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# O'Connor v. Consolidated Coin Caterers Corp.: Can an ADEA Plaintiff Ever Win

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# *O'CONNOR v. CONSOLIDATED COIN CATERERS CORP.*: CAN AN ADEA PLAINTIFF EVER WIN?

## I. INTRODUCTION

> Other acquainted years sidle with modest decorum across the scrim of toughened tears and to a stage planked with laughter boards and waxed with rueful loss but forty with the authorized brazenness of a uniformed cop stomps no-knocking into the script bumps a funky grind on the shabby curtain of youth and delays the action. Unless you have the inborn wisdom and grace and are clever enough to die at thirty-nine.[1]

Age discrimination in employment is ever-increasing as aging is inevitable and as society places its emphasis on youthfulness. In today's society, workers are becoming older and their need to continue working is often a necessity in order to survive. Today, because of increased longevity, approximately thirty-million people in the United States are age sixty-five or older, which represents one out of eight citizens of the United States.[2] By the year 2010, approximately one-half of the workers in the United States will be age forty or over.[3] The Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing and administering the Age Discrimination Employment Act ("ADEA"), reported that age discrimination complaints were the fastest growing category of claims that it dealt with.[4]

In *O'Connor v. Consolidated Coin Caterers Corp.*,[5] the Supreme Court held in an unanimous decision, that an employer, who replaces an older worker because of age, with another younger worker in the same protected class, may violate the ADEA.[6] Though the holding seems simple, the brief rule of the case raises several unanswered questions. For example, do courts look at a replacement worker being younger or being substantially younger than the terminated employee or prospective applicant? Is proof of a replacement necessary in determining if a plaintiff has a prima facie case? The Supreme Court still did not

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1. Maya Angelou, *On Reaching Forty, in* MAYA ANGELOU: POEMS, 58 (Bantam Books 1986).

2. *See* SENATE SPECIAL COMMITTEE ON AGING, 101ST CONG., 1ST SESS., AGING AMERICA-TRENDS AND PROJECTIONS 1 (Comm. Print 1989).

3. *See* The Bureau of National Affairs, Inc., *Older Americans in the Workforce: Challenges and Solutions*, 1, 6 (1987).

4. *See* Vihstadt, *Congressional Update*, 5 BIFOCAL 8 (1984). The EEOC's office of Program Operations reported in its 1985 Annual Report that the number of ADEA charges filed with the agency rose from 8,101 in 1981 to 11,328 in 1984, which was a 40% increase during the four year span, while Title VII claims only increased by 4%.

5. 116 S. Ct. 1307 (1996).

6. *See id.* at 1308.

address whether the *McDonnell Douglas*[7] test is the appropriate test to apply in age discrimination cases, nor whether the *McDonnell Douglas* test disallows a prima facie case involving direct evidence and circumstantial evidence?

Part II of this Note details the factual and legal background and the narrow issue of the *O'Connor v. Consolidated*[8] case. Part III discusses the law prior to this decision, and Part IV discusses the Court's holding. Part V details the author's analysis of the new interpretation of the fourth prong of the *McDonnell Douglas* test by discussing the history and the application of the ADEA, the different classifications courts give to discriminatory acts and how these classifications will change the outcome of an age discrimination claim; and, whether the Court's application of the *McDonnell Douglas* test and the fourth prong was correct. In Part VI of this Note, the author will discuss the future implications and impacts of the new interpretation of the fourth prong and questions left unanswered by the Supreme Court's decision.

## II. STATEMENT OF THE CASE

### *A. Facts*

James O'Connor ("O'Connor") had been an employee of Consolidated Coin Caterers Corporation ("Consolidated ") for twelve years,[9] when at age 56 he was fired and replaced by a 40 year old man.[10] Consolidated serviced vending machines and cafeterias in industrial plants, schools, health care facilities and businesses.[11] O'Connor was the general manager of Consolidated's northern region until the corporation reorganized, demoting him to general manager of the southern region.[12] Consolidated also restructured the southern region making it smaller.[13] O'Connor's supervisor explained that the demotion resulted because O'Connor was slow in responding to problem accounts[14] and he failed to respond in a timely manner to a food distribution problem.[15] Several months later, the corporation again restructured the regions, discharged O'Connor and replaced him with Ted Finnell, age 40, a manager of a smaller operation within Consolidated.[16]

During O'Connor's employment there were several occasions when O'Connor's supervisor made comments to him regarding his age.[17] This direct

7. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
8. *See O'Connor*, 116 S. Ct. at 1307.
9. *See id.* at 1309.
10. *See id.*
11. *See* O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542, 543 (4th Cir. 1995).
12. *See id.*
13. *See id.* at 544.
14. *See id.*
15. *See id.* at 545.
16. *See id.* at 544.
17. O'Connor and Williams were in a company conference room watching the U.S. Open Golf Tournament, and O'Connor stated he didn't think he could walk and play eighteen holes of golf, five days in a row. Williams told O'Connor that he was too old. *See O'Connor*, 56 F.3d at 549. A month later, Williams

evidence of comments by the supervisor, in which there were witnesses, was submitted by O'Connor at trial.[18]

O'Connor brought suit against Consolidated claiming that they had violated the ADEA by discharging him because of his age and replacing him with Finnell.[19] The district court granted summary judgment to Consolidated because the court believed O'Connor had not made a prima facie case since the replacement was 40 years old and in the same protected class as O'Connor.[20] On appeal by O'Connor, the Fourth Circuit Court of Appeals affirmed for the same reasons.[21] The Supreme Court subsequently granted certiorari to O'Connor.[22]

### *B. Issue*

The only issue the Supreme Court reviewed was whether O'Connor must show that he was replaced by someone outside the age group protected by the ADEA to make a prima facie case.[23]

## III. PRIOR LAW

In litigating Title VII claims, the Supreme Court fashioned a test which evaluates a plaintiff's claim of employer discrimination.[24] Because ADEA claims are similar to Title VII claims, lower courts have applied this same test to ADEA claims.

### *A. The McDonnell Douglas Case*

In *McDonnell Douglas,* the Supreme Court established a test to evaluate circumstantial evidence offered by a plaintiff to prove that an employer intentionally discriminated in violation of Title VII.[25] Percy Green, a black mechanic for McDonnell Douglas, was laid off because of a reduction in the work

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came into O'Connor's office and told him, "O'Connor, you are too damn old for this kind of work." O'Connor shouted to the Human Relations Manager, who was in earshot, "Allison, did you hear that?" Allison told Williams that he "shouldn't say things like that." Brief for Petitioner at 5, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354). A month after that and two days before O'Connor was terminated, Williams, O'Connor and another company employee were in the car, when the employee said he was about to turn 50, Williams said "[i]t's about time we get some young blood in this company." *O'Connor v. Consolidated,* 56 F.3d at 549.

18. In further support of O'Connor's direct evidence, he offered the testimony by Philip Dennis, a salesman for Consolidated. *See* O'Connor, 56 F.3d at 551 (4th Cir. 1995). A day after O'Connor was fired, Dennis had asked Williams why O'Connor was fired. *See id.* Williams replied "that all of us were getting old, that Jim [O'Connor] was getting old." *See id.*

19. *See* O'Connor v. Consolidated Coin Caterers Corp., 829 F. Supp. 155 (W.D.N.C. 1993) (granting summary judgment granted for Consolidated).

20. *See id.*

21. *See O'Connor,* 56 F.3d at 543 (4th Cir. 1995).

22. *See O'Connor,* 116 S. Ct. at 1309 (1996).

23. *See id.*

24. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (the *McDonnell Douglas* test used for burden allocation in Title VII cases).

25. *See id.*

force.[26] Green was involved in the civil rights movement and protested that his lay off was racially motivated.[27] Three weeks later, McDonnell Douglas advertised for mechanics and Green re-applied.[28] His application was rejected because of his civil rights protest, and Green brought a formal complaint with the EEOC that he had been racially discriminated against.[29]

The Supreme Court, in hearing McDonnell Douglas' petition for certiorari, first created a three-step test to allocate the plaintiff's burden of production and the defendant's burden of production of evidence as follows: 1) the employee must first establish a prima facie case;[30] 2) then the burden of production shifts to the employer to rebut the discrimination evidence by offering a nondiscriminatory reason for its actions; and 3) the burden shifts back to the employee to produce evidence that the offered reason was untrue.[31] The burden of proof always remains with the plaintiff, it is only the burden of production that shifts.[32]

Because Green had no direct evidence of intentional racial discrimination, the Supreme Court created a test to weigh the probative value of circumstantial evidence that a plaintiff must produce to meet the prima facie burden:[33] 1) plaintiff belongs to a racial minority; 2) plaintiff applied and was qualified for a job for which the employer was seeking applicants; 3) despite plaintiff's qualifications plaintiff was rejected; and 4) after plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.[34]

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26. *See id.* at 794.

27. *See id.* As part of this protest, Green and other members of the Congress on Racial Equality illegally stalled their cars at the plant and blocked access to it. *See id.* at 794-95.

28. *See McDonnell Douglas Corp.*, 411 U.S. at 796-97.

> The Commission made no finding on respondent's allegation of racial bias under [§] 703(a)(1), but it did find reasonable cause to believe petitioner had violated [§] 704(a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccess-fully [sic] attempted to conciliate the dispute it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

*Id.* at 797.

29. *See McDonnell Douglas Corp.*, 411 U.S. at 797.

30. The term "prima facie" not only denotes "the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *See* 9 J. WIGMORE, EVIDENCE, § 2494 (3d ed. 1940) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252 n.7 (1980)). "*McDonnell Douglas* should have made it apparent that in Title VII context we use 'prima facie case' in the former sense." *Id.*

> The prima facie case described in McDonnell Douglas did not include proof that some person outside the protected class was hired in complainant's place. Rather the prima facie case there described is based on the notion that, by ruling out the more obvious job-related reasons for not hiring him, a Title VII complainant can create an inference of some tainted reason, i.e., some discriminatory reason, sufficient to require the employer to articulate a legitimate reason for the complainant's rejection.

*Id.; see also* Loeb v. Textron, 600 F.2d 1003, 1013 (1st Cir. 1979).

31. *See Burdine*, 450 U.S. at 253.

32. *See* id. "The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id. See also* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 & 29 (1978) (Stevens, J., dissenting). *See generally* 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940) ("the burden of persuasion 'never shifts'").

33. *See McDonnell Douglas*, 411 U.S. at 800.

34. *See id.* at 802.

A prima facie case raises inferences of discrimination only because the acts are presumed, when otherwise unexplained, because more likely than not they are based on consideration of impermissible factors.[35] This is largely presumed because experience shows that more often than not, people do not act arbitrarily, without underlying agendas, especially in the workforce.[36] Once the plaintiff establishes the prima facie case, the burden of production then shifts to the employer to produce evidence rebutting the prima facie presumption.[37] The employer must articulate, but does not have to prove, a legitimate, nondiscriminatory reason for its actions.[38] If the employer fails to meet this burden of production, the presumption remains and the court will most likely enter summary judgment or after trial, a directed verdict for the employee.[39] If the employer does meet this burden by articulating a legitimate, nondiscriminatory explanation for the action, then the burden of production shifts back and the plaintiff must produce evidence that the employer's explanation was false.[40]

Other Supreme Court decisions and lower court decisions refined the *McDonnell Douglas* test for use in Title VII and ADEA claims.

### *B. Texas Dept. of Community Affairs v. Burdine*

The Court expanded its reasoning of applying the *McDonnell Douglas* test in *Texas Dept. of Community Affairs v. Burdine.*[41] Joyce Burdine was hired by the Texas department as an accounting clerk, for which she had several years experience.[42] She sought a promotion for which she was denied and subsequently terminated.[43] She brought a Title VII claim asserting that she was discriminated against because of her gender.[44] The Supreme Court applied the *McDonnell Douglas* test and clarified the parties burdens of production and persuasion.[45]

First, the Court stated that limiting a defendant's evidentiary burden to production did not hinder the plaintiff because the defendant's explanation must be clear and reasonably specific.[46] Even though the defendant does not have the burden of persuasion, the defendant does retain an "incentive to persuade

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35. *See* Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). *See also* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

36. *See Furnco*, 438 U.S. at 577.

37. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1980).

38. *See McDonnell Douglas*, 411 U.S. at 802.

39. *See Burdine*, 450 U.S. at 254.

40. *See McDonnell Douglas*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 256; Saint Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2754 (1993). *See, e.g.*, United States v. McMillon, 14 F.3d 948 (4th Cir. 1994); DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993); Moham v. Steego Corp., 3 F.3d 873 (5th Cir. 1993).

41. *Burdine*, 450 U.S. 248.

42. *See id.* at 250.

43. *See id.* at 251.

44. *See id.*

45. *See id.* at 250.

46. *See id.* at 258. "This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext." *Id.*

the trier of fact that the employment decision was lawful."[47] Second, if the plaintiff meets the four criterion established in the *McDonnell Douglas* case, then the plaintiff is entitled to an inference of illegal employer discrimination, despite the direct evidence reflecting intentional discrimination.[48] The Court reasoned that this inference would be given because the two most obvious reasons for termination, lack of qualifications and lack of work, would be eliminated.[49] Finally, the Court reaffirmed that they "remain confident that the *McDonnell Douglas* framework permits . . . plaintiff[s] meriting relief to demonstrate intentional discrimination."[50]

The McDonnell Douglas framework (as used in ADEA discrimination cases) has been applied differently in the lower and appellate courts. Generally, the lower courts fashioned the prima facie criterion to be case specific, while each circuit applied the fourth criteria differently to ADEA cases.

### *C. The Fourth and Sixth Circuits*

The Fourth and Sixth Circuits interpret the fourth prong of the *McDonnell Douglas* test to mean that if the replacement or retained worker was forty or above, then they were also in the protected class, and only replacement by workers or retained workers who were under forty would be evidence that is relevant to establishing that prong.[51]

The Fourth Circuit in *Mitchell v. Data General Corp.*[52] applied the *McDonnell Douglas* test in deciding a reduction-in-force case. Mitchell, a fifty-eight year old manager, was terminated when the company was forced to reduce its workforce, based upon his poor performance evaluations.[53] Mitchell brought an ADEA claim against the company. The Fourth Circuit interpreted the fourth prong of the *McDonnell Douglas* test in the reduction-in-force case as requiring Mitchell to show that the employees retained were under the age of forty and that they were performing at a lower level than he was.[54]

In *Roush v. KFC National Management Co.*,[55] the Sixth Circuit applied the *McDonnell Douglas* test in a discharge case. Betty Roush was sixty-one years old when she was confronted with the choice between early retirement or being discharged from her job.[56] Roush brought a claim of age discrimination

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47. *Burdine*, 450 U.S. at 258. A defendant normally attempts to prove the factual basis for its non-discriminatory explanation. Already liberal discovery rules are supplemented by plaintiff having access to the Equal Employment Opportunity Commission's investigatory files. *See* EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981).

48. *See Burdine*, 450 U.S. at 254.

49. *See id.* at 253-54.

50. *Id.* at 258.

51. *See, e.g.*, Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1314-15 (4th Cir. 1993); Roush v. KFC Nat'l Mgmt. Co., 10 F.3d 392, 396 (6th Cir. 1993).

52. *Mitchell*, 12 F.3d at 1314-15.

53. *See id.*

54. *See id.* at 1316.

55. 10 F.3d at 395.

56. *See id.*

against KFC.[57] The Sixth Circuit, in applying the *McDonnell Douglas* test, required Roush to show that she had been replaced by an employee younger than workers in the protected class as well as showing that she had been discharged because of her age.[58]

Other lower courts do not apply the fourth prong of the *McDonnell Douglas* test so fatally.

### *D. All Other Lower Circuit Courts*

The other lower circuits, (except for the First Circuit), use the *McDonnell Douglas* test as well, but require that the plaintiff prove the replacement *was* younger.[59] The courts differ on how much younger the replacement must be.[60] An example of this application can be found in *Schwager v. Sun Oil Co.*,[61] where the Tenth Circuit interpreted the fourth prong to mean only that "the position was filled by employees younger than the age of the plaintiff."[62] Schwager, who had been a long-time employee of Sun, was discharged and replaced with younger workers who were within the protected class.[63] The Tenth Circuit held that Schwager met the fourth prong of the *McDonnell Douglas* test.[64]

In deciding ADEA claims, the First Circuit, when it applied the *McDonnell Douglas* test, did not require that the employee prove that the employee was replaced by a younger employee or an employee outside the protected age group.[65] The issue the First Circuit decided was whether or not the employee was discharged because of the employee's age.[66] In *Loeb v. Textron, Inc.*,[67] Loeb was fired at age fifty-four and was replaced by a thirty-four year old.[68] The First Circuit interpreted *McDonnell Douglas* as not requiring proof that the replacement was outside the protected class, just that the employee had been fired for discriminatory reasons.[69] The First Circuit, as well as later Supreme

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57. *See id.*

58. *See id.* at 396.

59. *See, e.g.*, Haskell v. Kaman Corp., 743 F.2d 113, 119 & 120 n.1 (2d Cir. 1984); Seman v. Coplay Cement Co., 26 F.3d 428, 432 n.7 (3d Cir. 1994); Lindsey v. Prive Corp., 987 F.2d 324, 326, n.5 (5th Cir. 1993); Roper v. Peabody Coal Co., 47 F.3d 925, 926-27 (7th Cir. 1995); Rinehart v. Independence, 35 F.3d 1263, 1265 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1822 (1995); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); Schwager v. Sun Oil Co., 591 F.2d 58, 60-61 (10th Cir. 1979); Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1442 (11th Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985); Cuddy v. Carmen, 694 F.2d 853, 856-57 (D.C. Cir. 1982).

60. *See supra* note 59.

61. 591 F.2d 58 (10th Cir. 1979).

62. *Id.* at 61 (footnote omitted). "In applying these standards, however, it is emphasized that they are merely guidelines and not inflexible, rigid approaches to determine whether a Prima facie case has been established." *Id.* at 61 n.1.

63. *See Schwager*, 591 F.2d at 59.

64. *See id.* at 61. Schwager established the prima facie case by showing that "sixty percent of his sales territory was taken over by employees substantially younger than 45 years of age." *Id.*

65. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979).

66. *See id.* at 1017.

67. 600 F.2d 1003 (1st Cir. 1979).

68. *See id.* at 1008.

69. *See McDonnell Douglas*, 411 U.S. at 805-6.

Court decisions, interpreted the fourth prong as not requiring proof that the replacement was outside the protected class.[70]

Based on the different interpretations by the lower circuit courts, it was clear that there was no uniformity in the application of the fourth prong of the *McDonnell Douglas* test.

## IV. THE *O'CONNOR V. CONSOLIDATED* DECISION

In short, a seven paragraph opinion by Justice Scalia, the Court only dealt with the fourth prong of the *McDonnell Douglas* test of whether the replacement employee must be outside the protected class.[71] In the unanimous decision, the Supreme Court held that because the ADEA prohibits discrimination on the basis of age and not class membership, the correct application of the fourth prong would require O'Connor to prove that the replacement was younger but not that the replacement was outside the protected class to establish a prima facie case.[72]

Justice Scalia suggested in the decision that a prima facie case meant "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'"[73] If an employee is fired because of age, it is irrelevant[74] if the person who replaced the employee is within the same protected class.[75] The fourth prong of the *McDonnell Douglas* test as it was being applied by the Fourth Circuit "lack[ed] probative value."[76] Instead, proving the prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion."[77]

The age difference between the discharged employee and the replacement employee cannot be insignificant.[78] The Court gave an example of a forty year old replaced by a thirty-nine year old[79] which would have been discriminatory replacement and would have met the fourth prong as it existed because the thirty-nine year old was outside the protected class. The Court compared this example to the fact that when a fifty-six year old was replaced by a forty year old, that replacement would not have met the fourth prong.[80] The Court, by these examples, stressed how illogically courts had been applying the fourth prong.

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70. *See also* International Bhd. Of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978).
71. *See* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996).
72. *See id.*
73. *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254, n.7 (1981)).
74. *See O'Connor*, 116 S. Ct. at 1310.
75. *See id.*
76. *Id.*
77. *Id.* (quoting Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 358 (1977) (emphasis added)).
78. *See O'Connor*, 116 S. Ct. at 1310.
79. *See id.*
80. *See id.*

The ADEA prohibits employers from discriminating because of age, not because of class membership. In dicta, Justice Scalia suggested that the replacement employee, rather than being outside the protected class, must be "substantially" younger than the discharged employee. The Court did not give any guidelines to follow in determining how much younger the replacement must be to meet the fourth prong.[81]

The Supreme Court still did not decide if *McDonnell Douglas* was the applicable test for age discrimination cases, but since O'Connor and Consolidated did not contest the application and because lower circuit courts have applied some version of the *McDonnell Douglas* test,[82] the Court proceeded as if it was the applicable test.[83] Unless the Supreme Court decides that *McDonnell Douglas* is the appropriate test to apply, clarifying how to apply the fourth prong could be immaterial since a different standard may be used.

## V. ANALYSIS

In deciding *O'Connor v. Consolidated*, the Supreme Court clarified that the fourth prong of the *McDonnell Douglas* test would be applied by looking at the age of the replacement worker without requiring the replacement worker to be outside the terminated employee's protected class. But the Court left unanswered questions in its decision. Some unanswered questions are: 1) must the replacement worker be younger or *substantially* younger than the terminated employee, 2) is proof of a replacement necessary in determining if a plaintiff has a prima facie case, 3) is the *McDonnell Douglas* test appropriate for age discrimination cases, and 4) does application of the *McDonnell Douglas* test disallow a prima facie case involving direct evidence or circumstantial evidence?

In understanding the seriousness of age discrimination and why the *McDonnell Douglas test* is an appropriate test, it is important to know the history behind the ADEA and how it arose out of Title VII of the 1964 Civil Rights Act.[84]

### *A. History of the ADEA*

"It is therefore the purpose of this [Act] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting

81. *See id.*
82. *See id.* at 1309.
83. *See id.*
84. The Secretary of Labor conducted a study of age discrimination. Title VII, § 715. The Secretary's report in 1965 concluded that congressional action was required because of the serious nature and problem of age discrimination in the workforce. The ADEA became effective June 12, 1968. SECRETARY OF LABOR, NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT, 95TH CONG., 1ST SESS. (Comm. Print 1977).

problems arising from the impact of age on employment."[85]

At the time of the adoption of Title VII of the 1964 Civil Rights Act, Congress was considering including age as a protected class along with race and gender, but because age was unlike those other distinct characteristics, Congress did not believe that age warranted the same protection from unjust employment as did race and gender.[86] Congress was still considering adding age to the protected classes in the Civil Rights Act, so the Secretary of Labor conducted a study on whether age should be considered as one of the protected classes.[87] Secretary Wirtz determined that Congress should act to protect older workers but concluded that age, which sometimes does affect ability, should not be treated the same as race or sex, which does not affect job performance.[88] The Secretary stated that older workers differed from other Title VII minority groups because "age is one minority group in which . . . all seek . . . eventual membership."[89] Because everyone ages, Secretary Wirtz felt that older workers were discriminated against, but not always because of employer animus. Rather, notions of a progressive society and the nation's misconceived perceptions regarding age led to such discrimination.[90]

The ADEA was originally drafted to protect workers, age forty to sixty-five, and no higher because after age sixty-five, ability to work may be affected.[91] Termination by the employer would be justified.[92] The Act underwent several amendments raising the age limit, until finally in 1986, the Act was amended with the age range beginning at age forty but having no upper limit.[93]

The ADEA states that "[i]t shall be unlawful for an employer 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."[94] According to the legislative debates, Congress deliberately structured the ADEA to protect older members of the protected class against younger members of the same class.[95] Con-

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85. 29 U.S.C. § 621(b) (1994).

86. SECRETARY OF LABOR, *supra* note 84.

87. *See* THE OLDER AMERICAN WORKER: AGE DISCRIMINATION in EMPLOYMENT, 111 CONG. REC. 23,037 (1965).

88. *See id.*

89. *Id.* at 23, 38.

90. *See id.*

91. *See* Age Discrimination Employment Act, PUB. L. NO. 90-202, 81 Stat. 602 (1967).

92. *See id.*

93. There is no upper limit for most employees. *See* ACT OF OCTOBER 31, 1986, PUB. L. NO. 99-592, § 2(c)(1), 100 Stat. 3342, 3344 (1986) (codified as amended at 29 U.S.C. § 631(a) (1994).

94. 29 U.S.C. § 623(a)(1)(1994).

95. Senator Javits stated:

> Section 4 of the Bill specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man age 52, then he will have violated the act.

113 CONG. REC. 31,255 (1967). Senator Yarborough, the floor manager of the bill, expressly agreed with this analysis:

> It is not the intent of the sponsors of this legislation . . . to permit discrimination on account of age, whether discrimination might be attempted between a man of 38 and one 52 years of age, or between

gress chose age 40,[96] because that was the age when discrimination most often began.[97] Nothing in the ADEA suggests that an employer may discriminate against an older employee in favor of a younger one merely because the younger one is in the protected class. As in *Maxfield v. Sinclair Int'l*,[98] the Third Circuit noted, "[i]f no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40."[99] A rule limiting protection to those replaced by employees younger than forty "fails to take the reality of the working place into account. Because of the value of experience, sixty-year-olds are rarely replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged."[100]

Age discrimination in an employer's actions and decisions is broadly forbidden by the ADEA. The forbidden discriminatory actions include: discharging; decisions regarding compensation; terms, conditions, and privileges regarding employment; job classifications; job referrals; and exclusion from union membership.[101] Employers, labor organizations, and employment agencies must abide by these requirements, provided these groups meet the qualifying criteria under the Act. To qualify, the employer, labor organization, or employment agency must have at least twenty employees for twenty or more weeks of the year.[102]

Under both the ADEA and Title VII, an employee who claims their employer acted with intentional discrimination may present direct evidence or circumstantial evidence of the employer's discriminatory motive to the fact finder.[103] One major difference between Title VII litigation and ADEA litigation, is that the ADEA incorporated the Fair Labor Standards Act,[104] entitling individuals to bring actions for legal relief as well as equitable relief.[105] Ac-

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one 42 and one 52 years of age. If two men applied for employment under the terms of this law, and one was 42 and one was 52, . . . [the employer] could not turn either down on the basis of the age factor.

*Id.*

96. "The prohibitions in this Chapter shall be limited to individuals who are at least 40 years of age." 29 U.S.C. § 631(a) (1994).

97. Senator Javits stated "[t]hus, the committee, in my judgment, wisely decided to lower the age limit only to 40, since that is the age where, according to information currently available, age discrimination generally seems to start." 113 CONG. REC. 31,255 (daily ed. 1967).

98. 766 F.2d 788 (3d Cir. 1985), *cert. denied* 474 U.S. 1057 (1986).

99. *Id.* at 792.

100. McCortsin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980). Although an employer may rarely replace a sixty year old with a person younger than 40, "the sixty-year-old will be replaced by a fifty-five-year-old, who, in turn, is succeeded by a person in the forties. . . . Eventually, a person outside the protected class will be elevated but rarely to the position of the one fired." *Id.*

101. *See* 29 U.S.C. § 623(a)-(c) (1994).

102. See 29 U.S.C. §§623(a),(d),(e), and (g) (setting out the requirements for employers); 29 U.S.C. §630(e) (1994) (setting out the requirements for labor organizations); 29 U.S.C. §§623(b),(d), and (e) (setting out requirements for employment agencies).

103. *See* United States Postal Serv. Board of Governors v. Aikins, 460 U.S. 711, 714 n.3 (1983).

104. 29 U.S.C. §§ 211(b), 216-17 (1994).

105. In Lorillard v. Pons, 434 U.S. 575, 585 (1978), the Court concluded that because the ADEA was to

cordingly, an ADEA plaintiff can have a jury trial whereas a Title VII plaintiff cannot. The Title IV plaintiff is only entitled to equitable relief.[106]

In litigating ADEA claims, courts have applied the same methods of proof as Title VII employment discrimination cases[107] since the purpose and the language of the Acts are similar.[108] "The mere fact that Congress chose to pass a separate statute rather than amend Title VII does not imply that age discrimination was intended to be subject to different standards and methods of proof than race or sex discrimination."[109] In *Cuddy v. Carmen*,[110] the D.C. Circuit, stated that because ADEA elements were analogous to Title VII elements, the *McDonnell Douglas* methods of proof were appropriate to apply. Cuddy worked for the New England Telephone company for thirty-eight years, when at age sixty-five he was forced to retire.[111] The court stated that in order for Cuddy to meet his burden of proof in the absence of direct evidence, the *McDonnell Douglas* method of allowing inferences based on circumstantial evidence must

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be enforced according to the FLSA which allows jury trials, jury trial should be available to an ADEA plaintiff. Now the ADEA expressly provides for jury trials. *See* 29 U.S.C. § 626(c) (1994).

106. *See id.*

107. *Compare* the language of the ADEA, 29 U.S.C. § 623 (1994):

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(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.

*with* 42 U.S.C. §§ 2000e-2(a) (1994):

(a) Employer practices

It shall be unlawful employment practice for an employer—

(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 race, color, religion, sex, or national origin; or

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

108. *See, e.g.*, Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("The method suggested in McDonnell Douglas . . . is merely a sensible, orderly way to evaluate the evidence in light of experience as it bears on the critical question of discrimination."). *See also* Loeb v. Textron Inc., 600 F.2d 1003 (1st Cir. 1979). The *McDonnell Douglas* test is used because:

[I]t addresses two problems that exist in most employment discrimination cases: (1) direct evidence of discrimination is likely to be unavailable, and (2) the employer has the best access to the reasons that prompted him to fire, reject, discipline or refuse to promote the complainant. To offset, to some degree [these difficulties], McDonnell Douglas affirms the right of a complainant to make a prima facie showing of discrimination by establishing that his rejection did not result from . . . lack of qualifications or absence of a job opening.

*Id.* at 1014. *See also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765-66 (1979); *Lorillard*, 434 U.S. at 577.

109. *Loeb*, 600 F.2d at 1015.

The first of these, 29 U.S.C. [§] 623 (f) (3), protecting an employer's right to act for good cause, expresses a principle equally applicable in Title VII cases a fact evidenced by the McDonnell Douglas case itself. The second provision, that older persons may be treated differently for reasons other than age, 29 U.S.C. [§] 623 (f) (1), also does not repudiate the McDonnell Douglas approach. (Footnotes omitted).

*Id.* at 1015-16.

110. 694 F.2d at 853 (D.C. Cir. 1982).

111. *See id.* at 854.

be used.[112] Because the ADEA arose out of Title VII of the 1964 Civil Rights Act,[113] it is appropriate to analogize previously litigated cases and methods of proof from Title VII claims to ADEA claims.

### *B. Types of Discrimination*

"Disparate treatment" and "disparate impact" are two types of discrimination that can arise in employment cases. The former occurs when an employer treats some people less favorably because of their age, race, color, religion, sex or national origin.[114] The latter occurs when employment practices are neutral on their face in their treatment of different groups, but are, in reality, more harsh on protected groups than non-protected groups.[115]

ADEA claims are typically classified as "disparate treatment" cases. Such a classification requires an ADEA plaintiff to prove that the employer intentionally treated the plaintiff differently from other employees because of the plaintiff's protected status.[116] Because it requires a plaintiff to prove the employer's motive, which is very difficult to do, a narrow view of discrimination results.[117] The Second and Eighth Circuits have allowed ADEA plaintiffs to use "disparate impact" theory in proving discrimination, where they could not prove discrimination under "disparate treatment."[118] "The development of "disparate impact" as an alternative theory has relieved some of the inequities resulting from the above difficulties by extending the definition of discrimination,"[119] but "disparate treatment" claims can't succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.[120]

*McDonnell Douglas* eased the burden of proof for "disparate treatment" cases by creating the four prong test.[121] Though *O'Connor v. Consolidated* is a "disparate treatment" discrimination case, it is important to realize that dispa-

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112. *See id.* at 857-60.
113. *Supra*, note 84.
114. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
115. *See id.*
116. *See* Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied* 451 U.S. 945 (1981).
117. *See id.* at 1032-33.
118. *See id.* at 1027; *see also* Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983).
119. Marla Ziegler, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038, 1041 n.15 (1984).
120. *See* Amicus Brief for Respondent (Jan. 1996) at 12, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354) (quoting Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1983)).
121. *See* Ziegler, *supra* note 118, at 1041 n.15.

> The basis of disparate treatment analysis is that everyone can and should be treated equally. This approach, however, contains both mechanical and theoretical difficulties. . . . In order to prove discrimination—that similarly situated people are treated differently—a plaintiff has to prove that the employer intended to discriminate against the plaintiff or the plaintiff's minority group. Since it is illegal to discriminate, and costly if one is caught, in only the most blatant of circumstances will the plaintiff be able to garner the requisite evidence. Even when there is evidence to garner, it is time consuming and costly because of the extensive discovery usually needed to feret [sic] out the proof of subjective intent. Equally important, discrimination is not always intentional at a conscious level. Under such circumstances it is unfair and counterproductive to require proof of a motive that is unnecessary for the action and the harm.

*Id. See also McDonnell Douglas*, 411 U.S. 792 (1973).

rate impact in ADEA discrimination cases will help plaintiffs prevail where otherwise they could not.

### C. *The Fourth Prong Applied*

In *O'Connor v. Consolidated*, the Supreme Court held in an unanimous decision, that an employer who replaces an older worker because of age with a younger worker in the same protected class, may violate the ADEA and the fourth prong of the *McDonnell Douglas* test.[122] In the author's view, the test should be applied by looking at the age of the discharged worker or prospective applicant and not by requiring the replacement worker to be younger than the terminated employee's protected class. The Supreme Court's rule of requiring a replacement to be younger or substantially younger[123] is as illogical as the Fourth Circuit's rule requiring a replacement to be from outside the protected class as a necessary element of a prima facie case in all cases, rather than focusing on whether the employee was actually discriminated against because of age.[124] Under the Fourth Circuit's rule, a forty year old plaintiff who was fired and replaced by a thirty-nine year old could establish a prima facie case, but a sixty year old replaced by a forty year old could not. It is not clear what would be unacceptable by the Supreme Court after this decision, even where comparative age evidence based on the difference in ages is minuscule in the first scenario but very strong in the second scenario.[125] Applying the fourth prong rigidly, in requiring a plaintiff to be replaced by someone outside the protected group or that the worker just be younger, is contrary to the Supreme Court's admonitions that the *McDonnell Douglas* framework should not be "rigid, mechanized or ritualistic,"[126] and that the burden of establishing a prima facie case is not onerous.[127] The Court emphasized that a prima facie case is necessary to "progressively . . . sharpen the inquiry into . . . the question of intentional discrimination,"[128] by elimination of nondiscriminatory reasons used most often in terminating individuals in protected classes, which are either absolute or relative to the lack of qualifications and the absence of the vacancy in the job sought.[129]

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122. *O'Connor*, 116 S. Ct. at 1310.

123. "Adding a 'substantially younger' requirement, for an example, will make the presumption underinclusive because not all cases of actual discrimination will involve a substantially younger replacement. . . . It is underinclusive particularly for older claimants, who are less likely to be replaced by persons under 40." Reply Brief at 5-6, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354).

124. *See* Amicus Brief for Petitioner at 10, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354).

125. *See id.*

126. Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978); Texas Dep't of Community Affairs v. Burdine,. 450 U.S. 248, 253 n.6 (1981).

127. *See* Amicus Brief for Petitioner at 10-12, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354).

128. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (quoting *Burdine*, 450 U.S. at 255 n.8).

129. *See Burdine*, 431 U.S. at 254 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977)).

Consolidated argued that the *McDonnell Douglas* test should be applied as follows: 1) O'Connor was in the age group protected by the ADEA; 2) O'Connor was discharged; 3) at the time of the discharge, O'Connor was not performing his job at a level that met his employer's legitimate expectations; and 4) following his discharge, O'Connor was not replaced by someone of comparable qualifications outside his protected class.[130]

In addition, Consolidated argued that the Fourth Circuit was correct in applying the fourth prong as it did; that there was no discrimination because O'Connor's replacement was not outside the protected class; and summary judgment was correct because O'Connor did not meet his prima facie burden, "which must throw off the necessary inference of illegal discrimination."[131] Consolidated continued to argue that because the ADEA forbade discrimination based on an individual's age and the Act was limited to those who are at least forty years old, the ADEA created a "protected class."[132]

Senior Circuit Judge Butzner dissented in the Fourth Circuit's decision of *O'Connor*, stating that the fourth prong the majority was applying was an incorrect interpretation of the *McDonnell Douglas* test for termination-replacement cases.[133] "Such an absolute requirement, however, has no justification in law or policy . . . . The Act contains no language permitting employers to favor a younger employee over an older one on the basis of age simply because the

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130. *See* Respondent's Brief at 6, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 950354).

> Where a plaintiff does not rely on the age characteristic of a replacement, the alternative test would require a plaintiff to demonstrate:
>
> (1) the employee was protected by the ADEA;
>
> (2) he was selected for discharge from a larger group of candidates;
>
> (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and
>
> (4) the process of selection produced a residual work force of persons in the groups containing some unprotected persons who were performing at a level lower than that at which he was performing.

*Id.* at 6-7.

131. *Id.* at 20. "The fourth element required to establish a 'prima facie case' of discrimination was intended to demonstrate unequal treatment by the relatively objective evidence of replacement by a member of a non-protected class." *Id.* at 20-21.

> The inference of illegal discrimination is generated by the fact that a non-protected person is somehow favored over a protected person. A sustainable inference cannot be similarly generated merely by comparison of chronological ages. Numerous courts have applied this analysis in both Title VII and ADEA contexts . . . . The Fourth Circuit merely applied this logic to the ADEA claim before it." (Citations omitted.)

*Id* at 21. *See also* EEOC v. Western Elec. Co., 713 F.2d 1011, 1014-15 (4th Cir. 1983).

132. Respondent's Brief at 22-23, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996)(No. 95-354).

> By focusing on the treatment of protected and unprotected persons when it evaluated the record evidence, the Fourth Circuit followed the framework utilized by Congress in crafting the Act's prohibitions. Congress recognized that a particular class of persons, those 40 and older, should be protected from age discrimination. While the ADEA forbids discrimination based on an individual's age; the Act's prohibitions are limited to individuals who are at least forty (40) years old. Thus, the Act creates a 'protected class.' (Footnotes and citations omitted).

*Id.* at 22-23. But the Respondent even realized this was in age discrimination disparate treatment cases, looking at how the employer treats individuals who are not of the same protected class as the older individual of the protected class. *Id.* at 23.

133. *See O'Connor*, 56 F. 3d at 550.

younger employee is within the protected age group."[134]

The EEOC contended that comparative age evidence should only be a part of plaintiff's overall burden of proving discriminatory intent and pretext but it should not be a part of the prima facie case.[135] Comparative age evidence is easy to provide to a court when there is a replacement, but when one does not exist, comparative age difference evidence should not be required.[136] And since there is no clear standard regarding comparative age difference, it is not fair that this evidence is necessary in some discrimination cases but not in other discrimination cases to establish a prima facie case, since in some cases it is sufficient to foreclose certain plaintiffs' cases.[137]

O'Connor was replaced because of his age, and the fact that the replacement was forty years old ("substantially younger") and in O'Connor's protected class, or if the replacement was fifty years old ("younger"), is insignificant. The Supreme Court should only focus on the plaintiff's age and not a replacement or retained worker's age for uniform application of the fourth prong of the *McDonnell Douglas* test.

## VI. FUTURE IMPLICATIONS AND IMPACTS

The Court's decision in *O'Connor v. Consolidated* not only avoided any definitive answers on an appropriate way to evaluate evidence in ADEA claims but created more questions. A few questions are as follows: 1) must the replacement worker be younger or *substantially* younger than the terminated employee; 2) is proof of a replacement necessary in determining if a plaintiff has a prima facie case; 3) is the *McDonnell Douglas* test appropriate in age discrimination cases; and 4) does application of the *McDonnell Douglas* test disallow a prima facie case involving direct evidence or circumstantial evidence? The questions will be discussed individually.

### A. *Substantially Younger v. Younger*

In dicta, Justice Scalia discussed that a replacement "substantially" younger than the plaintiff is a "far more reliable indicator of age discrimination."[138] The decision does not analyze whether *substantially* younger or younger is the appropriate standard or how to apply it. This creates great uncertainty in application by lower courts and there will be no uniformity in future case decisions.

The *McDonnell Douglas* framework must be applied as intended, to allow workers with meritorious age discrimination claims to get past the initial burden

134. *Id.* "The age of a replacement employee should be a relevant, but not dispositive, factor for a court to consider when deciding whether the plaintiff has established a prima facie case under the McDonnell Douglas framework." *Id.*

135. *See* Amicus Brief for Petitioner at 14-18, O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307 (1996)(No. 95-354).

136. *See id.*

137. *See id.*

138. *O'Connor*, 116 S. Ct. at 1310.

of proof and be allowed to present evidence that they were discharged, demoted or denied employment because of their age, whether *substantially* younger or just younger.[139] A "'[p]rocrustean limitation' restricting the ability to establish a prima facie case to situations in which the replacement is younger than 40 would preclude many older, more experienced employees with meritorious claims from relying on the *McDonnell Douglas* framework, simply because their replacement was age 40 or 41 (rather than 38 or 39), even though that fact alone does not remove the inference of discrimination."[140] Because the *McDonnell Douglas* test is a question of law for a judge, the court would focus on what "substantially younger" means and could determine that the plaintiff has not met the burden of proof of discrimination before the case ever reaches a jury.[141] If the court focused on the plaintiff's age and not on a replacement worker's age or retained worker's age, the plaintiff's age alone could be an indicator of the employer's motive.

A recent ruling in *Phuong v. National*[142] demonstrates how the Court's holding in *O'Connor v. Consolidated* creates uncertainty and a lack of uniformity in lower courts. The D.C. district court held that a 57 year old replaced by a 42 year old was substantially younger and therefore, violated the ADEA, but the court did not give any guidelines on how they reached that conclusion.[143] Compare *Phuong* with *Farley v. Miller Fluid Power Corp.*,[144] where the Illinois District Court felt that a twenty-six year difference met the Supreme Court's definition of younger.[145]

The proper test should not be substantially younger or younger, instead there should be no requirement of proof of replacement to meet the prima facie burden.

### *B. Proof of Replacement should not be Required*

The courts could avoid this uncertain test by doing away with the substantially younger versus younger requirement altogether. The EEOC suggested in

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139. *See* Amicus Brief for Petitioner at 20-21 (Dec. 1995), O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996)(No. 95-354).

140. *Id.* (quoting McCortsin v. United States Steel Corp., 621 F.2d 749, 753 (5th Cir. 1980)). (There is "no reason to engraft [an under-age-40] requirement on to the law.") (quoting Maxfield v. Sinclair Int'l, 766 F.2d 788, 792 (3d Cir. 1985)).

141. *See* Amicus Brief for Petitioner at 20-21, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354).

142. 927 F. Supp. 487 (D.D.C. 1996).

143. *See id.* at 491. Tran Anh Phuong was employed with the National Academy of Sciences (hereinafter "NAS") for 18 years. Ms. Phuong had held her position as Executive Assistant at the Commission on Engineering and Technical Systems for many years and received outstanding performance evaluations and commendations over the years. Her supervisor claimed she was replaced because she was unable to perform certain computer tasks that she was expected to complete and that her writing was unsatisfactory, as well as being responsible for the loss and misprocessing of certain documents. NAS contended that it made every effort to find an alternative position for Ms. Phuong but she resigned because of a work-related back injury. Ms. Phuong testified that she was removed from her job by NAS because of her age and that she was forced to resign. *See id.* at 489.

144. 1996 WL 252478 (N.D. Ill. 1996).

145. *See id.*

its amicus brief[146] that a plaintiff need not produce evidence regarding the replacement's age at all.[147] The EEOC said no evidence should be needed because in some cases,[148] evidence concerning a replacement is impossible to prove because the company is in the process of hiring a replacement, or in a reduction in force case, there is no replacement.[149] Because the EEOC is the agency that handles age discrimination complaints,[150] their deference should be afforded greater weight.[151] The Court has repeatedly accepted the proposition that a prima facie case can exist without any regard to the identity of the replacement employee.[152]

This acceptance of a prima facie case would be an appropriate standard because in some cases where an employer seeks a replacement for a terminated employee but does not find one, the terminated employee would still be able to make a prima facie case. In this situation, a court could find that the plaintiff satisfied the fourth prong by showing that the employer sought a replacement who had qualifications similar to the plaintiff's qualifications, even though no replacement was found.[153]

In termination cases, the inference is that the employer fired the plaintiff despite plaintiff performing satisfactory work and that the employer continued to need someone to perform plaintiff's job. Employers do not ordinarily terminate workers who were performing satisfactorily. Thus, the employer must explain the basis for its termination of the employee. This explanation would meet Justice Scalia's test that "there must be at least a logical connection be-

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146. *See* Amicus Brief for Petitioner at 14, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996)(No. 95-354).

147. *See id.* at *5.

148. *See* EEOC v. Western Elec. Co., 713 F.2d 1011 (4th Cir. 1983).

149. Petitioners Brief at 20-23, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354).

150. "Consistent with the language and legislative history of the statute, EEOC regulations bar discrimination within the protected age group." *Id.* at 10.
The regulations state:

> [i]t is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age.

29 C.F.R. 1625.2 (a).

151. *See* Kralman v. Illinois Dept. of Veterans' Affairs, 23 F.3d 150, 155 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 359 (1994) (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). The EEOC is to issue regulations "necessary or appropriate for carrying out [the Act]," as well as creating "reasonable exemptions" from the Act. *See* 29 U.S.C. § 628.

152. In *McDonnell Douglas*,

> the employer failed to hire a qualified black employee, and then continued to look for employees of similar qualifications; the Court held that this was sufficient to make out the prima facie case. The prima facie case there did not depend on the race of the employees actually hired. And more recently in St. Mary's, the Court set forth a hypothetical in which a black employee was discharged from a workforce whose minority fraction was far larger than the minority fraction of the population as a whole, and the firing decision was made by a black supervisor to boot. The Court recognized that these facts, which did not include any reference to the race of the employee who was hired instead of the plaintiff, would make out a prima facie case.

Petitioner's Brief at 15-16, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354). *See also St. Mary's Honor Center*, 113 S. Ct. at 2750-51 (1993).

153. *See* Amicus Brief for Petitioner at 20-23, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354).

tween each element of the prima facie case and the illegal discrimination"[154] and the rebuttable presumption.[155] In a termination case under this proposal, ADEA plaintiffs should be able to make out prima facie cases by showing that they were within the protected age group, that they were discharged from a position that they were qualified for, and that the employer sought or obtained a replacement worker with similar qualifications to the discharged worker.[156] This showing would eliminate the two most common non-discriminatory reasons employers give for a discharge: 1) lack of qualifications in the applicant and 2) the lack of available work.[157] An inference is then raised that there was discrimination by the employer, even if the plaintiff does not identify the replacement worker's age, by presenting to the court evidence that the job qualifications were being met satisfactorily by the plaintiff.[158] Such a showing shifts the burden to the employer to articulate a legitimate, nondiscriminatory reason for the termination.[159] A similar approach has been applied in Title VII cases.[160]

The Supreme Court should avoid this uncertain test by doing away with the *substantially* younger and younger requirement altogether and instead not require an ADEA plaintiff to produce evidence regarding the replacement's age at all because in some cases, evidence concerning a replacement is impossible to prove because the company is in the process of hiring a replacement, or in a reduction in force case, where there is no replacement.

### *C. Is McDonnell Douglas the appropriate test to apply in ADEA cases?*

Is the *McDonnell Douglas* test the proper test to apply in ADEA cases? Yes. The *McDonnell Douglas* test is the best test because the ADEA is based on Title VII of the Civil Rights Act; because *McDonnell Douglas* establishes a burden allocation of proof for plaintiff and defendant; because most lower courts and litigants recognize it as an appropriate test to apply; and because it allows a plaintiff to utilize circumstantial evidence when that may be the only evidence a plaintiff can obtain. In *McDonnell Douglas*, the plaintiff did not have to identify the race or other traits of applicants; rather, the plaintiff only had to prove that McDonnell Douglas continued to search for applicants with qualifications similar to the plaintiff's.[161] The employer should have the burden of proving lawful discharge because they have the records of the employee's work history.[162] In *McDonnell Douglas*, the Court stated that "the

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154. *O'Connor*, 116 S. Ct. at 1310; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

155. *See O'Connor*, 116 S. Ct. at 1310.

156. *See* Amicus Brief for Petitioner at 8, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-534).

157. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

158. *See id.*

159. *See id.*

160. *See id; see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

161. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

162. Judge Posner explained, in *Riordan v. Kempers*, 831 F.2d 690, 697-698 (7th Cir. 1987):

facts necessarily will vary in Title VII cases, and the . . . prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations."[163]

The Fourth Circuit argued that the application of the *McDonnell Douglas* test was appropriate for termination-replacement cases, but because Consolidated only had replaced two employees and since there was no dispute as to who replaced O'Connor,[164] and the replacement was in the protected class, O'Connor didn't meet the burden. Without the *McDonnell Douglas* test, it would have been difficult to decide the case.[165]

Consolidated argued that the *McDonnell Douglas* elements did not create as strong an inference of discrimination based on age because the failure to fill a vacancy with a qualified individual over age forty raises less suspicion than the refusal to offer the job to a qualified individual who is a minority.[166] In contrast to most race or gender cases where the employment hirers tend to be white males, those making the employment decisions in age cases tend to be over age forty themselves and are likely to have close relationships with older employers.[167] Consolidated additionally argued that the Supreme Court's treatment of age classifications under the equal protection clause of the 14th Amendment, in refusing to treat age as a suspect class and not subjecting age classifications to the stricter scrutiny accorded to classifications based on race and sex, was also an indication that *McDonnell Douglas* was not the appropriate test.[168]

The Sixth Circuit had observed that the replacement of an older worker with a younger one may not create the same inference of discrimination as does the replacement of an African-American worker with a Caucasian worker because it is a part of the natural progression of life that when older workers leave the work force, they will usually be replaced with younger workers.[169]

All the problems notwithstanding, the *McDonnell Douglas* test is the best test we have to apply to ADEA cases as of date. Again, because the language and purpose of the ADEA track the language and purpose of Title VII, and because the purpose of the *McDonnell Douglas* framework is to protect employees from discriminatory employer action, the Supreme Court will probably continue to apply Title VII principles, via the *McDonnell Douglas* test, to

> Because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against—the cost of discrimination is too great. The law tries to protect the average worker and even below-average workers against being treated more harshly than would be the case if they were of a different [protected class], but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative. *Id.*

163. *McDonnell Douglas*, 411 U.S. at 802 n.13.

164. *See O'Connor*, 56 F.3d at 550.

165. *See id.*

166. *See* Brief for Respondent at 9, O'Connor v. Consolidated Coin Caterers Crop., 116 S. Ct. 1307 (1996) (No. 95-354).

167. *See id.* at 31.

168. *See id.*

169. *See* Laugesen v. Anaconda, 510 F.2d 307 (6th Cir. 1975).

ADEA cases.

### *D. Is Direct Evidence Ignored?*

Another issue not raised in *O'Connor v. Consolidated*, that will surface in other ADEA cases, is the courts pigeon-holing plaintiff's prima facie evidence into categories, destroying the evidence's probative value.

In *O'Connor v. Consolidated*, O'Connor tried to make out a prima facie case under *McDonnell Douglas* and he based his case on direct evidence of the age-related comments made by his supervisor.[170] The Fourth Circuit rejected the direct evidence because the remarks had nothing to do with the discharge decision itself.[171] This ruling may have been correct as it related to the prima facie case, but the court unfairly treated the age-based comments as having no probative value.[172] Even if the remarks of age bias are too attenuated to constitute direct proof of discrimination, the remarks should be relevant as part of a circumstantial case.[173] The Fourth Circuit ignored this as circumstantial evidence as well, when it focused solely on O'Connor's inability to satisfy the fourth prong.[174] This approach was too formalistic. In *McDonnell Douglas*, the Supreme Court itself cautioned against applying the circumstantial evidence framework in a "rigid, mechanized or ritualistic" fashion.[175] By pigeon-holing part of O'Connor's evidence as relevant only to his direct evidence case, and by viewing the *McDonnell Douglas* framework only in literal terms of the four elements, the Fourth Circuit failed to consider the probative power of all of O'Connor's evidence.[176] Unfortunately, other courts compartmentalize direct and circumstantial evidence in this same mechanical way.[177]

On remand, the Fourth Circuit again granted Consolidated summary judgment. The court did not consider the direct evidence and did not believe O'Connor met the prima facie case by proving that his age was the true reason for his discharge and not because of poor performance.[178]

An ADEA plaintiff's prima facie direct and circumstantial evidence should not be pigeon-holed into categories destroying its probative value. Instead, if there is direct evidence, the plaintiff should be allowed to use it for its own worth and not forced into fitting it into the *McDonnell Douglas* test.

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170. *See supra* note 17.

171. *See O'Connor*, 56 F.3d at 550.

172. *See* Amicus Brief for Respondent at 10, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-0354).

173. *See id.*

174. *See O'Connor*, 56 F.3d at 547-48.

175. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981).

176. *See* Amicus Brief for Respondent at 10-11, O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996) (No. 95-354).

177. *See* Trans-World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

178. The Fourth Circuit still did not believe O'Connor met his burden of proof under the McDonnell Douglas test by proving that the plaintiff's age was the true reason for the discharge and that its decision was pretextual. O'Connor v. Consolidated Coin Caterers Corp., 84 F.3d 718 (1996) (Butzner, Senior Circuit Judge, dissenting for the same reasons in *O'Connor I*).

## VII. CONCLUSION

In *O'Connor v. Consolidated*, the Supreme Court held that an employer who replaced a worker because of age with a younger worker in the same protected class violates the fourth prong of the *McDonnell Douglas* test. This simple holding's unanswered questions should be answered as follows: the younger versus substantially younger test can be avoided by not requiring proof of a replacement in determining if plaintiff has a prima facie case. Courts should not look at a replacement workers being younger or substantially younger than the terminated employee, or prospective applicant, because proof of a replacement should not be necessary in determining if plaintiff has a prima facie case when in some cases there is no replacement. *McDonnell Douglas* is the appropriate test to apply in age discrimination cases, with the change of only focusing on the age of the plaintiff. Direct evidence should not be pigeon-holed into the *McDonnell Douglas* test of the prima facie burden, but rather looked at independently.

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