Cir. 1981). In *Naton*, the plaintiff was discharged as part of a reduction-in-force plan. The court did not detail specific elements that the plaintiff would have to prove to establish an ADEA violation in such a situation. The court, instead, reviewed the relevant evidence, which indicated that the defendant was seeking younger employees, and concluded that the plaintiff's age was a determining factor in his discharge. *Id.* at 698.

[85] *See* Cuddy v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982); Smithers v. Bailar, 629 F.2d 892, 895 (3d Cir. 1980); Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979); *cf.* Mistretta v. Sandia Corp., 649 F.2d 1383, 1386 (10th Cir. 1981) (court suggested in a layoff situation that *if* a trial court had ruled against plaintiffs *solely* on the basis of plaintiffs' inability to prove that they had been replaced by younger persons, this would have been a sound basis for appeal).

sex discrimination will be defeated by a showing that a person of the same race and sex as the plaintiff was employed in the position sought by the plaintiff.[86] This is because if a person of the same race and sex as the plaintiff were employed in the position sought or occupied by the plaintiff it would be difficult, absent additional facts, to infer that the treatment of the plaintiff was motivated by race or sex considerations.[87] The same logic would appear to be valid under the ADEA. If the evidence shows that persons of approximately the same age as the plaintiff were employed over her then it is difficult to draw an inference that the defendant was motivated by age considerations.[88]

When there is a substantial age difference between the plaintiff and the person favored, however, regardless of whether the favored person is below or above age forty, it is possible for a court to infer that the employer was motivated by the age difference between the competitors. The greater the age difference is, the greater the inference of age motivation will be.

The Ninth Circuit's approach to a prima facie case[89] is thus the approach ultimately most loyal to the principles of *McDonnell Douglas*. The Ninth Circuit recognizes that the age difference between the plaintiff and persons favored by the employer is the significant factor in the creation of the inference of discriminatory motive, and not simply the adverse treatment of the plaintiff.[90]

The major divisions among the circuits may be summarized as

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[86] *See* cases cited *supra* note 78.

[87] *See* Keys v. Lutheran Family & Childrens Servs., 668 F.2d 356, 359-60 (8th Cir. 1981) (Gibson, J., dissenting). Of course, if it appears that hiring persons of the same classification as the plaintiff was being used to avoid litigation, then illegal discrimination would be established notwithstanding the lack of an initial inference of nondiscriminatory conduct. *See* Jones v. Western Geophysical Co. of Am., 669 F.2d 280, 284 (5th Cir. 1982); Smith v. World Book-Childcraft Int'l, Inc., 502 F. Supp. 96, 102 (N.D. Ill. 1980).

[88] *See* Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242 n.13 (4th Cir. 1982). Thus, the position of the Ninth Circuit appears to be soundly based. It is of no great import, however, in most cases whether this evidence of younger persons is a required part of the prima facie case, or whether such evidence can be used by defendant to defeat the prima facie case. Although the First, Fourth, and Eighth Circuits do not require a showing *by the plaintiff* that younger persons were favored, there is nothing in these cases to indicate that, if evidence were presented *by the defendant* showing that the persons hired over plaintiff were approximately the same age as plaintiff, this would not undercut the prima facie showing of plaintiff. Indeed, the Fourth Circuit suggested this in *Lovelace*. *Id.*

[89] *See supra* notes 81-83 and accompanying text.

[90] *See supra* note 83 and accompanying text.

follows: (1) First, Fourth, and Eighth Circuits: relatively literal adaptation of *McDonnell Douglas* with no proof of favoritism toward younger persons required; (2) Third, Sixth, Ninth, Tenth, and District of Columbia Circuits: requirement that plaintiff prove as part of her prima facie case that persons "substantially younger" than the plaintiff were favored; (3) Fifth and Eleventh Circuits: in all cases, except reduction-in-force, the plaintiff must prove that persons under age forty were favored over the plaintiff, and in reduction-in-force situations there must be additional evidence beyond bare *McDonnell Douglas* elements that suggests age motive.[91] The approaches of the Second and Seventh Circuits are unclear.[92]

2. *The Standard Applied: The Elements of a Plaintiff's Prima Facie Case: What Must Be Proved and How.*

a. Age. First, all courts agree that the plaintiff must establish that her age at the time of the employment decision was between forty and seventy. The plaintiff should secure an admission during discovery or stipulation prior to trial. If that is not secured, the

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[91] The Sixth Circuit, while now accepting the *McDonnell Douglas* model, has not precisely defined the necessary elements of a prima facie case. The court appeared to require proof that a younger person was favored by the employer, but left open the question whether the younger person must also be under age 40. *See* Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1181 n.6 (6th Cir. 1983).

[92] In the Second Circuit one case indicated a need for a plaintiff to prove that younger persons were favored without suggesting a need to prove that persons under 40 were favored. *See* Stanojev v. Ebasco Servs., Inc., 643 F.2d 914, 919-20 (2d Cir. 1981); *cf.* EEOC v. TWA, Inc., 544 F. Supp. 1187, 1218-19 (S.D.N.Y. 1982) (stating that inference of discrimination can be drawn when the replacement is younger but not outside the protected class). In Pena v. Brattleboro Retreat, 702 F.2d 322, 324 (2d Cir. 1983), the court stated: "[A] *prima facie* case of age discrimination would consist of sufficient evidence to support a finding that (i) she was in the protected age group, (ii) she was qualified for her job, (iii) she was discharged, and (iv) the discharge occurred in circumstances which give rise to an inference of age discrimination." The court gave no indication as to what "circumstances" would give rise to an inference of age motivation. Presumably, replacement by a substantially younger person would be such a "circumstance." The Second Circuit thus requires something more to be proved than adverse treatment of an older worker, but how much more is unclear. The Seventh Circuit, in an ambiguous opinion, suggested that the plaintiff's *McDonnell Douglas* burden included proof that the employer had no legitimate reason for its action. *See* Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1219, 1222-23 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *see also* Golomb v. Prudential Ins. Co. of Am., 688 F.2d 547, 549 (7th Cir. 1982); Michaelis v. Polk Bros. Prods., 545 F. Supp. 109, 111 (N.D. Ill. 1982). This, of course, misstates the *McDonnell Douglas* obligation and places the obligation to establish a negative element on the plaintiff—a fact completely within the knowledge of the defendant.

plaintiff should introduce an official document such as a birth certificate or passport. Courts have not generally required, as part of a prima facie case, proof that the defendant was aware of the plaintiff's age at the time the defendant acted. Nonetheless a wise plaintiff would present evidence of the defendant's knowledge. This knowledge should be proved because it is the defendant's awareness that the plaintiff was over age forty that permits an inference that the age of the plaintiff motivated the defendant's decision.[93] This fact, too, can be satisfied by an admission or stipulation. If it is not so satisfied, the plaintiff should present documents such as application forms or insurance policies that would permit a finder of fact to infer that defendant was aware of plaintiff's general age. Oral statements, such as "the plaintiff is over the hill" or "one of the good ole boys," made before the trial would indicate that the defendant's agents knew or believed that the plaintiff was over forty.[94] The plaintiff clearly should not rely on details of the personal appearance of the plaintiff, such as gray hair, to establish the defendant's knowledge.[95]

b. Employer's action: rejection or discharge. The second universally required element is that the plaintiff either sought a job[96] and was rejected or that as an employee she was discharged or subjected to an adverse employment action.[97] Although this element is not difficult to prove, if not stipulated, the plaintiff should introduce evidence of such adverse action. This could be done through

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[93] Hodgson v. Earnest Mach. Prods., Inc., 479 F.2d 1133, 1134 (6th Cir. 1973). In Parcinski v. Outlet Co., 673 F.2d 34, 36-37 (2d Cir. 1982), plaintiff failed to prove age motivation when it was shown that the decision that affected the plaintiff was made without knowledge of the ages of the affected persons.

[94] See Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975), where a notation on a file stating that plaintiff had "too many years on the job" was sufficient to raise an inference of age motivation. *See also* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 823 (5th Cir. 1972) (notation "too old for teller" aided in establishing prima facie case).

[95] Hodgson v. Earnest Mach. Prods., Inc., 479 F.2d 1133, 1134 (6th Cir. 1973).

[96] *See, e.g.*, Reilly v. Friedman's Express, Inc., 556 F. Supp. 618, 624 (M.D. Pa. 1983) (informal inquiry not an application); Johnson v. Armco, Inc., 548 F. Supp. 1109, 1111 (D. Md. 1982); Nelms v. Ampex Corp., Empl. Prac. Dec. (CCH) ¶ 9466 (M.D. Ala. 1974).

[97] *See* Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (employee resigned and was not terminated). An employee can be "constructively discharged," however, when an employer "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Id.*; *see* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (working conditions must be "so difficult or unreasonable that a reasonable person in the employee's shoes would be forced to quit").

testimony of the plaintiff. Any supporting documentary evidence available, however, such as an application form, letter of rejection, or a discharge slip, should be introduced.

c. Vacancy. In cases involving applications for initial employment, promotion, or transfer, the plaintiff must prove the existence of a vacancy. Occasionally, proof of this element can present problems.[98] If the defendant does not admit that a vacancy existed, documents should be introduced that show the defendant advertised in the media for positions, that the defendant had contacted a union or employment agency, that the job opening was posted or appeared in a staffing or organizational chart. If nothing else is available, the plaintiff can testify that she was told of a vacancy or at the time of the application was not told by the defendant that no vacancy existed, or both. Proof of vacancy is not necessary in a discharge case.

d. Qualification. The fourth element that the plaintiff must prove is that she was "qualified" for the job. This element, more than any other, has proved difficult to define. In discharge cases defendants have argued that plaintiffs must prove they are "qualified" for continued employment by showing that they did not warrant discharge.[99] Similarly, in situations involving reduction in force, defendants have argued that plaintiffs must show that they were "qualified" for continued employment by proving that they were superior to employees not laid off. Generally, in both Title VII and ADEA litigation, such arguments have been rejected. According to the weight of authority, proof that *up to the point of discharge* the plaintiff was doing satisfactory work establishes that the plaintiff was "qualified."[100] That there was "good cause" for

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[98] *See, e.g.*, Daves v. Payless Cashways, Inc., 661 F.2d 1022, 1025-26 (5th Cir. 1981); Chavez v. Tempe Union High School Dist. No. 213, 565 F.2d 1087 (9th Cir. 1977). The plaintiff in *Chavez* argued that she was denied advancement to chairperson owing to her national origin. The court, however, found that at the time the plaintiff applied for the position, it had already been filled. The court noted that the plaintiff had ample notice of the opening but failed to take advantage of the opportunity. *Id.* at 1090, 1093; *see also* Lee v. National Can Corp., 699 F.2d 932, 937-38 (7th Cir. 1983).

[99] *See, e.g.*, Grant v. Gannett Co., 538 F. Supp. 686, 689 (D. Del. 1982).

[100] Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1181 (6th Cir. 1983); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Hedrick v. Hercules, Inc., 658 F.2d 1088, 1094 (5th Cir. 1981); Grant v. Gannett Co., 538 F. Supp. 686, 689-90 (D. Del. 1982); *cf.* Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282-83 (7th Cir. 1977) (Title VII). But see the leading case of Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979), where the court stated: "Complainant would be required to show that he was 'qualified' in the sense

the discharge is a burden to be carried by the defendant after a prima facie case is made and not telescoped into the plaintiff's prima facie showing. "Qualification" can be established by introducing prior efficiency ratings, bonus awards, or salary increases. Even the length of employment and the lack of reprimands should establish the "qualification" of the current employee for continued employment.

In cases involving a refusal to hire or promote to a vacancy, defendants have argued that an applicant is "qualified" only if she was relatively the most qualified. Courts have not required this level of proof. Generally stated, at least in Title VII litigation, the plaintiff need prove only that she possesses the posted job qualifications.[101] That is, if the job requires typing fifty words per minute, the plaintiff must prove that she can so perform. If the vacancy is for a "skilled mechanic," the plaintiff must show that through training and experience she has that skill. If the job specifications state a college degree and five years' experience, the plaintiff must introduce into evidence proof that she possesses those credentials. Comparative evidence showing that the plaintiff is the best, or most qualified, of the applicants is not part of a prima facie case. Rather, evidence that the person hired had abilities, skills, or traits superior to the plaintiff is a "legitimate, nondiscriminatory reason" to be presented by defendants.[102]

The Seventh Circuit, however, appears to have departed from this interpretation of "qualified." One case involved an employee over age forty who worked for the defendant for two years and received performance evaluations of "good."[103] He was discharged.

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that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." *Id.*

[101] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258-59 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978); EEOC v. Federal Reserve Bank, 698 F.2d 633, 671-72 (4th Cir. 1983); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983); *cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (suggesting that the plaintiff's prima facie case include proof of "an absolute or *relative* lack of qualifications" (emphasis added)). The suggestion has prompted a minority of courts to hold that when the defendant has indicated that the plaintiff was not selected because of superior qualifications of another applicant, the plaintiff must prove, as part of her prima facie showing, that a less qualified person was selected. *See* Cartagena v. Secretary of Navy, 618 F.2d 130, 133 (1st Cir. 1980); Fridge v. Staats, 30 Fair Empl. Prac. Cas. (BNA) 216 (D.D.C. 1982).

[102] *See supra* note 101.

[103] Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218-19 (7th Cir. 1980), *cert.*

Nevertheless, the court held that plaintiff had not carried the burden of proving that he was "qualified" because the evidence indicated that in some aspects the plaintiff's work had been inferior to other employees.[104] Although the court's result may be defensible in that work deficiencies ultimately justified the employer's action, the decision suggests a burden on the plaintiff to prove a negative—absence of faults—as part of a prima facie showing, a burden the weight of authority would not place on the plaintiff.

e. Favoring younger persons. The Third, Sixth, Ninth, Tenth, and District of Columbia Circuits have indicated that plaintiffs must prove, as a part of their prima facie case, that substantially younger persons were favored over the plaintiff. Even in circuits not specifically requiring it, however, such evidence of relative age should always be presented by the plaintiff. Ultimately, it is the difference in age between the plaintiff and the persons favored by the employer that permits an inference of age discrimination to be drawn.[105] If the differences are dramatic, the probative value is great. In cases involving a refusal to employ or a denial of a promotion, evidence of age differential should not be difficult to present. Through discovery the plaintiff can secure from the defendant the name and age of those hired for the vacancy sought by the plaintiff. In cases involving discharges, however, it may be difficult to identify the particular person replacing the plaintiff. Nonetheless, evidence that the discharge of the plaintiff started a chain of events that ultimately created a vacancy filled by a younger employee will suffice,[106] as will evidence that the work of the plaintiff was shared or absorbed by a number of younger workers.[107]

When the plaintiff is laid off pursuant to a reorganization or reduction in force, it perhaps is impossible to show that younger em-

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denied, 450 U.S. 959 (1981).

[104] *Id.* at 1220-21; *see also* Erwin v. Bank of Miss., 512 F. Supp. 545, 551 (N.D. Miss. 1981). In *Erwin* the court held that the plaintiff had failed to prove qualification when evidence presented by the employer indicated that the plaintiff had a "bad attitude" and lacked ability to "secure cooperation" of co-workers. *Id.*

[105] *See* Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242 n.13 (4th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

[106] *See* McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980).

[107] *See* Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979) (plaintiff demonstrated statistically that workers over 40 were disproportionately affected by the employer's reduction-in-force plan).

ployees actually displaced the plaintiff. Proof of a statistically significant pattern showing that a disproportionate number of older workers were adversely affected, however, should satisfy any requirement that the plaintiff show that younger employees were favored over the plaintiff.[108] Plaintiffs thus should be alert to developing a statistical showing. Raw data can be discovered in the defendant's employment records. Should expert analysis of this data indicate a pattern of age distinctions that is unlikely to be produced by chance or nonage factors, this evidence should be presented. This can be done through qualification of the expert, identification and introduction of the raw employment records, summaries prepared by the expert from that data, and the expert's testimonial conclusions regarding the statistical significance of the data. This evidence may be necessary to establish a prima facie showing in those courts requiring some showing of favoritism toward younger workers and is circumstantial evidence of motivation for those courts requiring more than a bare *McDonnell Douglas* showing.[109]

In the Fifth and Eleventh Circuits plaintiffs should be sure to show hiring of or replacement by a person under age forty. A violation exists, of course, regardless of the age of the favored person. Absent alternative evidence, however, a prima facie inference of age motivation in these courts requires proof that a person under

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[108] *See* Schmid v. Frosch, 680 F.2d 248, 250-51 (D.C. Cir. 1982); EEOC v. Sandia Corp., 639 F.2d 600, 621 (10th Cir. 1980) (stating that statistics provide a strong circumstantial basis for determining the presence of age discrimination); Walker v. Pettit Constr. Co., 605 F.2d 128, 131 (4th Cir. 1979) (statistics demonstrated that odds were 97 to 3 that age had something to do with the plaintiff's discharge).

[109] *See* Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 765 (5th Cir. 1983); Schmid v. Frosch, 680 F.2d 248, 249-51 (D.C. Cir. 1982); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 818 (5th Cir.), *cert. denied*, 103 S. Ct. 451 (1982); Davis v. Califano, 613 F.2d 957, 962-63 (D.C. Cir. 1979). *See generally* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 1-2 (1980); C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 6, § 1.8. Absent some indication of the disparate treatment of the plaintiff, however, the statistical data, standing alone, may not show disparate treatment. *Compare* Smith v. Farah Mfg. Co., 650 F.2d 64, 69-70 (5th Cir. 1981) (statistical evidence that showed the existence of age discrimination in hiring policies is irrelevant to proving discriminatory discharge as to a particular employee), *with* Gay v. Waiters' & Dairy Lunchmen's Union, Local 30, 694 F.2d 531, 552 (9th Cir. 1982) (statistical evidence showing a clear pattern of discrimination inexplicable on grounds other than race can establish prima facie case). The statistical evidence must involve a sufficiently large experience to be significant. *See* Stendebach v. CPC Int'l, Inc., 691 F.2d 735 (5th Cir. 1982); Pirone v. Home Ins. Co., 31 Empl. Prac. Dec. (CCH) ¶ 33,447 (S.D.N.Y. 1983).

forty was hired over the plaintiff.

B. Step Two: Defendants' Burden to Articulate Legitimate Reasons

1. Generally. The Title VII case of *Texas Department of Community Affairs v. Burdine* established that from a prima facie showing an inference of illegal motive must be drawn, and if the defendant fails to come forward with legitimate, nondiscriminatory reasons for its action, the plaintiff is entitled to a judgment as a matter of law.[110] ADEA cases have reached an identical resolution. Subject only to credibility findings on the existence of the facts necessary for a prima facie showing, the absence of a legally sufficient demonstration by the defendant to meet a prima facie case requires the court to direct a verdict for the plaintiff.[111]

Burdine held also that the "burden to articulate" required the defendant to do more than plead or argue a reason, but also demanded an evidentiary showing that would justify a verdict in the defendant's favor.[112] Such a requirement is equally applicable to the ADEA.[113]

The Title VII case of *McDonnell Douglas Corp. v. Green* held that, to be legally sufficient, the reason articulated must be "legitimate" and "nondiscriminatory."[114] The ADEA, however, has language not found in Title VII that allows discharge "for good cause"[115] and permits an employer to make distinctions based on "reasonable factors other than age."[116] Some ADEA cases have adopted the precise language used in *McDonnell Douglas,* "legitimate, nondiscriminatory reason,"[117] while other courts have utilized the statutory language of the ADEA and placed a burden on

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[110] 450 U.S. 248, 254 (1981).

[111] *See, e.g.,* Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 535 n.7 (9th Cir. 1981); Mistretta v. Sandia Corp., 649 F.2d 1383, 1386-87 (10th Cir. 1981).

[112] 450 U.S. at 255.

[113] *See* Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982).

[114] 411 U.S. 792, 802 (1973).

[115] 29 U.S.C. § 623(f)(3) (1976).

[116] *Id.* § 623(f)(1).

[117] *See, e.g.,* Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321 (11th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981); Smithers v. Bailar, 629 F.2d 892, 895 (3d Cir. 1980); Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980).

the employer to present evidence "that the discharge was 'for good cause,' . . . or . . . was 'based on reasonable factors other than age.' "[118] Although the phrases "reasonable factors" and "legitimate, nondiscriminatory reasons" could be given different meanings, the courts have not found any particular significance in the language difference. They seem to accept that "reasonable factors other than age" and "legitimate nondiscriminatory reasons" are rough equivalents[119] and that the defendant's burden is one of presentation, as opposed to persuasion.[120]

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[118] Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959-60 (8th Cir. 1978); *see* Price v. Maryland Casualty Co., 561 F.2d 609, 612-13 (5th Cir. 1977).

[119] *See* Smith v. Farah Mfg. Co., 650 F.2d 64, 67 (5th Cir. 1981); Marson v. Jones & Laughlin Steel Corp., 523 F. Supp. 503, 507 (E.D. Wis. 1981).

[120] *See* Reeves v. General Foods Corp., 682 F.2d 515, 521-23 (5th Cir. 1982); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 (1st Cir. 1979).

It might be argued that the wording and history of the ADEA suggests a result that would differ from the Title VII model. After all, Title VII, unlike the ADEA, has no "reasonable factors" defense. The provision in the ADEA is structurally a defense. This "defense" was inspired by similar language found in the Equal Pay Act that allows employers to justify pay distinctions between men and women doing "equal work" if the difference is based on "any other factor other than sex." 29 U.S.C. § 206(d)(1) (1976). The "any other factor other than sex" provision of the Equal Pay Act has been definitively interpreted as an affirmative defense. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). Consequently, once a plaintiff establishes a pay distinction between males and females for jobs that require "equal work," the employer must carry the burden of persuading the factfinder that the established pay difference was, in fact, based on a "factor other than sex." *Id.* at 196-97. This is not merely a burden of presenting some evidence on the issue, but is a relatively heavy burden of persuading the factfinder of the business reasonableness and gender neutrality of the factor that the defendant alleged to have utilized. *See* Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982); Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1047 (5th Cir.), *cert. denied,* 414 U.S. 822 (1973). This difference between the ADEA and Title VII and the similarity of the ADEA to the Equal Pay Act could suggest that on the issue of the nature of defendant's burden the ADEA should follow the Equal Pay Act model and treat the defendant's burden as a defense that must be proved by defendant. Notwithstanding the superficial appeal of such a suggestion, the courts have been correct in not following it. Under the Equal Pay Act the issue is one of equal work and unequal pay between sexes—objective factors. Motive is not part of plaintiff's prima facie case and need not be proved. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); Shultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970). Under the ADEA, however, similar to under Title VII, the primary issue is the defendant's motivation. The plaintiff's burden in an ADEA case, unlike the Equal Pay Act, is to create an inference of improperly motivated action. The role of the defendant's burden under the ADEA, as under Title VII, is simply to place in issue the inference of motivation drawn from plaintiff's prima facie case. This is fundamentally a different issue from that confronted in the Equal Pay Act, where only equality of work and inequality of pay, not motive, are addressed. Given the difference in issues between an ADEA case and the Equal Pay Act, it is appropriate to

Under Title VII the concept of "legitimate, nondiscriminatory reason" is fixed and constant in that the reason articulated is not balanced against the strength of the prima facie case to determine by the relative weight whether the reason is "legitimate."[121] This is because in Title VII litigation the *McDonnell Douglas* formula produces an inference of motivation that remains essentially constant. For example, hiring a white over a black applicant produces an inference of racial motivation that does not vary appreciably from case to case. The relationship that produces the inference of race motivation remains constant. Additional evidence may strengthen the inference, but that evidence goes to pretext and is not part of the prima facie showing. Similarly, if a woman is discharged and replaced by a man, the initial inference of sex motivation does not change significantly by altering the factual context. In each case the relationship between the plaintiff and the favored person is a fixed or constant relationship that creates an inference of consistently similar strength. Thus the defendant's burden to articulate a legitimate, nondiscriminatory reason is not balanced, but rather remains constant.

In age discrimination cases the establishment of the inference of motivation changes. The relationship between the plaintiff and the person favored creates an inference of age motivation that will vary in each case with the difference in the ages of the plaintiff and the person favored. If the age of the person favored is thirty-nine and the plaintiff is only forty, very little, if any, inference of age motivation is created. Indeed, it would be insufficient to establish a prima facie case. If the age difference is increased to ten years, however, then the difference in ages between plaintiff and the person favored is sufficient to create an inference of age discrimination.[122] If that age differential is increased to twenty, thirty, or forty years, the inference of age motivation becomes correspondingly stronger. In short, unlike race or sex differences, which re-

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follow the analogous model of Title VII in ADEA litigation.

[121] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978). This is to be contrasted with the concept of "business necessity" utilized in adverse impact cases. Some courts have indicated that "necessity" requires a balancing of the need for the criteria against the degree of impact that the criteria imposes on the particular class. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[122] Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242 n.13 (4th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 533 (4th Cir. 1981).

main constant, the strength of the inference of age motivation that flows from a prima facie showing varies and is a product of the difference between the age of the plaintiff and the age of the person favored by the defendant. It is hard to deny that when the plaintiff is sixty-five and the favored person is twenty-five—a forty-year difference—the inference of age motivation is significantly stronger than when the plaintiff is forty-five and the favored person is thirty-five—a ten-year difference.

Because the inference of age motivation does vary with the age differences of the persons involved, it would seem appropriate to vary the burden of the defendant by making that burden correspond to the strength of plaintiff's prima facie showing. To carry a burden of going forward with the evidence, a defendant must first present evidence that would create some inference going to the issue. Second, that inference must be sufficiently strong, in light of the prima facie showing, to raise a genuine issue of fact that could be resolved in favor of the defendant.[123] The failure to meet and refute the prima facie showing would entitle the plaintiff to a judgment.

This discussion suggests the possibility—one that no court has yet recognized—that in evaluating the legal sufficiency of the reason articulated by a defendant, the courts in ADEA cases might utilize a flexible concept of legitimacy. A court could balance the strength of the reasons articulated in terms of their business rationality against the relative strength of the prima facie showing. The greater the age differential between the plaintiff and the person favored, the stronger, in terms of the reason's relationship to bona fide employer concerns, the defendant's articulated reason should be. A relatively slight difference in ages would produce an inference of age discrimination that is relatively weak. In such a case a reason that is weak in that it is somewhat arbitrary or subjective might be legally sufficient. The same arbitrary or subjective reason might be held to lack legitimacy where a great difference in age between the plaintiff and the person favored produced a strong inference of age motivation. The weakness of the reason in light of the likelihood that age was a motivating factor would allow a court, as a matter of law, to conclude that a judgment for the defendant

[123] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 401-02 (1976).

could not be justified.

2. The Elements of Legitimacy: What the Defendant Must Prove. Regardless of the precise wording of defendants' burden, ADEA litigation has followed broadly the Title VII concept of "legitimacy" established by *McDonnell Douglas* and *Furnco*. Employer decisions will be deemed legitimate even if not proved to be "necessary" in terms of being directly tied to work performance.[124] Reasons will not lack legitimacy simply because they may reduce the employment opportunities of older persons or because the "reason" articulated is not the "best" method of making employment decisions.[125] The use of the term "legitimate" in both Title VII and ADEA litigation, however, suggests that an employer could not rely on reasons that violate the law. Articulation of an illegal reason is not "legitimate," and such a reason would not support an inference that the employer was motivated by nonage considerations.[126] Furthermore, a reason that is wholly arbitrary and totally unrelated to any bona fide employer concerns would not be legally sufficient. Not only are arbitrary reasons, by definition, not "reasonable" within the express ADEA statutory requirement, a reason totally unrelated to normal employer concerns would carry little or no inference that this reason, rather than age, was the reason that motivated the particular decision.[127]

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[124] *See* Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982); Carter v. Maloney Trucking & Storage, Inc., 631 F.2d 40, 42-43 (5th Cir. 1980); Marson v. Jones & Laughlin Steel Corp., 523 F. Supp. 503, 507-08 (E.D. Wis. 1981); Walter v. KFGO Radio, 518 F. Supp. 1309, 1313-14 (D.N.D. 1981).

[125] *See* Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321-22 (11th Cir. 1982); Mistretta v. Sandia Corp., 649 F.2d 1383, 1389-90 (10th Cir. 1981); Carter v. Maloney Trucking & Storage, Inc., 631 F.2d 40, 42 (5th Cir. 1980). If a particular practice can be shown to have an adverse impact on older workers, the plaintiff should consider a count based on that impact. *See supra* note 18. Plaintiff should not rely on the presence of impact to carry a disparate treatment charge. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576-78 (1978).

[126] For instance, an employer might assert that an employee was discharged because of union activity, a violation of the Labor Management Relations (Taft-Hartley) Act, § 8, 29 U.S.C. § 158(a)(3) (1976), or not hired because of his race, or her sex, a violation of Title VII. Such reasons could hardly be said to be either "legitimate" or "nondiscriminatory."

[127] A reason that the employee was not hired because he was curly headed or left handed or blue eyed would lack legal sufficiency because no inference could be drawn that an employer, who is presumed rational, would be motivated by such irrational factors. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). A number of Title VII cases suggested that "legitimacy" requires some rationality. *See* Miller v. WFLI Radio, Inc., 687 F.2d 136, 138-39 (6th Cir. 1982); Little v. Master-Bilt Prods., Inc., 513 F. Supp. 901, 903 (N.D. Miss.

A divergence exists between Title VII and ADEA cases concerning the legitimacy of subjective evaluations and the acceptability of vague conclusions as legitimate reasons. As a general proposition, when job performance is capable of objective evaluation, Title VII courts have tended to reject vague, purely subjective conclusions concerning employee or applicant ability.[128] Subjectivity is suspect because it lacks norms that allow rebuttal by the plaintiff, and, consequently, effective judicial review is impossible. Furthermore, subjectivity is a "ready mechanism for discrimination . . . much of which can be covertly concealed."[129] Subjective reasons are not, however, illegitimate per se. If the job or job performance can be evaluated only in terms of subjective standards, such as those involving management, professional, or artistic skill, Title VII permits the use of reasonable subjective standards, particularly if they are applied with procedural safeguards to ensure fairness.[130]

Similarly, under the ADEA, when job duties can be evaluated only in subjective terms, subjective evaluations of performance can be legitimate. Even where some subjectivity is unavoidable, however, some courts may accept a level of subjectivity in ADEA cases that would be rejected in Title VII litigation.[131]

1981).

[128] *See, e.g.*, Mohammed v. Callaway, 698 F.2d 395, 401 (10th Cir. 1983); Gay v. Waiters' & Dairy Lunchmen's Union, Local 30, 694 F.2d 531, 554-55 (9th Cir. 1982); Watson v. National Linen Serv., 686 F.2d 877, 880-81 (11th Cir. 1982); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1076 (5th Cir. 1981); Abrams v. Johnson, 534 F.2d 1226, 1231 (6th Cir. 1976); United States v. N.L. Indus., Inc., 479 F.2d 354, 372 (8th Cir. 1973). Although Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), raised no objection to the relatively subjective reason given by defendant ("personality conflicts"), the Court did require that defendant's reasons be "clear and reasonably specific." *Id.* at 258. In Grano v. Department of Dev., 699 F.2d 836, 837 (6th Cir. 1983), the court stated that subjectivity was suspect and the greater the subjectivity is, the greater the defendant's burden under *Burdine* to establish its legitimacy will be. *Accord* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815-16 (8th Cir. 1983).

[129] *See* Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972); *see also* O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 867 (9th Cir. 1982).

[130] *See* Lieberman v. Gant, 630 F.2d 60, 65-67 (2d Cir. 1980) (professors); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir.) (supervisors), *vacated*, 423 U.S. 809 (1975); Nath v. General Elec. Co., 438 F. Supp. 213, 220 (E.D. Pa. 1977) (engineer), *aff'd*, 594 F.2d 855 (3d Cir. 1979).

[131] *Compare* Walter v. KFGO Radio, 518 F. Supp. 1309, 1314 (D.N.D. 1981) (court accepted relatively subjective justifications for discharging a radio personality over age 40), *with* Chaline v. KCOH, Inc., 693 F.2d 477, 481-82 (5th Cir. 1982) (rejecting defendant's reason for not hiring a white radio announcer—that the announcer did not have a "black voice," which was presumably preferred by the predominantly black listening audience).

Even more significant, however, is the difference in which the courts approach the legitimacy of subjective reasons where performance standards are capable of objective evaluation. In these cases ADEA decisions appear to accept subjective evaluations and conclusions that probably would not pass muster in Title VII litigation. For example, courts have allowed testimony about "strained relationships" and "personality conflicts" to carry the defendant's burden of presenting reasonable factors.[132] One court accepted the statement of the defendant that the younger job applicant who received the appointment was "more articulate and could present himself in his position more clearly" than could the plaintiff.[133] In cases involving layoff of older workers during an economic slowdown, courts have accepted testimony of a supervisor that he had evaluated the relative job performance of numerous employees and that the plaintiffs' work failed to "measure up."[134] As to how the plaintiffs failed to "measure up" the defendant did not specify, and the courts did not inquire. One employer utilized a system for determining layoffs by instructing a supervisor to eliminate "the employee that you felt that you would miss least."[135] No criteria were specified. No protections were afforded to guard against age prejudice. Nonetheless, the court held that the defendant had articulated a legitimate basis for discriminating against the plaintiff.[136] The Tenth Circuit has indicated that reasons, such as that the plaintiffs "lacked versatility" and that their production had been declining, would be "legitimate" even without additional specific detail.[137]

Although substantial leeway has been granted to employers to utilize vague, subjective reasons, occasionally a court will reject a reason that is patently tied to the age of the plaintiff. For example, a rejection of an applicant in the protected age group in favor of a

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This comparison is not to suggest necessarily that one of the other positions illustrated by these cases is correct but is to demonstrate the apparent willingness of courts to accept subjective reasons in ADEA cases that they might reject if placed in a Title VII context.

[132] *See* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982); Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 371 (5th Cir. 1980).

[133] Smithers v. Bailar, 629 F.2d 892, 895 (3d Cir. 1980).

[134] *See* Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 960-61 (8th Cir. 1978).

[135] Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982).

[136] *Id.*

[137] Mistretta v. Sandia Corp., 649 F.2d 1383, 1390 (10th Cir. 1981).

younger person on the grounds that the older applicant lacks the "potential" of the younger applicant would not be legitimate.[138] Similarly, statements that the applicant had been in "one line of work too long," or "she was not current in knowledge of field" may be so closely related to the age of the applicant that they will not be accepted as carrying the defendant's burden; and when these reasons have been part of an overall evaluation system, decisions based on that system have been overturned.[139] Similarly, the employer may attempt to justify the treatment of older employees on the grounds that it was eliminating the employees with the highest wages in an effort to save the maximum amount of money. As this "reverse seniority" is almost inherently tied to the age of the employee, such a reason necessarily is based on age and should lack legitimacy.[140]

This apparent willingness of the courts in ADEA cases to accept subjective conclusions about the relative worth of the plaintiff should be reexamined. This reexamination should start with the proposition that older workers often are the highest paid employees. Thus, particularly in reduction-in-force situations the employer's economic temptation is to effect maximum cost reductions by laying off the older employees. Yet, it is universally recognized that an employer cannot base employment decisions on the relative cost of retaining older workers.[141] Therefore, the courts must take special care that an employer is not disguising decisions based on relative costs with rationalizations framed in conclusory terms such as "more efficient," or "greater overall contribution." Requiring objectivity is the best, and perhaps only, defense against this

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[138] *See* Pirone v. Home Ins. Co., 507 F. Supp. 1281, 1289 (S.D.N.Y. 1981). "Potential" may mean "number of working years remaining," and that translates directly to "age."

[139] Mistretta v. Sandia Corp., 649 F.2d 1383, 1387-90 (10th Cir. 1981); *accord* Kerwood v. Mortgage Bankers Ass'n of Am., 494 F. Supp. 1298 (D.D.C. 1980). In *Kerwood*, the court accepted as legitimate for discharge the reason that plaintiff had the "inability to adjust and cooperate with a new manager's style and zeal." *Id.* at 1309.

[140] *See* Geller v. Markham, 635 F.2d 1027, 1034 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). The employer in *Geller* initiated a policy whereby teachers would be recruited only below a certain salary level. The plaintiff introduced evidence that indicated that approximately 93% of the currently employed teachers between 40 and 65 years of age were above the maximum salary level. Although the policy was enacted as a cost-cutting device, the court held that its result caused it to be discriminatory as a matter of law. *Id.* at 1030, 1033.

[141] Geller v. Markham, 635 F.2d 1027, 1034 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); EEOC v. Borden's, Inc., 30 Fair Empl. Prac. Cas. (BNA) 933 (D. Ariz. 1982); EEOC Age Discrimination in Employment Interpretative Rules, 29 C.F.R. § 1625.7(f) (1982).

danger.

It must be recognized, too, that there is a documented prevailing assumption that older workers simply do not perform on the same level of efficiency as younger workers.[142] The need to overcome this assumption prompted the enactment of the ADEA. Consequently, as with cost considerations, courts cannot allow the preconceived notion of relative ability to be transformed into a restated rationalization that the younger worker was "better" or "more effective" than the plaintiff.

It should be recognized that younger workers are entering their profession and thus may exhibit an enthusiasm fired by ambition that will propel them to dramatic short-term job performances. Older workers, conversely, may be nearing the end of their careers and usually will not display the same level of kinetic energy, idealism, and ambition that characterize the work of their younger counterparts. The contribution of older workers may be a product of discretion, experience, and wisdom. This difference in approach of older and younger workers may give a superficial appearance of comparative inferiority of the older worker. In reality, however, the differences in ultimate and actual job performance, when all elements are considered, may not differ significantly. Therefore, to permit subjectivity (e.g., "harder worker," "more dedication") is to sanction an inherently inaccurate evaluation system that produces an inherently discriminatory result.

In summary, when these three factors are considered—temptation to reduce costs by displacing older workers, prejudice about the ability of older workers, and general differences in the approach to jobs—the conclusion must be that subjective conclusions are inherently unreliable and a potential disguise for conscious or unconscious use of statutorily proscribed factors. Therefore, when objective demonstrations of job performance can be generated, they should be required. Legitimacy demands that reasons based on a comparison be supported by objective facts. A subjective comparison should not be a "legitimate nondiscriminatory reason."

Furthermore, even when comparisons are made by applying apparently objective criteria, courts should evaluate the legitimacy of

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[142] *See* 29 U.S.C. § 621 (1976); EEOC, *supra* note 9; U.S. DEP'T OF LABOR, *supra* note 9; *see also* EEOC v. Wyoming, 103 S. Ct. 1054, 1057-59 (1983); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 692 (8th Cir. 1983).

these criteria in terms of whether their use will undercut the remedial purposes of the ADEA. If a particular result is desired by the employer (e.g., elimination of more costly and perceived less efficient workers) and the employer is permitted without check to define the terms by which that result can be rationalized, most employers will have little difficulty in selecting in advance the precise criteria necessary to justify the preconceived desire. This potential for selective adoption of criteria to produce the desired result is particularly acute with age discrimination because it can be expected that the enthusiasm and ambition of youth might produce on carefully preselected criteria at least marginally superior results when measured against the typical working style of the older employee. Consequently, courts should subject narrow criteria to careful scrutiny and demand that any alleged superiority demonstrated by the employer's criteria go to the essence of long-term overall job performance.[143]

This is not to suggest that an incompetent older worker must be retained, nor that an employer should be obligated to retain demonstrably inferior older employees. It is to suggest, however, that if an older worker's overall job performance meets or exceeds median norms of the employer's work force, any short term, narrow, or spot comparison against a younger employee should be accepted as legitimate *only* if the data demonstrates the clear overall superiority of the younger worker. If courts tolerate older workers being replaced by eager new employees who will often, in the short run, provide at least an apparent and marginal superiority in some aspect of their job, the statutory goal of remedying the problem of older workers being routinely displaced by younger ones easily could be frustrated.

Finally, when an employer articulates relative performance as a reason for its action, to be legitimate that comparison should be a product of an evaluation system procedurally shielded from both knowledge of relative employer costs and the ages of the persons being compared. Given the assumed ultimate underlying economic need to reduce costs, the relative higher costs of older employees, and the preconceived idea that older workers tend to be less efficient, the fairness of the evaluation is subject to serious doubt if supervisory personnel have knowledge of relative costs and ages of

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[143] *See* Leftwich v. Harris-Stowe State College, 702 F.2d 686, 692 (8th Cir. 1983).

employees while applying performance norms. Only if the comparison is made on bona fide factors, free of knowledge of costs or age, can the court be assured that a legitimate comparison was indeed made. This is particularly true when the employer is utilizing subjective criteria. If the facts are such that a subjective evaluation is unavoidable, an absolute requirement for legitimacy must be that this evaluation be made as free as possible from the corrupting influence of knowledge concerning costs and relative age.[144]

Despite the current willingness of the courts to permit subjective judgments to satisfy the defendant's legal burden of presentation, defendants should neither ignore objective, procedurally fair methods of evaluation nor fail to present evidence of detailed objective reasons for their actions. First, courts may and should begin to scrutinize unduly vague and subjective reasons more rigidly for legal sufficiency. Second, and most important, if the plaintiff presents additional evidence of illegal motivation, the defendant's vague, subjective articulations may make it difficult for the defendant to avoid an adverse jury verdict. Evidence of only vague and subjective judgments made in an atmosphere of procedural arbitrariness will do little to persuade a jury not to believe the plaintiff's evidence. Evidence of precise, objective reasons formulated through a process guarded by procedural fairness will go a long way in making it difficult for plaintiffs to prove that it was age, rather than the articulated reason, that motivated the defendant's decision.

Traditionally, in Title VII litigation, when the defendant asserted a reason that necessarily involved comparative evaluation of performance or credentials, the courts demanded that as an element of legitimacy defendants present comparative evidence demonstrating that the person selected over the plaintiff indeed had the credentials or performance not possessed by the plaintiff. As the Fifth Circuit stated, "comparative evidence lies at the heart of a rebuttal of a prima facie case of employment discrimination."[145]

The recent decision of the Supreme Court in *Texas Department*

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[144] *See* Robbins v. White-Wilson Medical Clinic, Inc., 642 F.2d 153, 156 (5th Cir. 1981) (inadequate safeguards); Nath v. General Elec. Co., 438 F. Supp. 213 (E.D. Pa. 1977), *aff'd*, 594 F.2d 855 (3d Cir. 1979) (adequate safeguards).

[145] East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975); *see also* Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 659-60 (8th Cir. 1980) (the proffered evidence of legitimacy lacked objective criteria and was therefore rejected), *vacated*, 450 U.S. 972 (1981).

of Community Affairs v. Burdine raised doubt as to the continuing vitality of the requirement of comparative evidence. The Court read the decision of the court of appeals as requiring the defendant to hire a minority plaintiff unless the defendant could prove by objective evidence that the person hired or promoted was more qualified than the plaintiff.[146] The Court in its reversal stated only that the employer may "choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."[147] Thus, under Title VII litigation, courts, careful not to require defendants to carry a burden of proof, could continue to demand some evidentiary showing of the comparison upon which the "reason" was allegedly based.[148]

Regardless of how *Burdine* is ultimately interpreted on the issue of comparative evidence under Title VII, ADEA courts have not demanded that the defendant produce comparative evidence. The courts have allowed simple testimony, unsupported by objective records or data, and general conclusions and summations by supervisors as to the relative merit of laid-off employees to carry the defendant's burden.[149]

Although naked conclusions bare of any evidence of comparative credentials or performance of persons favored may be legally sufficient, the defendant should, nonetheless, be prepared to present comparative evidence directly or on cross-examination. The defendant should be aware that the plaintiff can probably secure through discovery evidence of the qualifications and performance of persons favored over the plaintiff, and when presented, this evidence will go a long way to prove actual illegal motivation.

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[146] 450 U.S. at 258.

[147] *Id.* at 259.

[148] *See* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 814 (8th Cir. 1983); Peters v. Lieuallen, 693 F.2d 966, 969-70 (9th Cir. 1982); Burrus v. United Tel. Co., 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 103 S. Ct. 491 (1982); *see also supra* text accompanying notes 56-60.

[149] *See* Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982); Harpring v. Continental Oil Co., 628 F.2d 406, 408-09 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981); Schwager v. Sun Oil Co., 591 F.2d 58, 61-62 (10th Cir. 1979); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 592 (5th Cir. 1978); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 960-61 (8th Cir. 1978); *cf.* Scofield v. Bolts & Bolts Retail Stores, 21 Fair Empl. Prac. Cas. (BNA) 1478, 1480 (S.D.N.Y. 1979) (defendant was required to present comparative data).

C. Step Three: Additional Evidence

1. Generally: Plaintiff's Burden. If, but only if, the defendant carries the burden of articulating legitimate, nondiscriminatory reasons, the plaintiff must present (or must have presented during her initial presentation) additional evidence suggesting illegal motivation. In the face of the defendant's evidence of legitimate reasons, the bare *McDonnell Douglas* showing, without additional evidence, is not sufficient to raise a jury issue of illegal age motivation.[150] Thus, when the defendant meets her evidentiary burden of establishing a legitimate, nondiscriminatory reason, an evidentiary burden is placed on the plaintiff to come forward and present additional evidence of motivation—evidence that suggests that the defendant's reason is not credible or that the reason articulated was a pretext covering improper age motivation.

2. Specific Examples of "Additional Evidence" That Will Raise the Ultimate Factual Issue of Motivation. The most easily identifiable evidence of illegal motivation is direct indications of the defendant's mental state. This direct evidence could be found in correspondence, employment records, interview files, or even corporate directives. Notations or directions such as "too old," "too long on job," "age," or "look for younger workers" strongly suggest that the defendant's treatment of the plaintiff was motivated by age considerations.[151] Management officials might have been heard

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[150] *See* Reeves v. General Foods Corp., 682 F.2d 515, 521-23 (5th Cir. 1982); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239-40 (4th Cir. 1982); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982); Houser v. Sears, Roebuck & Co., 627 F.2d 756, 757-58 (5th Cir. 1980); *cf.* Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), *cert. denied,* 454 U.S. 860 (1981). In *Tribble* and *Spagnuolo* a plaintiff had established a prima facie case of age discrimination, and the defendant had articulated a reason (reorganization of jobs) that both courts deemed "legitimate." This articulation, the courts held, sufficed to avoid a directed jury verdict in favor of plaintiff. *Tribble,* 669 F.2d at 1196; *Spagnuolo,* 641 F.2d at 1112. This articulation by the defendants, however, did not necessarily entitle them to a directed verdict. Even in the absence of significant evidence of actual illegal motivation or pretext, a jury issue was presented. A verdict in favor of the plaintiff need not be set aside, because, as these courts held, the jury was entitled to accept that the reorganization was a pretext. *Tribble,* 669 F.2d at 1196; *Spagnuolo,* 641 F.2d at 1112. The approach of these two courts appears to be inconsistent with the *McDonnell Douglas* model as refined in *Burdine,* which requires a judgment for the defendant if the plaintiff has no challenge to the defendant's articulated, legitimate reason.

[151] *See* Laugesen v. Anaconda Co., 510 F.2d 307, 310-11 (6th Cir. 1975) (separation notice stated "too many years in job"); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 823 (5th Cir. 1972) (interview notes indicated "too old for teller").

to state a general prejudice against older workers[153] or a preference for "youth" or "creating a youthful image."[153] The employer may have advertisements published that expressed a preference for workers of a particular age. Such advertisements are an independent act of illegality.[154] In addition, they provide strong direct evidence of discriminatory motivation for the rejection of the plaintiff.[155]

The plaintiff also may have indirect evidence from which the factfinder could infer improper motivation in the treatment of the plaintiff. Statistical evidence, for instance, can often be marshaled in a way that draws an inference of discriminatory motive.[156] For example, the plaintiff may make a work-force comparison that demonstrates the statistically significant absence of workers of certain age groups at certain job levels. The percentage of older workers in a particular job is compared with the percentage of older workers in the area population qualified to perform that particular job.[157] Or the plaintiff might be able to demonstrate adverse "applicant flow" by comparing the percentage of younger applicants or employees with the number of older applicants or employees that are affected by certain selection procedures.[158] For example, the plaintiff might demonstrate that in selecting employees for va-

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[152] Hedrick v. Hercules, Inc., 658 F.2d 1088, 1092 (5th Cir. 1981) ("Get rid of the good 'ole Joes" and "get some younger folks in"); Naton v. Bank of Cal., 649 F.2d 691, 698 (9th Cir. 1981) (plaintiffs are "over the hill").

[153] *See* Jackson v. Shell Oil Co., 702 F.2d 197, 201 (9th Cir. 1983) (statement that Shell could "hire younger people for less money"); Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980). Such evidence, although clearly relevant, may not be conclusive evidence of improper motivation requiring judgment for the plaintiff. Particularly, such statements as, "The agency's future lay with the young executives" may be more of a truism than proof of age bias.

[154] 29 U.S.C. § 623(e) (1976). For a discussion of the range of permissible age preference advertisements, see 29 C.F.R. § 1625.4 (1982).

[155] Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733-34 (5th Cir. 1977); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 822-23 (5th Cir. 1972) (a notation on interview notes that the plaintiff was too old to be a teller was part of a "strong" prima facie case).

[156] Inferences of motive can be drawn from statistical patterns. *See* EEOC v. Federal Reserve Bank, 698 F.2d 633, 645 (4th Cir. 1983); Gay v. Waiters' & Dairy Lunchmen's Union, Local 30, 694 F.2d 531, 550 (9th Cir. 1982); Reeves v. General Foods Corp., 682 F.2d 515, 524-25 (5th Cir. 1982); Davis v. Califano, 613 F.2d 957, 962-63 (D.C. Cir. 1979).

[157] *E.g.*, Harpring v. Continental Oil Co., 628 F.2d 406, 408 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981); Schulz v. Hancock Mfg. Co., 358 F. Supp. 1208, 1213 (N.D. Ga. 1973).

[158] For example, in Michaelis v. Polk Bros., 545 F. Supp. 109, 112 (N.D. Ill. 1982), a "25-year history of hiring young individuals, invariably under 40" was quite probative.

cancies fifty persons below age forty applied and an equal number applied who were above the age of forty. The employer hired twenty persons, and nineteen of those were below age forty. This "flow" suggests age was a motivating factor. Although such "flow" evidence is rarely conclusive proof of illegal motivation in that it will require a jury verdict in favor of the plaintiff,[159] clearly this evidence can satisfy the plaintiff's evidentiary burden of coming forward with additional evidence of illegal motivation.[160] Plaintiffs thus should be alert to utilizing expert analysis and testimony on the statistical significance of any data.

Indirect evidence of improper motivation can also come from comparative evidence. One kind of comparative evidence is a showing that the plaintiff's relevant abilities or potential were superior to those of the person selected or retained by the defendant.[161] The plaintiff might show that he had greater seniority, higher work evaluations, less absenteeism, or fewer errors or reprimands than did the person retained or promoted over the plaintiff. A plaintiff who sought employment might show the relative qualifications of the person selected by comparing that person's years of education, depth or breadth of experience, or quality of recommendations from past employers with his own. This comparative evidence is relevant because if the plaintiff can show that the employer selected a person who, as a worker, was generally inferior to the plaintiff, then this would suggest that it was something other than job qualifications—namely age—that motivated the defendant's action.[162] Plaintiffs thus should discover all the relevant details of the background and employment record of persons favored over the plaintiff.

A second kind of comparative evidence that the plaintiff could use in rebuttal would be that of comparing methods of selection.

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[159] *See* Stendebach v. CPC Int'l, Inc., 691 F.2d 735, 738 (5th Cir. 1982); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982); Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123, 1124 (5th Cir. 1977).

[160] *See* Reeves v. General Foods Corp., 682 F.2d 515, 524 (5th Cir. 1982); EEOC v. Sandia Corp., 639 F.2d 600, 623 (10th Cir. 1980); Walker v. Pettit Constr. Co., 605 F.2d 128, 131-32 (4th Cir. 1979).

[161] *E.g.*, Michaelis v. Polk Bros., 545 F. Supp. 109, 112 (N.D. Ill. 1982).

[162] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258-59 (1981); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983); Chaline v. KCOH, Inc., 693 F.2d 477, 480-81 (5th Cir. 1982); Burrus v. United Tel. Co., 683 F.2d 339 (10th Cir.), *cert. denied*, 103 S. Ct. 491 (1982).

The plaintiff may be able to prove that the method of selection that resulted in her rejection has a foreseeable impact on the employment opportunities of older workers. In addition, the plaintiff may be able to prove that better, more accurate methods of employee selection were readily available to the defendant. From the conjunction of alternative less discriminatory selection devices that would select good employees more accurately, a factfinder would be allowed to infer that the employer adopted the particular method of selection precisely because of its discriminatory effect on older workers and not for any asserted business reason.[163] Plaintiffs may want to consult industrial experts as to available selection devices and their relative impact on older workers.

Finally, the plaintiff may have evidence that any reason articulated by the defendant was not uniformly applied. Such disparate application of a rule, which shows that persons younger than the plaintiff were not similarly subject to it, would be clear and direct evidence of illegal action. For example, the plaintiff might be able to show that the defendant had failed similarly to discipline younger employees for misconduct that allegedly prompted the discharge of the plaintiff.[164] Or the plaintiff may be able to show that the defendant accepted the absence of credentials in hiring younger applicants while the plaintiff's application was rejected for allegedly lacking the required credentials.[165] The plaintiff might introduce testimony from other employees who were similarly situated and compare the reasons given to them by the defendant with the reason articulated by the defendant for the plaintiff's treatment.[166] Such testimony might disclose inconsistency or other suggestions of pretext. In one case a plaintiff proved that the defendant had expanded the sales territory for the younger sales person hired to replace the plaintiff.[167] This was persuasive evi-

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[163] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 n.9 (1978) (plaintiffs argued that hiring method purposely discriminated against blacks); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (where defendant shows job relatedness of employment tests, the plaintiff will be allowed to demonstrate the existence of equally effective nondiscriminatory alternatives).

[164] Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1223 (11th Cir. 1982); Walker v. Pettit Constr. Co., 605 F.2d 128, 131 (4th Cir. 1979).

[165] Leibovitch v. Administrator, 29 Empl. Prac. Dec. (CCH) ¶ 32,874 (D.D.C. 1982).

[166] Harpring v. Continental Oil Co., 628 F.2d 406, 409 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981).

[167] Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1178 (6th Cir. 1983).

dence that the reason for discharging plaintiff, "poor sales performance," was pretextual.[168] Or the plaintiff might show that in a reorganization younger employees, but not the plaintiff, were given an opportunity to relocate.[169] Or the plaintiff might show that in the past seniority was the usual selection factor utilized, while in her case seniority was ignored. It is important, however, that the plaintiff do more than allege disparate treatment. Courts will demand that the plaintiff present evidence of specific examples of such discriminatory application of selection rules and criteria.[170]

Logic and the traditional model suggest that this additional evidence be presented at the third step of the trial as a rebuttal to the defendant's articulation of a legitimate reason. It is true that much of this evidence suggests that the defendant's articulated reason is but a pretext to disguise illegally motivated action. Nevertheless, not presenting this evidence at the first stage of the trial during plaintiff's initial presentation has certain risks. First, the Fifth and Eleventh Circuits in layoff situations[171] demand, for a prima facie showing, evidence in addition to the traditional *McDonnell Douglas* showing. In these courts the absence of additional evidence in plaintiff's initial showing will result in a directed verdict for the defendant. The plaintiff will have no opportunity for rebuttal. Second, elements necessary to establish a prima facie case may be lacking or not found to be supported by creditable evidence. Thus, to remedy any possible or unforeseen defects in the prima facie case, the plaintiff should present additional evidence during her initial presentation.[172] Finally, if from cross-examination or stipulations the defendant establishes an evidentiary basis for a legitimate reason, the plaintiff's bare prima facie showing will have been met. Should the defendant thereupon elect to rest, a trial court in its discretion may refuse to allow the plaintiff to reopen its case to present additional evidence. A directed verdict for the defendant

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[168] *Id.* at 1181.

[169] Deutsch v. Carl Zeiss, Inc., 529 F. Supp. 215, 218 (S.D.N.Y. 1981).

[170] *See* Houser v. Sears, Roebuck & Co., 627 F.2d 756, 759 (5th Cir. 1980).

[171] *See supra* notes 71-80 and accompanying text.

[172] For example, in courts that follow the Ninth Circuit's requirement that a prima facie case include a showing that the plaintiff prove that a person "substantially younger" than the plaintiff secured the job, there might be a debate whether a favored person, indeed, was "substantially younger," for example, if that plaintiff was only three years older. In such case a court might rule that such a difference is not "substantial." Absent additional evidence of improper motivation, a judgment might be rendered for defendant.

could be the result.[173] To avoid these dangers plaintiffs should seriously consider abandoning the classical three-step *McDonnell Douglas* model, present all of their evidence, both on the prima facie elements and on pretext, during the initial presentation, and reserve for rebuttal only evidence that concerns those elements in the defendant's case that require direct contradiction.[174]

3. Defendant's Additional Evidence. It should be noted that the defendant may have additional evidence, other than her articulated reasons, that suggests that she was not motivated by illegal considerations. First is the testimony of the defendant's representatives. For example, although mere denials of illegal motive and assertions of proper motive will not be legally sufficient to meet the defendant's burden of articulating a "reason," testimonial denials are admissible and usually should be presented. Second, actions consistent with the articulated reason, such as similar treatment of other persons outside the protected age group, suggest the absence of age motivation. If the plaintiff's treatment was consistent with past practice, this fact should be proved. Third, the defendant may be able to develop statistical data that indicates that older workers are not being treated differently as a class from younger workers or applicants. Although such evidence does not conclusively show the lack of discriminatory treatment of a particular plaintiff, it is relevant evidence of the defendant's lack of illegal motivation.[175]

In short, defendants should not rely solely upon the presentation of a reason that the court accepts as legally sufficient to rebut the plaintiff's prima facie case. Defendants should be alert to any evidence from which it can be inferred that it was the "reason," rather than age, that motivated the defendant's action.

V. THE FINAL STEP: JURY INSTRUCTIONS AND FACTUAL RESOLUTION

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[173] *See* Holden v. Commission Against Discrimination, 671 F.2d 30, 35-36 (1st Cir.), *cert. denied*, 103 S. Ct. 97 (1982); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977); Sime v. Trustee of Cal. State Univ., 526 F.2d 1112, 1114 (9th Cir. 1975).

[174] Such evidence might be evidence challenging the factual existence of the reason articulated. For instance, a defendant may assert that the plaintiff was discharged for striking a supervisor. The plaintiff may have evidence that such an event never took place. Or defendant's articulated reason might be that the plaintiff had a criminal record. Plaintiffs might produce evidence that no such criminal record exists and that there is no way defendant should have believed such a record existed.

[175] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978).

A. *The Legal Burdens Revisited*

To this point the issues largely have been ones of law. Throughout this Article evidence has been evaluated in terms of whether it would be *legally* sufficient to support a necessary factual finding on behalf of the party carrying the burden. If a party failed to carry its assigned evidentiary burden, the court would be required, as a matter of law, to grant a judgment to the opposing party without resolving any factual issue of motivation. If, however, the parties each satisfied their respective burdens at each of the steps in the "judicial minuet"—1) plaintiff's prima facie case, 2) defendant's articulation of legitimate, nondiscriminatory reason, 3) plaintiff's additional evidence of age motivation—the remaining issue is one of ultimate fact to be resolved, in most cases, by a jury: What was the mental attitude or motivation of the defendant at the time it denied the plaintiff the employment opportunity? In nonfederal employment cases the jury must be instructed.

B. *Ultimate Burden of Persuasion: "Deciding Factor"*

The burden of convincing the factfinder that the defendant was motivated by the age of the plaintiff is a burden cast upon the plaintiff. The defendant does not carry a burden of convincing the factfinder that the articulated reason motivated its action.[176] For a court to suggest such a burden would be error.

In satisfying the plaintiff's burden of proof or, more properly, the risk of nonpersuasion, the plaintiff need not convince the factfinder that age was the sole factor in making the employment decision. The plaintiff, however, must prove that age did more than play some factor or was only remotely considered by the defendant. Rather, the plaintiff must convince the factfinder by *a preponderance of the evidence* that age was the "deciding factor," i.e., that had it not been for the plaintiff's age she would not have been rejected. In short, the plaintiff must prove that "age made a difference."[177] The jury should be so instructed as to the plaintiff's

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[176] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Kelly v. American Standard, Inc., 640 F.2d 974, 984 (9th Cir. 1981).

[177] *See* Cuddy v. Carmen, 694 F.2d 853, 857-58 (D.C. Cir. 1982); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239-40 (4th Cir. 1982); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982); Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1316 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982); Haring v. CPC Int'l, Inc., 664 F.2d 1234,

burden.

C. *The Evidence: Appropriate Instructions*

1. Introduction. The court should also aid the jury in its evaluation of the evidence. In framing instructions there is no single, invariably correct pattern to follow. Nevertheless, appellate courts have cautioned trial courts to avoid technical legal phrases such as "prima facie case," "presumption," and "shifted burden."[178] Rather, trial courts should instruct juries on the significance of the various types of evidence in plain language.

2. Prima Facie Case. In addressing the evidence that is relevant to the resolution of the ultimate factual issue of motivation, the factfinder may consider the inference of age discrimination that flows from the prima facie showing. That inference does not "disappear" upon the presentation of the defendant's reason but rather remains to be accorded the weight the factfinder deems appropriate.[179] Before an inference of age discrimination can be drawn, however, the factfinder must first conclude that the underlying facts necessary to create a prima facie case indeed do exist. Thus, in instructing the jury the trial court should direct the jury's attention to each of the elements of a prima facie case and, if contested, should tell the jury that if, but only if, they find that each of the elements exist—(1) the plaintiff is between forty and seventy; (2) a vacancy existed; (3) the plaintiff sought the position; (4) the plaintiff was qualified; (5) the plaintiff was rejected; and (6) the position was filled by a substantially younger person—may they then infer that the defendant was motivated by considerations of the plaintiff's age.[180] It would seem that the jury could be told that they could consider the difference in age between the age of the plaintiff and the age of the person favored to determine the

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1239-40 (5th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979); *cf.* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (Title VII nonjury standard).

[178] Haring v. CPC Int'l, Inc., 664 F.2d 1234, 1237 (5th Cir. 1981).

[179] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10. The Court rejected Professor Thayer's "bursting bubble" theory that once evidence is presented that challenges the prima facie case the evidentiary value of the prima facie case is destroyed. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 346 (1898).

[180] Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238-39 (4th Cir. 1982).

strength of that inference.[181]

3. The Defendant's Evidence. Similar to the basic factfinding necessary to infer illegal motive from a prima facie case, there must be preliminary factual findings concerning the existence of the defendant's articulated reasons. The jurors can be told that from the existence of articulated reasons they can infer that the defendant was motivated by those reasons rather than by the plaintiff's age. Nevertheless, before an inference of proper motivation can be drawn, it is necessary for the facts upon which that inference is based first to exist. Thus, if the existence of the reason articulated is placed in factual dispute by the plaintiff, the jury should be instructed that it must first determine whether the articulated reason exists.[182] If the reason is found to exist, the jury may be told that it may infer from this fact that the reason motivated the action of the defendant. They should also be told the converse of this proposition, however. If they find that the reason proffered by the defendant does not in fact exist or that the defendant did not in good faith believe it existed,[183] they may not infer

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[181] *See supra* text accompanying notes 121-23.

[182] For example, the defendant asserts as his "reason" that the plaintiff cursed a supervisor. The plaintiff's version of the incident is that the plaintiff was silent and the supervisor used the abusive language. Thus, the issue is whether plaintiff cursed or was believed to have cursed. This issue can only be resolved by a credibility determination. If the jury finds that the plaintiff did not curse or that the defendant did not believe the plaintiff cursed, the jury cannot infer that the "reason"—cursing—motivated the discharge. In such a case the prima facie case is unrefuted, and judgment should be for the plaintiff. *See* Peters v. Lieuallen, 693 F.2d 966, 969-70 (9th Cir. 1982); Miller v. WFLI Radio, Inc., 687 F.2d 136, 138-39 (6th Cir. 1982); Schulz v. Veterans Admin., 30 Fair Empl. Prac. Cas. (BNA) 209 (D.D.C. 1982); 29 C.F.R. § 1625.7(e) (1982) ("When the exception of a 'reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age exists factually.' ") *Contra* Reeves v. General Foods Corp., 682 F.2d 515, 521-23 (5th Cir. 1982) (additional evidence of age motivation is necessary to raise a factual issue of illegal motivation); Danzl v. North St. Paul-Maplewood-Oakland Indep. School Dist., 663 F.2d 65, 67 (8th Cir. 1981) (en banc).

[183] Reliance on the existence of an otherwise valid reason will be legitimate even if it is later established that the reason did not actually exist. De Anda v. St. Joseph Hosp., 671 F.2d 850, 854 (5th Cir. 1982). For example, if an employer believed in good faith that an employee submitted false time cards and discharged the employee based on that belief, the reason would be legitimate. That legitmacy is not destroyed if it is later discovered or proved that the employee, in fact, was innocent of any wrongdoing. Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1256 (5th Cir. 1977). It is the subjective belief in the existence of the objective reason that negates the inference of improperly motivated action. Thus, the employer carried its burden of articulating a reason if the factfinder believes that the employer relied in good faith upon the existence of the reason.

that the defendant's motivation was proper. In such a case they should be instructed to return a verdict for the plaintiff.

The defendant's testimony that it was the articulated reason that motivated its action and not age is relevant and can be given the weight the witness's credibility warrants. The jury can be so instructed. Further, should the defendant have statistical data that indicate that persons of the plaintiff's age group have not been a victim of disparate treatment, the jury should be told that from a balanced work force and apparent even-handed treatment of older workers they may infer that the plaintiff was not treated differently because of age. They should be cautioned, however, that such evidence is not conclusive evidence of nondiscrimination in the plaintiff's case of individual disparate treatment and that merely because an employer has a balanced work force or has not discriminated against others does not establish the absence of discriminatory treatment of the plaintiff.

4. The Plaintiff's Additional Evidence. As to direct evidence of improper motivation, such as notations, advertisements, or oral statements, little comment is necessary save that this is evidence of discriminatory motive to be considered with the inference flowing from the plaintiff's initial showing. As to the inferences flowing from comparative evidence, the jury can be instructed that proof that the plaintiff was generally superior is some, but not conclusive, evidence that the defendant was motivated by nonbusiness concerns and that the existence of lesser discriminatory alternatives (if they exist) that would better serve an employer's bona fide needs (if it would) can be taken as some evidence that age may have motivated the employer's decision. Again, a trial court may need to caution the jury that the defendant is under no legal obligation to select the "best" employee or utilize the least discriminatory alternative and to emphasize that these factors are evidence only of age motivation.

Regarding instructions on statistical showings, like the instructions given on the defendant's presentation, the jury must be told that it can infer that this particular plaintiff was a victim of illegal age discrimination from statistical evidence of wide-ranging disparate treatment. A *finding* of illegal motivation in the individual case, however, is not required by statistical evidence that the plaintiff's class is unfavorably treated by the defendant. In short, the statistics permit only an inference of discriminatory motive;

they do not require a finding thereof.

VI. Summary and Conclusion

Most courts have adapted the Title VII standard for proof of illegal discrimination to litigation under the ADEA. Under this standard, most plaintiffs will find it relatively easy to establish a prima facie case. In ADEA litigation, however, while following Title VII formulations, the courts have been more lenient than Title VII courts in evaluating what reasons will be deemed legally sufficient to meet the standard of "legitimate" or "reasonable factors." Extremely vague, conclusory, and subjective judgments have been held to meet the defendant's evidentiary burden. Comparative evidence is rarely demanded. Given the ease with which a defendant can meet her burden, to get to the jury most plaintiffs will have to present additional evidence, direct or circumstantial, of illegal motivation—evidence that goes beyond the bare prima facie showing. If the plaintiff does not have any additional evidence, then the likelihood of eventual success will be small. They should be so advised. Even when additional evidence of illegal motive is presented, the result will not necessarily be success, however, because the case probably will be resolved at the ultimate fact level by the jury. The plaintiff must carry the substantial burden of persuasion on the issue of the defendant's motivation. Predicting success when the issue is one for jury resolution is at best a perilous business. Thus most prospective plaintiffs will have to be advised that their case will probably be resolved by a jury with no talisman for predicting victory. Even strong showings of illegal motivation may not convince a jury. And in spite of the strength of the plaintiff's case, if the jury is correctly instructed and the reason articulated by the defendant meets the weak legal standard of "legitimacy," the chances of reversing an adverse finding on appeal are remote.[184]

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[184] In reviewing a finding of the bona fides of a seniority system under Title VII, the Supreme Court in Pullman-Standard v. Swint, 102 S. Ct. 1781, 1790 (1982), suggested that a finding on motivation made by a trial judge was a finding of fact subject to reversal on appeal only if "clearly erroneous." The lower federal courts are not in agreement as to how this ruling on seniority affects findings of motivation in Title VII disparate treatment cases. Some have interpreted *Pullman-Standard* to apply to all cases where motivation is at issue, including disparate treatment cases, and to limit the scope of review of motive findings to reversal only if "clearly erroneous." *See* Lincoln v. Board of Regents, 697 F.2d 928, 940 (11th Cir. 1983); Robbins v. White-Wilson Medical Clinic, Inc., 682 F.2d 503 (5th Cir. 1982).

Others believe that *Pullman-Standard* is applicable only to a determination of the bona fides of seniority systems interposed as a defense under Title VII and thus should not change the traditional scope of review when the issue is an employer's motivation in its treatment of an individual plaintiff. Such courts would continue to hold that a finding of motivation is an "ultimate legal fact" subject to more thorough review on appeal than underlying or "basic facts." EEOC v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 545 n.14 (9th Cir. 1982). Regardless of how this division is ultimately resolved in Title VII nonjury cases, it seems clear that under the ADEA when a jury makes a finding of motivation, that finding will not be reversed on appeal unless the appellant can demonstrate a clear lack of evidentiary support for the verdict. *See* Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1181 (6th Cir. 1983); Archambault v. United Computing Sys., 695 F.2d 551, 552 (11th Cir. 1983); *see also* Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir.) (recent examples of appellate deference to jury verdicts), *cert. denied*, 454 U.S. 860 (1981).

This deference to the jury finding reinforces the need for courts to be more attentive than they have been in the past in evaluating the legal sufficiency of the plaintiffs' prima facie case, defendants' showing of a "legitimate, nondiscriminatory reason," and any additional evidence from plaintiffs tending to suggest pretext. Only if at each stage can it be said that the party's evidence supports an inference of motivation delegated to that party should the court permit the issue to be submitted to the jury for final resolution.