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Discrimination, Plain and Simple

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INTRODUCTION

Over the last decade, the Supreme Court has attempted to simplify Title VII and, with it, discrimination. This process began with the Court's decision in *St. Mary's Honor Center v. Hicks*,[1] and continued in *Sundowner Offshore Services, Inc. v. Oncale*.[2] In *Hicks*, the Court emphasized that the inquiry in a Title VII disparate treatment race-based case should be aimed solely at whether intentional discrimination occurred. In the process, the Court minimized the import of the three-part test for proving discrimination that had been announced twenty years earlier in *McDonnell Douglas Corp. v. Green*.[3] In *Oncale*, the Court noted that any course of conduct yielding discrimination because of sex, regardless of whether that conduct fit prior definitions of sex discrimination or sexual harassment, may be actionable under Title VII. By cutting away much of the structure that flowed from and arguably illuminated its prior vision of discrimination in general and race and sex discrimination in particular, the Court suggests that Title VII should be relatively simply interpreted and that discrimination is or should be relatively easily understood.

Though the Court's desire for simplification may be reasonable, it may have unintended consequences depending on how that desire is interpreted. Whether the Court's simplification is of systematic benefit will depend on whether its results comport with Title VII's broader vision of discrimination. While the Court's simplification may eliminate doctrinal clutter and make Title VII somewhat easier to understand, if it also obscures the nuance necessary to discern discrimination fully and vigorously enforce Title VII, it serves little purpose.

This short essay is a brief examination of the Court's relatively recent attempts to simplify Title VII and employment discrimination; it is not intended to be a comprehensive review of the Court's discrimination jurisprudence. Rather, it seeks to identify a few concerns with and implications of the Court's apparent

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1. 509 U.S. 502 (1993).
2. 523 U.S. 75 (1998).
3. 411 U.S. 792 (1973).

desire to simplify Title VII jurisprudence. Part I briefly examines how the Court has simplified employment discrimination through *Hicks* and *Oncale*. Part II examines how the Court's simplifications have been used. Part III suggests concerns that should accompany the Court's simplification.

I. SIMPLIFYING TITLE VII AND REDEFINING DISCRIMINATION

A. Simplifying The Race Discrimination Inquiry

Title VII bars race discrimination.[4] However, proving through direct evidence that an employment decision was motivated by discrimination is difficult, even when discrimination actually motivated the decision.[5] Direct evidence of discrimination, i.e., evidence of a decisionmaker's mental state, is notoriously difficult to find, though discrimination unquestionably exists.[6] Employers rarely acknowledge race discrimination, and Title VII provides additional incentive to hide such discrimination.[7] By necessity, allowing discrimination to be proven indirectly has been a key to effectively enforcing Title VII.

1. The *McDonnell Douglas* Test

In *McDonnell Douglas v. Green*,[8] the Supreme Court memorialized a three-part test for indirectly proving race discrimination in Title VII disparate treatment cases.[9] Though the *McDonnell Douglas* court did not note precisely why it created the three-part test, at least two possibilities exist.[10] The first is that the

4. 42 U.S.C. 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer - 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 . . .").

5. *See* Copley v. Bax Global, Inc., 80 F. Supp. 2d 1342, 1350 (S.D. Fla. 2000) ("Because employers who engage in illicit discrimination rarely leave records of their invidious acts, cases in which discrimination is proved through direct evidence are rare").

6. Even racial slurs or commentary that indicates racially-motivated dislike of an employee do not truly constitute direct evidence of racial motivation for an adverse job action, though courts have treated it as if it did. *See, e.g.*, Plaisance v. Travelers Ins. Co., 880 F. Supp. 798, 807 (N.D. Ga. 1994) ("Direct evidence consists of the actions or remarks of an employer reflecting a discriminatory attitude"). However, even if such language is not direct evidence of discrimination, it can be important to proving discrimination. *See* Jones v. Bessemer Carraway Med. Ctr., 151 F.3d at 1323 n.11 (11th Cir. 1998) (per curiam) ("Language not amounting to direct evidence, but showing some racial animus, may be significant evidence of pretext once a plaintiff has set out the prima facie case").

7. However, employers have not always completely shied away from overt discrimination. Of course, employers have been more willing to indicate their gender preferences than their race preferences. *Compare* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (detailing company's explicit exclusion of women with preschool age children from certain jobs) *with* Duke Power Co. v. Griggs, 401 U.S 424 (1971) (reviewing company's installation of tests and high school diploma requirement that disproportionately disqualified black workers just when Title VII required end of explicitly discriminatory practices).

8. 411 U.S. 792 (1973).

9. This test is not limited to proving race discrimination. *See, e.g.*, Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (applied in age discrimination context).

10. The *McDonnell Douglas* test was a change. *See* Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters In Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385 (1994) (noting that before the *McDonnell Douglas* test, employment discrimination cases were treated just like other civil litigation cases).

Court needed to make explicit that the indirect method of proof was a legitimate way to prove any case, including one of racial discrimination.[11] The second is that the Court believed that specifying that an indirect method of proof is allowable in the Title VII context was necessary to guarantee that courts did not dismiss cases or grant summary judgment just because no smoking-gun evidence of discrimination existed. This concern could stem from the belief that meritorious Title VII claims might not receive a full hearing simply because proving discrimination can be difficult.[12] Regardless of its justification, the *McDonnell Douglas* test explicitly provides an indirect route to Title VII relief.

The *McDonnell Douglas* test first requires the plaintiff to prove a prima facie case of discrimination, then requires the employer to provide legitimate non-discriminatory reasons (LNR) for its actions, and finally requires the plaintiff to prove that the employer's reasons are pretext for discrimination. The prima facie case varies from case to case, and merely constitutes any set of facts sufficient to support an inference of discrimination.[13] Proof of the prima facie case yields a mandatory rebuttable presumption of discrimination that requires that a verdict be directed in the plaintiff's favor if the employer does not rebut it.[14] The presumption of discrimination is fully rebutted when the employer articulates an LNR for its actions. The employer need not prove that the LNR is the reason for the job action; it need merely articulate the LNR.[15] That the presumption of discrimination is fully negated with the mere articulation of a reason for the job action suggests that the presumption was meant as a strong incentive for the employer to present a case rather than as a reflection of a belief that the prima facie case actually proves discrimination.[16]

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11. That *McDonnell Douglas* may merely have been a formalization of the process that district courts and courts of appeals were engaging in would certainly be consistent with the notion that the three-part test flows from common sense rather than judicial demand. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (suggesting that the McDonnell Douglas test "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); Green v. McDonnell Douglas Corp., 463 F.2d 337, 353 (8th Cir. 1972) *aff'd* 411 U.S. 792 (1973) ("When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination").

12. Given that at the time *McDonnell Douglas* was decided all Title VII trials were bench trials, the *McDonnell Douglas* structure, including its mandatory presumption of discrimination, would seem to have been aimed at reluctant judges. The Civil Rights Act of 1991 provided plaintiffs the right to jury trials in Title VII cases. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, -1977A(c) (codified at 42 U.S.C. 1981a(c) (2000).

13. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) (noting that facts of a prima facie case vary from case to case). Of course, many different sets of facts may support an inference of discrimination. *See* Scarriano v. Municipal Credit Union, 894 F. Supp. 102, 106 (E.D.N.Y. 1995) (suggesting that a prima facie case is proven when any set of facts creating inference of discrimination exists); Perkins v. Regents of Univ. of Mich., 934 F. Supp. 857, 862 (W.D. Mich. 1996) (suggesting that a prima facie case may require that plaintiff prove he or she "was treated differently than similarly situated non-minority employees").

14. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

15. *See id* at 254; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

16. That the presumption is fully negated is clear. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 510 ("If... the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens - is no longer relevant").

After the LNR is proffered, the plaintiff is allowed to prove that the LNR is pretext either by proving it untrue or by proving that discrimination better explains the employer's action.[17] Proof that the LNR is untrue leaves the finder of fact with no reason on which the employer can rely to explain the particular job action. Conversely, proof that intentional discrimination is more likely the reason for the employer's actions leaves the employer's proffered reason as a possible explanation of the action, but as an unconvincing one. The Court has made clear that these two methods of proving pretext are independent and that either method is sufficient to sustain a verdict.[18]

The debate regarding what impact proof that the LNR is untrue or not credible should have has raged for years. Some have argued that proof that the proffered reasons were not the real reasons coupled with the prima facie case was sufficient to mandate a finding for the plaintiff.[19] This is the pretext-only position. Others have argued that such proof was evidence, though not dispositive evidence, of the intentional discrimination.[20] Yet others have argued that such proof alone might allow a plaintiff to avoid a directed verdict in the employer's favor.[21] This is the pretext-plus position. *St. Mary's Honor Center v. Hicks*, provided the Supreme Court's opinion on the issue, though even that decision has not ended the debate.

2. *St. Mary's Honor Center v. Hicks* and The Import of Proof of Pretext

In *Hicks,* the Supreme Court ruled simply that proof of pretext - proving that LNRs proffered by an employer were untrue or not credible - was not proof that it was more likely than not that intentional discrimination had motivated a particular employment decision. To understand the ruling fully, a short recitation of the facts in *Hicks* is necessary. Plaintiff Melvin Hicks' formal termination from St. Mary's Honor Center occurred when "he was discharged for threatening Powell [his supervisor] during an exchange of heated words[.]"[22] This exchange ended a downward spiral of Hicks' employment during which Hicks "became the subject of repeated, and increasingly severe, disciplinary actions."[23] Hicks claimed that racial discrimination explained the course of action that culminated in his termination.[24] At trial, after Hicks proved a prima facie case, St. Mary's Honor

17. That either prong is an appropriate way to demonstrate pretext is clear. *See Burdine*, 450 U.S. at 256.

18. *See id.*

19. *See* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 77-91 (1991) (reviewing the use of pretext-only and pretext-plus rules in federal courts).

20. *See, e.g.,* Blanks v. Waste Mgmt. of Ark., Inc., 31 F. Supp. 2d 673, 677 (E.D. Ark. 1998) ("But it is not enough that the employee submits evidence of pretext such that the factfinder disbelieves the employer's 'legitimate' reasons .... An employee's proof of pretext is relevant to, but not dispositive of, the ultimate issue of discrimination") (citation omitted).

21. *See* Lanctot, *supra* note 19.

22. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 505 (1993).

23. *Id.*

24. *Id.*

Center proffered "the severity and the accumulation of rules violations committed by" Hicks as the reasons for his termination.[25] As a result of Hicks' evidence that such explanations were not true, the district court, sitting as factfinder, found that the reasons proffered by the employer were not the true reasons for Hicks' firing.[26] However, the court also found that Hicks had not met his burden of proving that intentional discrimination caused his termination, and rendered judgment for St. Mary's Honor Center.[27] That judgment was reversed by the Eighth Circuit Court of Appeals.[28]

In the Supreme Court, Hicks argued that the finding that the employer's reasons were not the true reasons for the termination should have mandated a ruling in his favor.[29] Under the *McDonnell Douglas* test, an employer that proffers no reason for its job action in the face of a proven prima facie case automatically loses.[30] Thus, the proffer and rejection of LNRs as untrue or not credible would seem to put the employer in at least as bad a position, i.e., a losing one, as it would be in if it had not offered any explanation for the job action. The Supreme Court disagreed.

Rather than focus on the procedural aspects of the *McDonnell Douglas* test, the Supreme Court focused on the ultimate question raised by a Title VII disparate treatment discrimination claim: Did the employer intentionally discriminate against the employee?[31] This focus allowed the *Hicks* Court to hold that proof that the employer's LNRs were untrue or not credible allowed, but did not require, a finder of fact to determine that intentional discrimination was more likely than not the cause of the job action.[32] While treating intentional discrimination as a fact question that generally cannot be definitively decided merely by proving that the LNR is untrue appeared uncontroversial to the majority, the implications of the decision were controversial.

The Court's treatment of this style of proof of pretext necessarily required a reexamination and narrowing of the *McDonnell Douglas* test. Rather than treat the *McDonnell Douglas* test as a substantive one or even as a procedural one with substantive implications, the Court determined that the test was purely procedural.[33] The *Hicks* Court limited the import of the *McDonnell Douglas* test to helping make certain that all of the evidence surrounding an indirect intentional discrimination case was presented. The mandatory presumption of discrimination that accompanies proof of a prima facie case is merely a vehicle to coax an LNR from the employer, and meant nothing once the employer articulated the LNR.

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25. These reasons became the LNR sufficient to rebut the presumption of discrimination that flowed from Hicks' proof of a prima facie case. *Id.* at 507.

26. *Id.*

27. *Id.* at 508.

28. *See* Hicks v. St. Mary's Honor Ctr., Div. of Adult Inst. of Dept. of Corr. and Human Res. of State of Mo., 970 F.2d 487 (8th Cir. 1992).

29. *Hicks*, 509 U.S. at 509.

30. This is the effect of the presumption of discrimination. *See id.*

31. *Id.* at 511.

32. *Id.*

33. *Id.* at 509-11.

Once the employer's burden of production was satisfied, the inquiry and all evidence, including the prima facie case and proof of pretext, focused on one question: Did intentional discrimination occur?

Rather than treat the *McDonnell Douglas* test as illuminating, the *Hicks* Court treated it as obscuring the ultimate question of intentional discrimination with intermediate questions that were merely related to, but not dispositive of, the actual question to be answered. Thus, according to the Court, the test was appropriately ignored once the presumption of discrimination was rebutted. Of course, in ignoring the *McDonnell Douglas* test, the Court also ignored the factual implications that flowed from the proof of pretext, never adequately answering how a factfinder can determine, in the face of a prima facie case and proof that the employer's reasons for firing an employee are false, that it is more likely than not that discrimination did not occur.[34] In simplifying the issue to be determined in Title VII indirect proof cases to a single question, the Supreme Court minimized the importance of the structure that had been built around the inquiry in the preceding 20 years and failed to appreciate the complex considerations that swirl around a seemingly simple question. The Court's simplification is somewhat troubling given that the structure it ignored was built in part precisely because determining whether discrimination exists is not an easy task. Of course, this was only the first area in which the Court attempted to simplify discrimination.

B. Simplifying Sex Discrimination

The Supreme Court has simplified sexual harassment and sex discrimination in two recent cases. In *Sundowner Offshore Services Inc. v. Oncale*,[35] the Court determined that whether a sexually harassing course of conduct is actionable depends solely on whether it violates Title VII's prohibition against sex discrimination, not on whether it conforms to previous standards of sexual harassment. In *Burlington Industries Inc. v. Ellerth*,[36] the Court distinguished quid pro quo and hostile work environment harassment solely by reference to the damage flowing from the underlying harassment, rather than other previously important factors.

1. *Sundowner Offshore Services, Inc. v. Oncale*

The question the *Oncale* Court answered is simple: Is same-sex sexual harassment cognizable under Title VII?[37] Its answer was in doubt because of the narrow explanation that courts had given for why sexual harassment constituted

34. The question is not aimed at claiming that the discrimination undoubtedly occurred, just that it more likely than not occurred. *See* Henry L. Chambers, *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 54-59 (1996).

35. 523 U.S. 75 (1998).

36. 524 U.S. 742 (1998).

37. *See Oncale*, 523 U.S. at 76 ("This case presents the question whether workplace harassment can violate Title VII's prohibition against 'discrminat[ion] . . . because of . . . sex,' . . . when the harasser and the harassed employee are of the same sex" (citation omitted)).

sex discrimination.[38] Sexual harassment was thought to be sex-based conduct or conduct based on sexual desire that yielded discriminatory terms or conditions of employment.[39] That sexual harassment focused on sex was no surprise given that Supreme Court sexual harassment cases had tended to involve sex-based conduct or conduct based on sexual desire and the Equal Employment Opportunity Commission's guidelines on sexual harassment.[40] Sexual harassment amounted to sex discrimination because the sex-based conduct ostensibly would not have occurred but for the victim's gender. Since sexual harassment's actionability was so linked to sex-based activity, there was serious dispute regarding whether same-sex conduct, particularly when not involving homosexuals or homosexual desire, could constitute sexual harassment.[41] *Oncale* ended the dispute.

In *Oncale,* the plaintiff alleged that he was sexually harassed and threatened with rape by members of the eight-man crew on the offshore rig on which he worked, and that he quit as a result of the harassment.[42] Two of the alleged harassers had supervisory duties.[43] The Court's ruling was simple and clear: Whenever sexually harassing conduct, including same-sex conduct, constitutes sex discrimination, it is actionable under Title VII.[44]

While the Court's conclusion might seem obvious, it was at odds with some of the courts that had previously opined on the subject.[45] Additionally, the ruling was somewhat surprising given that the Court could have decided *Oncale* on different and narrower grounds. If the sex-based threats suffered by Oncale were taken merely as the harassers' chosen form of gender-neutral harassment rather than a prelude to sexual activity, *Oncale* could have been deemed not to involve sexual harassment, but merely a particularly troubling brand of horseplay not to be redressed under Title VII.[46] Conversely, the Court could have viewed the

38. Interestingly, a number of commentators have suggested that the Court has never given an adequate explanation for why sexual harassment is sex discrimination. *See* Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination,* 34 GA. L. REV. 1591, 1604 n.54 (2000) (citing articles suggesting that the Supreme Court has not articulated precisely why sexual harassment is sex discrimination).

39. *See* Equal Employment Opportunity Commission *Guidelines on Discrimination because of Sex,* 29 C.F.R. 1604.11 (1999) (defining sexual harassment largely in relation to sex or sex-based activities such as sexual advances and requests for sexual favors).

40. The sexual harassment cases on which the Supreme Court had issued opinions involved sex-based behavior. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (involving allegations of unwanted sexual advances and rape); Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993) (involving largely immature behavior and language that focused on sex).

41. *Oncale,* 523 U.S. at 79 (noting problems that courts have had applying Title VII to same sex sexual harassment).

42. I note that the actions are alleged merely because of the procedural posture in which the case reached the court – on appeal of a summary judgment ruling against the plaintiff. *Id.* at 77.

43. *Id.*

44. *Oncale,* 523 U.S. at 79-80 ("Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this include[s] sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements").

45. *Id.* at 79 (noting the different ways courts had viewed the same sex harassment question).

46. Some have suggested that *Oncale* may blur the line between actionable conduct and non-actionable horseplay. *See, e.g.,* Wendy M. Parr, Casenote, *When Does Male-on-Male Horseplay Become Discrimination Because of Sex?: Oncale v. Sundowner Offshore Services, Inc.,* 25 OHIO N.U. L. REV. 87 (1999).

alleged conduct as quintessentially sex-based and thus treated it as sex-based harassment—an already recognized type of sexual harassment – involving homosexual threats made by heterosexuals.

Rather than further define or parse what is sexual harassment, the *Oncale* Court suggested that Title VII was simply written and should be simply applied. The Court eliminated much of the structure surrounding sexual harassment, including the notion that sexual harassment was necessarily about sexual activity.[47] Simply, the Court noted that harassing activity need merely be undertaken because of the employee's sex or gender to constitute potentially actionable sex discrimination.[48] Though the *Oncale* Court arguably broadened the conduct that can be deemed actionable sexual harassment, it also left the decision regarding whether a particular course of sexually harassing conduct would constitute actionable sex discrimination to courts and factfinders, by suggesting that context would determine whether any particular course of conduct would qualify as actionable sexual harassment.[49] As with the Court's decision in *Hicks,* this leaves the factfinder with the task of determining when discrimination has occurred without much guidance regarding how to undertake the task.

2. *Burlington Industries, Inc. v. Ellerth*

The Court's desire for simplification was also apparent in *Burlington Industries, Inc. v. Ellerth.*[50] There, the Court simplified the structure surrounding sexual harassment by redefining how sexual harassment claims should be categorized.[51] Traditionally, sexual harassment has been divided into quid pro quo and hostile work environment harassment.[52] Before *Ellerth*, quid pro quo harassment was generally thought to encompass situations where job benefits, or the avoidance of job detriment, were conditioned on sexual activity.[53] Conversely,

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47. Certainly, some courts and commentators had previously suggested that sexual harassment was about more than sexual conduct. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); L. Camille Hebert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565 (1995).

48. *Oncale*, 523 U.S. at 80 ("But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace").

49. *Id.* at 81-82 (noting that the same behavior may have different implications for sexual harassment depending on the context in which it occurs).

50. 524 U.S. 742.

51. The other large issue in *Ellerth* was the standard of liability that employers face for sexual harassment claims and the affirmative defense that may accompany it. I have largely ignored this aspect of *Ellerth* and another case decided on the same day, Faragher v. City of Boca Raton, 524 U.S. 775 (1998), because that issue focuses less on constructing discrimination and more on what to do once the fact of discrimination has been proven.

52. For a discussion of the distinction between quid pro quo and hostile work environment actions before and after *Ellerth*, *see* Chambers, *supra* note 38, at 1609-33.

53. *See, e.g.*, Molnar v. Booth, 229 F.3d 593, 602 (7th Cir. 2000) (validating a pre-*Ellerth* jury instruction allowing recovery under quid pro quo theory if plaintiff "suffered or was threatened with a materially adverse change in the terms or conditions of her employment as the result of her refusal to comply with the sexual requests and advances"); Hurley v. Atlantic City Police Dept., 174 F.3d 95, 120-

hostile work environment harassment encompassed situations where sexual harassment was so severe or pervasive that it materially altered employees' working conditions.[54] The categorization process is important because employers are vicariously liable for some claims, are vicariously liable subject to an affirmative defense for some claims, and are only liable for their negligence regarding other claims. Thus, *Ellerth* did not expand the reach of Title VII; it altered how to analyze conduct that all would concede is subject to Title VII.

In *Ellerth*, the plaintiff alleged that her supervisor's supervisor made numerous sex-based advances and comments to and about her during her tenure.[55] While she apparently received pay raises and promotions at Burlington, she quit her job after fourteen months alleging that she quit because of the harassing conduct.[56] Thus, *Ellerth* focused on what to do in a situation where sexual harassment may have occurred, but had not caused tangible detriment to the plaintiff's employment. Under the categorization process in place before *Ellerth* was decided, Ellerth's treatment could have been considered to include aspects of both quid pro quo and hostile work environment harassment.[57] Not so after *Ellerth* was decided.

After noting that the distinction between quid pro quo and hostile work environment was somewhat artificial and not particularly useful, the *Ellerth* Court determined that quid pro quo harassment encompassed sexual harassment that caused a tangible job detriment and that hostile work environment harassment encompassed sexual harassment that did not cause a tangible job detriment.[58] The *Ellerth* Court simplified the distinction between quid pro quo and hostile work environment claims with a bright line so clear that there should be little confusion regarding whether or not a quid pro quo claim has been pleaded. For example, claims based on unfulfilled threats, which may have been thought to involve quid pro quo conduct, are now clearly considered hostile work environment claims.[59] While this change may not affect a large number of plaintiffs, it may be of concern, particularly if some unfulfilled threats will not be actionable because they are not considered sufficiently severe or pervasive, as required for hostile work environment harassment to be actionable.[60]

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21 (3rd Cir. 1999)(validating pre-*Ellerth* jury instruction that might have allowed recovery under quid pro quo theory for the mere conditioning of job benefits on sexual activity rather than the imposition of actual job detriment).

54. *See* Chambers, *supra* note 38, at 1616-33 (discussing hostile work environment harassment).

55. *Ellerth*, 524 U.S. at 747-48.

56. Indeed, *Ellerth* alleged constructive discharge as a result of the harassment. However, constructive discharge cases are difficult to prove. *See* Cross v. Chicago School Reform Board of Trustees, 80 F. Supp. 2d 911, 916-17 (N.D. Ill. 2000) (noting how difficult it is to prove a constructive discharge case).

57. The Court of Appeals considered *Ellerth's* claim to have elements of both causes of action. *See Ellerth*, 524 U.S. at 749-50 (noting the Court of Appeals' difficulty in characterizing Ellerth's claim).

58. *Id.* at 752.

59. Ogden v. Wax Works, Inc., 214 F.3d 999, 1006 (8th Cir. 2000) ("Of course, in 'supervisor harassment' cases such as this, the terms 'quid pro quo' and 'hostile environment' remain relevant only to the extent they illustrate the evidentiary distinction between cases involving threats which are carried out and those featuring offensive conduct in general").

60. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)(noting that hostile work

Ellerth, *Oncale* and *Hicks* simplify discrimination or the processes surrounding it. *Ellerth's* import regarding this issue is merely to confirm that the Court continues to desire simplification in Title VII. Since its impact is limited to a narrow area, further discussion of *Ellerth* will be minimal. Conversely, *Hicks* and *Oncale* may substantially alter how race and sex discrimination may be viewed and proven by allowing factfinders more freedom to determine whether discrimination exists. *Hicks* frees factfinders from required findings of discrimination allowing them to determine on their own whether discrimination has really occurred; *Oncale* frees factfinders from strict categorization to allow them to determine on their own what conduct should be deemed discrimination. Discussion now turns to their implications of this restructuring.

II. OPERATIONALIZING SIMPLIFICATION

The Supreme Court's simplifications allow trial and appellate courts to reexamine settled notions of discerning discrimination, paring away concepts that do not precisely fit their particular vision of Title VII. This, of course, is of concern.

A. Interpreting *Hicks*

The *Hicks* Court made three central points respecting the *McDonnell Douglas* test. The first is that the prima facie case is relatively weak.[61] The second is that the mandatory presumption of discrimination is procedural and is rendered completely irrelevant once rebutted.[62] The third is that proof of the falsity of the employer's proffered reasons does not guarantee a verdict for the plaintiff.[63] Each point undermined the *McDonnell Douglas* test and buttressed the notion that intentional discrimination is the only issue in a disparate treatment Title VII case, and that issue is to be decided by the factfinder.

1. The Prima Facie Case

The *Hicks* Court's analysis of the prima facie case can be interpreted to suggest that the prima facie case is always weak.[64] Though the prima facie case is not invariably weak, some courts appear to believe it is.[65] The prima facie case can be constructed in at least two ways - as a checklist of facts that appear relevant to discrimination or as a set of facts aimed directly at supporting an inference of

environment harassment must be severe or pervasive to be actionable).

61. *Hicks*, 509 U.S. at 506 (noting the minimal requirements of the prima facie case).

62. *Id.* at 510-11 ("The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture").

63. *Id.* at 519 ("It is not enough, in other words, to disbelieve [sic] the employer, the factfinder must believe the plaintiff's explanation of intentional discrimination").

64. However, some courts have recognized that some prima facie cases are stronger than others. *See, e.g.*, Lattimore v. Polaroid Corp., 99 F.3d 456, 465 (1st Cir. 1996)(suggesting that strong prima facie cases exist and necessarily suggesting that weak ones exist as well).

65. Dyer v. TW Services, Inc., 973 F. Supp. 981, 984 (W.D. Wash. 1997) (noting that the prima facie case requires minimal proof); Johnson v. Arkansas State Police, 10 F.3d 547, 551 (8th Cir. 1993) (noting that the evidence supporting the prima facie case is minimal).

discrimination.[66] Only when the prima facie case is viewed as a checklist of facts and is constructed without care is a prima facie case necessarily weak.[67] While the *McDonnell Douglas* Court's listing of specific facts that would suffice to prove a prima facie case in that factual setting might lead one to view the prima facie case as a checklist, the appropriate way to view the prima facie case is as a set of facts that creates an inference of discrimination.[68] Indeed, that has been a vision attributed to the *McDonnell Douglas* test.[69]

Courts viewing the prima facie case as any set of facts that supports an inference of discrimination have taken various paths to guarantee that the prima facie case does support an inference of discrimination.[70] Some courts simply explicitly require that the prima facie case support an inference of discrimination.[71] Of course, such a case cannot be dismissed as inconsequential or perfunctory, even if it alone does not necessarily prove that intentional discrimination occurred. Other courts require that the prima facie case include allegations that the plaintiff was treated differently than similarly situated employees of a different race.[72] Such prima facie cases necessarily support an inference of discrimination since differential treatment is the hallmark of a disparate treatment claim.[73] Indeed, this relatively significant amount of proof, if unrebutted, should plainly support a verdict for plaintiff. While the prima facie

66. *McDonnell Douglas*, 411 U.S. 792 (1973).

67. Of course the specific requirements of a prima facie case will be different depending on the context of the case. *See McDonnell Douglas*, 411 U.S. at 802 n.13.

68. *Burdine*, 450 U.S. at 253, 254 (suggesting that prima facie case may require facts that would support inference of discrimination); Plaisance v. Travelers Ins. Co., 880 F. Supp. 798, 808 (N.D. Ga. 1994) ("In evaluating whether a plaintiff has satisfied the initial burden of a prima facie case, the central inquiry is whether the circumstantial evidence presented is sufficient to create an inference, i.e., a rebuttable presumption, that the employer's personnel decision was based on impermissible considerations").

69. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)(suggesting that prima facie case creates inference of discrimination); Murphy v. Housing Auth. of Atl. City, 32 F. Supp. 2d 753, 763-64 (D.N.J. 1999) (suggesting that inference of discrimination arises from prima facie case because the facts supporting a prima facie case allow the presumption that impermissible factors have guided the subject decision).

70. *See* Chambers, *supra* note 34, at 17-18.

71. If the prima facie case cannot support the inference, it does not qualify as a prima facie case. *See* Scarriano v. Municipal Credit Union, 894 F. Supp. 102, 106 (E.D.N.Y. 1995) ("[P]laintiff must establish a prima facie case of discrimination by showing by a preponderance of the evidence the following: 1) he belongs to a protected class; 2) his job performance was satisfactory; 3) he was discharged; and 4) his discharged occurred in circumstances giving rise to an inference of racial discrimination"); Blanks v. Waste Mgmt. of Ark., Inc., 31 F. Supp. 2d 673, 676 (E.D. Ark. 1998) ("A plaintiff may establish a *prima facie* case of discrimination based upon discharge from employment by showing . . . (4) his discharge occurred under circumstances which allow the court to infer unlawful discrimination"); Khan v. Abercrombie & Fitch, Inc., 35 F. Supp. 2d 272, 276 (E.D.N.Y. 1999) ("In this case, to establish a prima facie case of discrimination, plaintiff is required to establish . . . (4) that the decision occurred under circumstances giving rise to an inference of discrimination").

72. *See, e.g.*, Perkins v. Regents of Univ. of Mich., 934 F. Supp. 857, 862 (W.D. Mich. 1996) ("This [prima facie case] requires that the plaintiff establish by a preponderance of the evidence that (1) he was a member of a protected class; (2) he was subject to an adverse employment action; (3) he was qualified for the job; and (4) for the same or similar conduct he was treated differently than similarly situated non-minority employees").

73. *See* Murphy v. Housing Auth. of Atl. City, 32 F. Supp. 2d 753, 763 (D.N.J. 1999) (noting that being treated differently that similarly situated employees defines a disparate treatment violation).

case alone is rarely, if ever, sufficient to prove intentional discrimination conclusively, when it supports an inference of discrimination, it has some factual force.

Though a prima facie case is rarely a proven discrimination case, when substantial evidence supports it, it can provide a factual background in which discrimination can be inferred even when the employer has a plausible defense. Unfortunately, the value of the prima facie case is somewhat unclear after the *Hicks* simplification precisely because the *Hicks* Court did not explain that a prima facie case may retain factual force in the face of the articulation of an LNR. By deeming intentional discrimination the only important issue, the Court suggests that the prima facie case is something of a necessary distraction. This allows trial courts to view the prima facie case in various appropriate and inappropriate ways, and provides the opportunity for courts to refashion the contents of specific prima facie cases.[74]

De-emphasizing or incorrectly defining the proper role of the prima facie case can result in inappropriate evidence being required to support a prima facie case. The importance the *Hicks* Court places on the ultimate question of intentional discrimination can suggest that evidence supporting a prima facie case should mirror evidence that would support a proven intentional discrimination case, i.e., that some proof of intentional discrimination is necessary to prove a prima facie case. This conflation of the prima facie case with the ultimate burden of proof may confuse courts into requiring that pretext or other evidence be presented as part of the prima facie case. The suggestion that prima facie cases are weak, and that quasi-direct proof of intentional discrimination must be strong to support a verdict, can create an impression that culminates in courts requiring much stronger evidence than should be required for a plaintiff to avoid summary judgment or to win a verdict.[75] Similar problems arise from the *Hicks* Court's

74. *Iadimarco v. Runyon*, 190 F.3d 151 (3rd Cir. 1999), is an example of this phenomenon. In *Iadimarco*, the court had to determine what set of facts would suffice as a prima facie case in a so-called reverse discrimination case. Though the court eventually required the same set of facts for a reverse discrimination prima facie case as for a standard discrimination prima facie case, it did so for the wrong reasons, appearing to suggest that any particular set of facts, whether applied to a situation involving a minority plaintiff or a non-minority plaintiff, yields the same inferences. *Id.* at 160 (rejecting different prima facie test for reverse discrimination cases than for regular discrimination cases). Since, the content of the prima facie case that the *Iadimarco* Court required was sufficient to support an inference of discrimination in any discrimination case, its decision was ultimately sound. *Id.* at 161 (noting that the test for both reverse and regular discrimination cases required that the employer "treat[ ] some people less favorably than others based upon a trait that is protected under Title VII"). However, the court's reasoning seems to ignore the recognition implicit in *McDonnell Douglas* that racial discrimination against minorities is a background feature of the American workplace. Since there is little reason to believe that racial discrimination against non-minorities is a background feature of the American workplace, the facts supporting a regular discrimination case might be insufficient to support an inference of discrimination in a reverse discrimination case. Presumably, this is why some courts that had analyzed the issue prior to the *Iadimarco* court had required that reverse discrimination plaintiffs prove additional background factors that would make inferring discrimination from the facts underlying a regular prima facie case reasonable in a reverse discrimination case.

75. The district court decision reversed in *Johnson v. Arkansas State Police*, 10 F.3d 547 (8th Cir. 1993), may be an example of this. In *Johnson*, the plaintiff gained a reversal of the trial court's verdict, which was based on the court's belief that the plaintiff had not proved a prima facie case. *Id.* at 550. While plaintiff may not have carried his ultimate burden in the case, he had demonstrated that

treatment of the presumption of discrimination flowing from a proven prima facie case.

2. The Presumption of Discrimination and LNRs

The *Hicks* Court's single-minded focus on the question of intentional discrimination has devalued the steps of the *McDonnell Douglas* test not directly aimed at that question. The import of the presumption of discrimination is a casualty of this approach. Rather than treating the presumption of discrimination as a stronger version of the inference of discrimination created by the prima facie case, the Supreme Court treats the presumption as nothing more than a procedural mechanism that is not substantively connected with the prima facie case and which is completely negated by the articulation of the LNR. [76] One danger in treating the presumption in this way is that it may appear to give the LNR more credit than it deserves.

The power to rebut the presumption of discrimination given to the articulated, but unproven, LNR may suggest that a court can ignore the factual import of the prima facie case and render summary judgment in favor of a defendant whenever an LNR has been presented and proof of intentional discrimination is lacking.[77] Of course, to the extent that a factfinder generally remains free to disbelieve an employer's LNR, it is unclear that it would ever be

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similarly situated officers of a different race were treated differently than he. *Id.* at 553. Given that this unquestionably can support an inference of discrimination and thus establishes a prima facie case, the appellate court's suggestion that the district court appeared to require that proof necessary to prevail be presented as part of the prima facie case appears apt. The requirement that pretext evidence be presented as part of the prima facie case likely stemmed from the belief that the ostensibly weak prima facie needed more power to support even an inference of discrimination. *Id.* at 551 ("The threshold of proof necessary to make a prima facie case is minimal and the district court improperly conflated the prima facie case with the ultimate issue in this Title VII case.") (citing Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)). Slightly altered, this notion may explain what concerned the *Iadimarco* court. *See Iadimarco*, 190 F.3d at 163 (suggesting that requiring that reverse discrimination plaintiffs prove background factors that would support an inference of discrimination may force such plaintiffs present pretext evidence as a part of their prima facie case).

76. *See* Terry v. Electronics Data Sys. Corp., 940 F. Supp. 378 (D. Mass. 1996), demonstrates how courts may interpret this aspect of *St. Mary's*. In *Terry*, plaintiff charged that the employer's refusal to hire him was based on discrimination. Plaintiff proved a prima facie case, demonstrating that he was qualified for the job because he had been performing it satisfactorily on a temporary basis before he applied for the permanent job. The employer countered that plaintiff was not hired permanently because a background check uncovered a delinquent student loan that the plaintiff could not adequately explain. Plaintiff's only evidence of pretext was that the person who ultimately refused to employ him had been condescending to him on one occasion and used an uncomfortable strained tone of voice when telling plaintiff he would not be permanently employed. *Id.* at 380. Though the plaintiff had proven a prima facie case, it was rendered meaningless by the rebuttal of the presumption. As the court noted, once the presumption was rebutted, the prima facie case yielded "a possible inference of discrimination should the fact finder find the reason advanced by the defendant to be pretextual." *Id.* at 384 (quoting WILLIAM G. YOUNG, ET AL., MASSACHUSETTS EVIDENCE, 19 Mass. Prac. Series 301.12 (West Pub. Co. 1997)). However, it should be clear that this conclusion is only appropriate because of the weakness of evidence supporting this plaintiff's prima facie case. Without proof of pretext, the plaintiff was "left with a circumstantial case so weak that no reasonable factfinder could, without speculation, conclude that he was the victim of racial discrimination." *Id.* at 387.

77. The possibility that the prima facie case may retain factual force suggests that in pretext-only jurisdictions, granting summary judgment would almost always be inappropriate. *Cf.* Lattimore v. Polaroid Corp., 99 F.3d 456, 465 (1st Cir. 1996) ("Since Massachusetts is a 'pretext only' jurisdiction, proof of pretext is sufficient to warrant a finding of discrimination under Chapter 151B").

appropriate to grant summary judgment to an employer in the face of a proven prima facie case. Nonetheless, in such a situation, precisely how much proof of pretext would be necessary to avoid summary judgment in such a situation is unclear.

Conversely, a court's cognizance that the rebuttal of the presumption of discrimination may require that a plaintiff present extremely strong evidence to prevail may lead that court to treat the employer's LNR too cavalierly. For example, in *Bates v. Greyhound Lines, Inc.*,[78] the court noted that if a factfinder finds no evidence to support the employer's claim that the LNR is the real reason for the job action, the court need not deem the LNR sufficient to rebut the presumption,.[79] In *Bates*, the plaintiff was fired ostensibly for mishandling a cash deposit.[80] However, problems with the safe into which the plaintiff placed the cash deposit and testimony by another employee that the deposit was handled appropriately suggested that the employer could not have really believed its proffered reason for firing plaintiff, thus allowing the *Bates* court to question whether the LNR was the real reason for the firing.[81] The *Bates* Court noted that the articulation of a legitimate, nondiscriminatory reason would not rebut the prima facie case if the employer did not actually rely on the reason in taking the job action[82] - a sensible notion supported in part by Supreme Court precedent.[83] Nevertheless, it conflicts somewhat with the general notion of pretext and *Hicks*.

The *Bates* Court's position is understandable given that *McDonnell Douglas* and its progeny seem to suggest that an employer that literally lies about its LNR should lose. Since the *Hicks* Court's analysis of proof of pretext makes a failure to rebut the mandatory presumption of discrimination the only way to effectuate a certain victory for a plaintiff, the *Bates* decision may merely reflect the court's belief that the plaintiff had an airtight case that the plaintiff deserved to win. However, *Bates* should have been resolved based on the factfinder's evaluation of pretext rather than on the employer's ostensible failure to rebut the presumption of discrimination.

A fabricated LNR is pretextual because it necessarily obscures the real reason plaintiff was fired. For example, one who is ostensibly fired for excessive tardiness could prove that the reason was pretext either because she was never late or because excessive tardiness alone is not an adequate ground for firing an employee. Though plaintiff's supposed tardiness would be pretext, it is clear that it would rebut the mandatory presumption stemming from proof of her prima facie case. That the employer did not and could not present evidence that the

78. 81 F. Supp. 2d 1292 (N.D. Fla. 2000).
79. *Id.* at 1300-02.
80. *Id.*
81. *Id.*
82. *Id.*
83. The fact that a theoretical explanation may exist is not sufficient to rebut the presumption of discrimination. *See Burdine*, 450 U.S. at 255 n.9 ("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").

proffered reason actually supported the firing appears irrelevant.[84] Indeed, in *Hicks,* the possible reason eventually given by the district court for plaintiff's termination and credited by the Supreme Court - a possibly non-racial vendetta against the plaintiff-employee - was denied by the person who fired the plaintiff.[85]

The *Bates* Court as well as those courts that grant summary judgment in the face of proven prima facie cases seem to miss the point of the *Hicks* Court's elimination of the presumption of discrimination after the articulation of an LNR - to make the issue of discrimination a fact question.[86] However, the confusion with respect to LNRs and the presumption of discrimination stems directly from the *Hicks* Court focus on simplicity and its failure to suggest explicitly that an LNR that rebuts the mandatory presumption of discrimination need not be treated as true, and even if believed will rarely eliminate the possibility that a reasonable inference of discrimination may flow from a proven prima facie case.[87]

3. Proof of Pretext

Not surprisingly, the *Hicks* Court's view of pretext allows courts to take varying views of the evidence that is required before a plaintiff may prevail. A court focusing on the *Hicks* Court's determination that pretext alone may support a verdict for plaintiff may legitimately direct a verdict for plaintiff in the face of unrebutted proof of pretext.[88] Conversely, given the Court's determination that pretext alone does not require a verdict in plaintiff's favor, problems may arise even when courts want to give proof of pretext vitality. For example in *Lattimore v. Polaroid Corp.*,[89] the court noted: "When the prima facie case is very strong and disbelief of the proffered reason provides cause to believe that the employer was motivated by a discriminatory purpose, proof of pretext 'may' be sufficient [to support a verdict]."[90] This reading is correct, but narrow. It suggests that a

84. This should be distinguished from a situation where the employer presents a reason that is eventually shown to be illegitimate or discriminatory. In that situation, the reason should not suffice to rebut the prima facie case.

85. *Hicks,* 509 U.S. at 508 (citing the district court opinion in *Hicks* for the proposition that non-racial, personal vendetta caused the firing). *See also id.* at 543 (Souter, J., dissenting) ("[T]he person who allegedly conducted this crusade denied at trial any personal difficulties between himself and Hicks").

86. *Bates,* 81 F. Supp. 2d at 1303 ("The jury determined that, but for her race, Ms. Bates would not have been fired. That was a reasonable determination on this record, well within the jury's province").

87. The lack of close analysis of what a fact finder can infer from evidence can yield troubling implications. In *Buggs v. Elgin, Joliet & E. Ry. Co.*, 824 F. Supp. 842 (N.D. Ind. 1993), the court noted that a mistaken belief that causes plaintiff to be terminated does not prove discriminatory intent - the prerequisite to a viable Title VII suit. *Id.* at 847. However, a mistaken belief posed as a reason for a termination can be challenged if the employer has never mistakenly fired a non-minority employee on such grounds. Indeed, one may not need additional proof to infer intentional discrimination if the mistaken belief is deemed too convenient. If an employer fired a black employee under the mistaken belief that he was not competent, some factfinders might be comfortable inferring that the real reason for the firing was racial discrimination even without additional proof. *Id.*

88. *Hicks,* 509 U.S. 502 (1993).

89. 99 F.3d 456 (1st Cir. 1996).

90. *Id.* at 465. *See also* Plaisance v. Travelers Ins. Co., 880 F. Supp. 798, 807 (N.D. Ga. 1994) ("If the trier of fact rejects defendant's proffered reason as incredible, this rejection, coupled with elements of plaintiff's prima facie case, may alone support a finding of pretext")(citing St. Mary's Honor Ctr v.

standard prima facie case coupled with proof of pretext may not be sufficient to sustain a verdict in some situations.

This is hardly a surprise given the *Hicks* Court's clear suggestion that proof of pretext is distinct from proof of discrimination.[91] With this distinction, the *Hicks* Court invites courts to require proof of discrimination before determining that plaintiffs have made a submissible case.[92] Thus, a court focusing on the distinction might appear to legitimately require direct evidence of discrimination in the pretext stage, with the lack of substantial proof of discrimination yielding a verdict for the employer.[93] Some courts appear to require independent evidence of intentional discrimination before being willing to grant verdicts to plaintiffs.[94]

Hicks, 509 U.S. 502, 509 (1993)).

91. This distinction has not been lost on courts hearing race discrimination cases. *See, e.g.,* Perkins v. School Board of Pinellas County, 902 F.Supp. 1503, 1509 (M.D. Fla. 1995)("[T]hat employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that Plaintiff's proffered reason of race is correct")(citing St. Mary's Honor Ctr v. Hicks, 509 U.S. 502 (1993)); Youmans v. Manna Inc, 33 F. Supp. 2d 462, 465 (D.S.C. 1998)(appearing to distinguish proof of pretext from proof that race was the real reason for the job action).

92. Indeed, in *Buggs v. Elgin, Joliet & Eastern Railway Co.,* 824 F. Supp. 842 (N.D. Ind. 1993), a case decided less than two months before *Hicks*, a district court made clear that when proof of pretext was not directly linked to race, such proof might not be sufficient to avoid summary judgment. In response to the employer's LNRs, plaintiff recited a lengthy list of allegations that he had been mistreated by the company. If the employee's allegations were believed, he was treated extraordinarily poorly while doing his job well. While the allegations may not explicitly rebut each of the LNRs, they detail a course of conduct that suggest that an African-American employee was unfairly targeted for termination. That alone would seem to plaintiff to survive summary judgment given that the *McDonnell Douglas* test allows a plaintiff to prove that race discrimination was a better explanation for the job action than the employer's proffered reasons, even when such reasons have not been completely discredited. Nonetheless, the *Buggs* court made clear that the inability to connect the allegations directly to race ended the litigation. *See id.* at 846-47 (noting that the incidents were not connected to race and "[did] not attack the articulated legitimate nondiscriminatory motive as a pretext or show that it is unworthy of credence"). Simply, the court refused to entertain the notion that treating an African-American employee in a way that it appears that no one else at the company was treated might support an inference of discrimination. *Id.*

93. *See, e.g.,* Youmans v. Manna Inc, 33 F. Supp. 2d 462, 465 (D.S.C. 1998)("Not only has Plaintiff failed to show that Defendant"s reason for 'terminating' him was pretextual but he also has produced no evidence to support his claim that his race was the real reason for his 'termination.' Thus, there can be no inference of intentional discrimination based on Plaintiff's race"). Unfortunately, it is unclear exactly what the court meant. If the suggestion is that quasi-direct evidence that race is the real reason for the job action is necessary to sustain an inference of discrimination, this case is deeply flawed. That a plaintiff proves that the reasons given are untrue, when added to the prima facie case, would seem to be indirect proof that race was the real reason for the job action to sustain an inference of discrimination. Conversely, it the court merely meant that either proof that the proffered reasons are untrue or proof that it is more likely than not that discrimination caused the action is needed, then the case reasonably flows from *Hicks*.

94. *See, e.g.,* Lattimore v. Polaroid Corp., 99 F.3d 456, 467 (1st Cir. 1996)("Title VII requires proof of something more than pretext. It also requires proof of discriminatory intent"). The requirement of a direct link between a plaintiff's claims and race appears clear in *Dyer v. TW Services, Inc.*, 973 F. Supp. 981, 984 (W.D. Wash. 1997). There, in response to allegations that he did not perform adequately, the plaintiff claimed that the employer treated him unfairly. The plaintiff's allegations ranged from complaints about possibly unfair treatment to being forced to be trained by an individual "who management knew 'had problems working with persons of color.'" *Id.* The court allowed that plaintiff's allegations suggested possible poor treatment, but appeared unrelated to race, as plaintiff "offered no specific instances where similarly situated employees of other races were treated differently for engaging in conduct similar to Mr. Dyer's." *Id.* The court declined to link the poor treatment to race, without specific proof to that effect. *Id.* ("Mr. Dyer also fails to offer any evidence that would suggest a causal connection between the events that transpired at Denny's and his status as an African American").

While this might appear to be supported by the *Hicks* Court's logic, the opinion does not support this renaissance of the pretext-plus vision.[95] Of course, requiring direct evidence of discrimination would be strange given that a plaintiff with direct evidence of discrimination need not use the *McDonnell Douglas* structure.[96]

Unfortunately, the result of the *Hicks* Court's streamlining of the *McDonnell Douglas* test is confusion regarding what proof of pretext implies. Indeed, the Court's dismissal of the importance of proof of pretext has necessitated the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*,[97] where defendants argued that proof of pretext alone would not allow the factfinder to make the leap that it was more likely than not that discrimination occurred. While the *Reeves* Court, like the *Hicks* Court, made clear that proof of pretext would generally be sufficient to sustain a verdict, it did not rule out the possibility that a directed verdict in the face of proof of pretext might be appropriate in some cases.[98] This still leaves the value of proof of pretext in a confused state.

The *Hicks* Court also leaves the *McDonnell Douglas* structure in a somewhat confused state. By undervaluing the *McDonnell Douglas* structure and its implications, the *Hicks* Court suggests that courts view evidence of pretext more skeptically than they should. Proving that an employer's LNRs are untrue is not easy. Given that LNRs are provided by the employer presumably to fit the contours of its case and are vigorously defended by its counsel, convincing a factfinder that the LNRs are untrue or not credible is difficult and should be treated as powerful evidence of discrimination when it occurs. A plaintiff's showing of pretext should always be sufficient to avoid a directed verdict against a plaintiff and should generally yield a verdict for the plaintiff.

B. Interpreting *Oncale*

Ultimately, the *Oncale* decision may muddle sex discrimination jurisprudence as much as it clarified same sex harassment.[99] By noting that any harassment, including same sex harassment, that amounts to sex discrimination will be

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95. *See* Reeves v. Sanderson Plumbing Products, 120 S. Ct. 2097 (2000).

96. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)(stating that the McDonnell Douglas test is inapplicable in direct evidence cases). Even in situations where a plaintiff's evidence looks similar to direct evidence of discrimination, it may be used to support pretext and the indirect method of proof rather than be considered as proof of discrimination. *See, e.g.*, Copley v. Bax Global, Inc., 80 F. Supp. 2d 1342, 1351 (S.D. Fla. 2000)("Although Montgomery's statements to the effect that he did not believe 'a blue-eyed blond-haired fellow' could effectively perform Plaintiff's job and that Defendant needed a 'Latin' in the position 'to achieve any level of success' are not direct evidence of discrimination, they are significant evidence of pretext. When these statements are considered in conjunction with the otherwise benign facts that (1) Plaintiff was terminated soon after Montgomery became president and (2) Plaintiff was immediately replaced with an individual of Hispanic descent, the evidence of pretext is strengthened"). Fortunately, the defendant's motion for summary judgment was denied. *See* 80 F. Supp. 2d at 1351.

97. 120 S. Ct. 2097 (2000).

98. *Id.* at 2109.

99. *See* Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("The Supreme Court has now cleared away much of the doctrinal underbrush that previously vexed courts confronting same-sex harassment claims. There is no longer any doubt that Title VII reaches claims of same-sex harassment").

actionable under Title VII, *Oncale* essentially restates Title VII.[100] In determining that same-sex harassment is context-driven, the *Oncale* Court implicitly suggests that all sex discrimination may be context-driven. This invites trial and appellate courts to conceive any particular course of conduct as sex discrimination or not at their discretion.[101] Thus, *Oncale* either expands or limits Title VII's reach depending on how individual courts interpret what qualifies as sex discrimination. Whether a court takes an expansive or a restrictive view of what constitutes sex discrimination, *Oncale* will ostensibly support that court's position.

An expansive view of sex discrimination encompasses the notion that the *Oncale* Court's recognition of same-sex harassment as sex discrimination necessarily broadens the scope of sex discrimination to include all conduct recognized as sex discrimination before *Oncale* and gender-related harassment claims that have been denied as non-cognizable in the past.[102] For example, nonsexual conduct flowing from gender hostility that may not have qualified as harassment before *Oncale* will qualify as sexual harassment after *Oncale.*[103] Some courts have acted on this suggestion, arguably expanding the sexual harassment cause of action.[104] A restrictive view of sex discrimination encompasses the notion that *Oncale* may limit sex discrimination claims.[105] An immediate concern is that proof of sexual harassment claims may be limited to the style of proof suggested in *Oncale.*[106] A long-term concern is that all sex discrimination claims, including those that have been traditionally accepted as sex discrimination claims, could be reevaluated based on limiting concepts underlying *Oncale.*[107] Both expansive and restrictive visions of sex discrimination have emerged as courts have begun to apply the Court's simplified vision of sexual harassment to same sex and sexual orientation harassment claims.

Suggesting a somewhat expansive vision of sex discrimination and

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100. *Oncale*, 523 U.S. 75 (1998).

101. *Id.*

102. *See, e.g.*, Aguilar v. Henderson, No. Civ. AMD98-3312, 2000 WL 462611 at *1 (D. Md. Apr. 5, 2000) ("Unquestionably, the rights and remedies provided by Title VII encompass protection from a hostile work environment based on gender"). Some courts have made clear that Title VII is about gender discrimination and nothing more. *See, e.g.*, Raum v. Laidlaw Ltd., 173 F.3d 845, (2nd Cir. 1999) ("In sum, while Johnston's alleged remarks may have been crass and offensive, they were not predicated on Raum's gender and therefore not actionable under Title VII").

103. *Oncale*, 523 U.S. at 80-81.

104. *See, e.g.*, O'Shea v. Yellow Tech. Services, Inc., 185 F.3d 1093, 1098-99 (10th Cir. 1999) (noting that derogatory comments regarding women can suggest gender or sexual animus that can properly support a hostile work environment claim).

105. This might also restrict the emergence of new harassment causes of action. In *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000), the court held that sexually harassing conduct aimed at both male and female employees would not support a sexual harassment claim. Even though the conduct might have been sufficient to support such a claim had it occurred to either employee alone, the equal opportunity harasser's conduct made clear that the style of conduct was not based on gender. The court engages in a discussion of *Oncale's* requirement of discrimination because of sex to suggest that differential treatment, not merely sex-based treatment, is necessary for a Title VII claim. *See* 211 F.3d at 402-04.

106. *See supra* Part I.B.1.

107. Given how the *Hicks* decision necessarily allows the reexamination of traditional discrimination principles, this concern is not far-fetched.

application of *Oncale*, the court in *Fry v. Holmes Freight Lines, Inc.*,[108] a same-sex harassment case, focused on the ultimate question of sex discrimination rather than on intermediate questions relating to the sexual orientation of the harassers. In *Fry*, the male plaintiff alleged that he was harassed by several male co-workers, including being physically touched and verbally assaulted.[109] The employer argued that plaintiff's failure to suggest or prove that those who harassed him were homosexual was fatal to his case.[110] The court disagreed, noting that a plaintiff need only present sufficient evidence for a fact finder to infer that the plaintiff was treated differently because of gender to avoid summary judgment.[111] Thus, even when harassment is sex-based and a claim would seem to require the invocation of homosexual tendencies to prove gender discrimination or differential treatment on the basis of gender, proof of the harassers' homosexuality is not required.[112] Of course, this result is justified under *Oncale*, where similar conduct occurred and no such requirement existed.[113]

The *Fry* court simply asked whether an inference of gender or sex discrimination could flow from the conduct the plaintiff endured, implicitly ignoring the sexual aspects of the case. This approach validates the notion that while sex-based harassment will not always be actionable,[114] it will be whenever it amounts to sex discrimination.[115] This approach is faithful to *Oncale* because it labels the conduct as sex discrimination or not, rather than as same sex harassment or not. However, this approach can be problematic in other cases. For example, if a course of conduct can be explicitly labeled sexual orientation discrimination, other issues arise.

While sex discrimination is actionable, sexual orientation discrimination has not been.[116] However, if a particular course of sexual orientation discrimination constitutes sex discrimination, it will presumably be actionable. Thus, plaintiffs pressing claims that seem to sound in sexual orientation discrimination must argue that differential treatment based on homosexuality or perceived homosexuality

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108. 72 F. Supp. 2d 1074 (W.D. Mo. 1999).

109. *Id* at 1076-77 (detailing harassing incidents).

110. *Id.* at 1078-79.

111. *Id.* at 1079. *See also* Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("*Oncale* also demonstrates that there is no singular means of establishing the discriminatory aspect of sexual harassment. So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination"). Of course, even this language allows courts to limit evidence to a relatively narrow evidentiary path if the court sees fit.

112. *Fry*, 72 F. Supp. 2d at 1078-79 ("Holmes misconstrues the level of factual support required for plaintiff to defeat summary judgment. Fry does not have to prove that his harassers are homosexual or investigate their sexual history to establish he was discriminated against because he is a man").

113. *Oncale*, 523 U.S. at 76-77.

114. *See, e.g.*, Mims v. Carrier Corp., 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) ("There is no arguable legal basis for contending that perceived sexual preference merits protection merely because it concerns sex. The clear meaning of 'sex' under Title VII is not 'intercourse,' but 'gender,' and Mims does not allege that he was discriminated against because of his gender").

115. *See, e.g.*, Bacon v. Art Inst. of Chi., 6 F. Supp. 2d 762 (N.D. Ill. 1998) (noting that allegations of same sex sex-based conduct, including rubbing against a co-worker and touching him, was sufficient evidence that the plaintiff was "harassed 'because of' his gender" to survive summary judgment).

116. *See, e.g.*, Schmedding v. Tnemec Co., Inc., 187 F.3d 862, 865 (8th Cir. 1999).

qualifies as sex discrimination in their case.[117] *Oncale's* simplification allows plaintiffs to ignore whether their claim is a best deemed a sexual orientation discrimination claim and allows those plaintiffs to assert that sex discrimination has occurred. Some courts have been favorably disposed to the argument that harassment on the basis of perceived homosexuality or actual homosexuality yields gender or sex discrimination; others have not.[118] Interestingly, the argument that sexual orientation discrimination may always be sex discrimination may be convincing if sexual orientation harassment generally is about gender roles and gender norms,[119] given that discrimination on the basis of gender norms and gender roles unquestionably constitutes sex discrimination.[120]

Simonton v. Runyon,[121] analyzes this sexual orientation discrimination conundrum. After noting that pure sexual orientation discrimination - even of the most despicable sort - is not cognizable under Title VII,[122] the court discusses the interaction of sexual orientation discrimination and same sex harassment.[123] Though it indicated that any course of conduct - whether it can be deemed a sexual orientation discrimination claim or not - can support a Title VII claim if it supports an inference of sex discrimination, the Court evaluated the alleged course of conduct with reference to a narrow vision of what constitutes proof of sex discrimination.[124] It asked whether the plaintiff could show specifically that women in plaintiff's workplace were treated differently than the plaintiff, rather than allowing the factfinder to infer that women were treated differently or would have been treated differently had they been subject to harassment.[125] While this method is one way to prove discrimination, it has not been deemed the only way

117. *Id.* (recognizing that sexual harassment claim styled as a sexual orientation harassment claim is not cognizable under Title VII).

118. *See, e.g., Schmedding,* 187 F.3d at 865 (holding that the claim that co-workers treated him as if he were homosexual to diminish his masculinity was sufficient to state a claim for sex discrimination); Fry v. Holmes Freight Lines, Inc., 72 F. Supp. 2d 1074 (W.D. Mo. 1999); *see also* Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000) (involving Title IX claim by student harassed because of perceived homosexuality).

119. *See also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (noting plaintiff's argument that harassment because of homosexuality was sex-plus discrimination when only homosexual men were targeted for abuse).

120. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989). *See also Higgins,* 194 F.3d at 259 (discussing sex stereotypes and their relationship to homosexual harassment).

121. 232 F.3d 33, 37 (2d Cir. 2000).

122. *Id.* at 36 ("Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII"). Other courts have echoed this. In *Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252 (1st Cir. 1999), the plaintiff suffered in a work environment permeated with hostility toward homosexuality. Though the workplace was quite literally hostile to the homosexual plaintiff, the court determined that discrimination on the basis of homosexuality was not covered by Title VII and rested its grant of summary judgment against plaintiff on the notion that a Title VII violation is about members of one gender being treated differently than members of the other gender. *Id* at 258-59 .

123. *Simonton,* 232 F.3d at 36.

124. *Id.*

125. *Id.* at 37 ("But since Simonton does not offer 'direct comparative evidence about how the alleged harasser treated members of both sexes in [his] mixed-sex workplace,' and does not allege a basis for inferring gender-based animus, we are unable to infer that the alleged conduct would not have been directed at a woman").

to prove discrimination.[126] Though plaintiff lost, the court reiterated that whenever conduct amounting to sexual orientation discrimination also amounts to sex discrimination, it will be cognizable.[127] By implicitly endorsing an open approach to proving sex discrimination but limiting proof to a narrow evidentiary channel, the *Simonton* court demonstrated the expansive and restrictive ways that a court can use *Oncale.*

Other courts have also limited how a plaintiff may prove a sexual harassment case involving suggestions or allegations of homosexuality. For example, in *Mims v. Carrier Corp.*,[128] plaintiff alleged he was harassed by a supervisor and co-worker who suggested that he was engaged in homosexual conduct with another employee.[129] The plaintiff lost after the court determined that plaintiff had not presented evidence addressing the specific ways the *Oncale* Court mentioned that a plaintiff could prove sex discrimination - that the harasser was motivated by sexual desire, that the harasser was motivated by gender hostility or that members of other genders were treated differently than plaintiff.[130] While proving sex discrimination outside of these parameters might be difficult, specifically limiting proof of discrimination to these methods is inappropriately restrictive.[131] One danger of this approach is that the style of evidence admitted may be limited to that which is directly relevant to one of these methods of proof. This would necessarily restrict how a plaintiff could create the inference of discrimination and prove its case.

To be clear, the suggestion is not that *Oncale* will necessarily yield particularly problematic cases; indeed, it may not. The cases above allow for varied ways to assert and prove sex discrimination. However, that fact suggests that the Supreme Court rulings allow an ad hoc, no-rules approach that affords different courts the ability to make very different decisions regarding the existence and analysis of sex discrimination cases.[132]

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126. In sex-plus cases, there does not seem to be a strict requirement that plaintiff prove that members of the opposite gender were specifically treated poorly. In *Price Waterhouse v. Hopkins* the court merely asked if Hopkins had been sexually stereotyped, not whether she alone had been sex stereotyped. 490 U.S. 228 (1989).

127. *Simonton*, 232 F.3d at 37(noting the possibility of a Title VII claim when sexual orientation discrimination is based on sexual stereotypes); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Thus, under *Price Waterhouse*, 'sex' under Title VII encompasses both sex - that is, the biological differences between men and women - *and* gender." Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("In other words, just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity").

128. 88 F. Supp. 2d 706 (E.D. Tex. 2000).

129. *Id.* at 710.

130. *Id.* at 714-15.

131. *See* Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) (commenting on plaintiff's failure to conform his proof to the ways suggested in *Oncale*: "Yet we discern nothing in the Supreme Court's decision indicating that the examples it provided were meant to be exhaustive rather than instructive. The Court's focus was on what the plaintiff must ultimately prove rather than on the methods of doing so").

132. This can be seen when the implications of Burlington Industries, Inc. v.

Ellerth are played out. The biggest implication of the Court's simplification in *Ellerth* is rather clear - unfulfilled threats may only support hostile work environment harassment, see Smith v. County of Culpeper, 191 F.3d 448, 1999 WL 100017, *1 (4th Cir. Sept. 9, 1999)("Even assuming that Smith properly raised her quid pro quo claim before the district court, Appellees were entitled to summary judgment because she failed to adduce any facts showing that Coleman fulfilled the alleged threat to reduce her salary"), though some courts still seem to view threats as implicating quid pro quo harassment. *See* DeClue v. Central Illinois Light Co., 223 F.3d 434, 437 (7th Cir. 2000)("Sexual harassment is the form of sex discrimination in the terms or conditions of employment that consists of efforts either by coworkers or supervisors to make the workplace intolerable or at least severely and discriminatorily uncongenial to woman ('hostile work environment' harassment), and also efforts (normally by supervisors) to extract sexual favors by threats or promises ('quid pro quo' harassment)"). However, courts may interpret the rule regarding unfulfilled threats in different ways. If credible, but unfulfilled, threats are viewed as strong proof of hostile work environment discrimination, their treatment may not affect a plaintiff's ability to recover for sexual harassment. Conversely, some courts may determine that because unfulfilled threats may only support a hostile work environment action, the importance of unfulfilled threats has diminished. This would allow those courts to treat individual threats with as little meaning as individual acts of hostile work environment harassment, thereby diminishing their impact. *See* Ponticelli v. Zurich American Ins. Group, 16 F. Supp. 2d 414, 428 (S.D.N.Y. 1998)("According to Ponticelli, she was nonetheless subjected to threats – for example, the threatened poor performance review. Yet no review was given. Ponticelli contends that while the threats were never acted upon, she continued to endure them and lived with the anticipation of their being realized. Assuming *arguendo* that Callas did make sexual advances toward Ponticelli, a threat of a tangible job detriment is insufficient to constitute *quid pro quo* sexual harassment"). The *Ponticelli* court's skepticism of plaintiff's claims allowed it to rely on the distinction between quid pro quo and hostile work environment harassment to disregard the value of the alleged threats. Of course, even if courts treat threats as seriously as they should, the threats must be severe or pervasive to support Title VII liability. *See* Anderson v. Dillard's Inc., 109 F. Supp. 2d 1116, 1122 (E.D. Mo. 2000)("Since Plaintiff's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct"). That could seriously impact how successful future sexual harassment plaintiffs will be. For example, one court has lumped unfulfilled threats generally with other hostile work environment conduct. *See* Ellis v. Director, Central Intelligence Agency, 191 F.3d 447, 1999 WL 704692 (4th Cir. Sept. 10, 1999)("Distinguished from quid pro quo harassment, hostile work environment sexual harassment focuses on general improprieties such as 'unfulfilled threats'"). This treatment of unfulfilled threats cheapens their significance. Given that a credible threat from a supervisor may

III. POSSIBLE IMPLICATIONS OF SIMPLIFICATION

That simplification can be useful hardly matters if it does not fix the problem it is supposed to resolve. Title VII is supposed to remedy intentional discrimination. The Supreme Court's decisions in *Hicks* and *Oncale* tell courts to find and remedy discrimination by reading Title VII simply. However, such direction does not help remedy discrimination if that process obscures a fact finder's ability to discern discrimination.

In simplifying the discrimination inquiry in *Hicks,* the Supreme Court eliminated the implications of the *McDonnell Douglas* test while leaving that structure intact; in *Oncale*, the Court eliminated the structure. The broader implication of simplification is to allow courts and factfinders freedom in resolving the fact question of discrimination on which Title VII cases turn. As sensible as this may seem, the history of Title VII litigation suggests that giving factfinders a free hand in determining what discrimination is may not be the best approach to remedying discrimination.[133]

Courts' and factfinders' freer hands to define discrimination may have different implications for race discrimination than for sex discrimination. The reexamination of race and sex discrimination that may occur will likely be structured around or limited by existing Supreme Court analysis. Because the Supreme Court's vision of race discrimination is less nuanced than its vision of sex discrimination, the process of simplification may have a different impact on race discrimination than on sex discrimination. [134] Simply, the Supreme Court appears to be somewhat blind to race-plus discrimination while being fully cognizant of sex-plus discrimination. The Court's blindness likely stems from the differing styles of cases that it has resolved in the race and sex discrimination areas. The focus of Supreme Court race discrimination cases has often been pure race discrimination, while the focus of sex discrimination cases has often been sex-plus discrimination. Thus, the Supreme Court and other courts are simply more cognizant of and familiar with sex-plus discrimination arguments than race-plus

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influence an employee greatly, equating such a threat with a random, hostile comment by a co-worker appears quite inappropriate. *See* Homesley v. Freightliner Corp., 2000 WL 1809975 (W.D.N.C. Nov. 8, 2000)(noting distinction between threats by supervisor and threats by co-workers). As with *Oncale*, the problem is not necessarily with the substance of what courts will do with the Supreme Court's rule, it is that courts may have a free hand in interpreting the significance of harassing threats is the concern.

133. Employment discrimination jurisprudence is replete with instances in which courts and legislatures have structured the discrimination inquiry to ensure reasonable results. *See, e.g.*, McDonnell Douglas v. Green, 411 U.S. 792 (1973); Price Waterhouse v. Hopkins, 490 U.S. 228. Simply, discrimination is not always easy to determine.

134. While analyzing age and disability discrimination as well would be preferred, this essay does not examine these issues in even cursory fashion. While some race and sex discrimination considerations are similar to those in the age and disability area, see *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000) (using the *McDonnell Douglas* test in an age discrimination case), the Court has not fully explored the similarities or differences. *Id.*

discrimination arguments.

Since sex-plus discrimination has always been recognized as sex discrimination, it has been the baseline of sex discrimination and has been relatively easy to discern.[135] That sex-plus discrimination has always been recognized as sex discrimination stems in part from the willingness of some employers to make sex-plus discrimination workplace policy. In these situations, the Court had no choice but to determine that policies that discriminated on the basis of sex plus some other factor necessarily constituted sex discrimination. For example, in *Phillips v. Martin Marietta*,[136] the defendant claimed that Title VII allowed it to prohibit women with preschool aged children, though not men with preschool aged children, from certain jobs. The Court noted that the practice undoubtedly constituted sex discrimination, and would yield liability unless the prohibition was justified as a bona fide occupational qualification.[137] Similarly, the nuanced discussion of sex stereotyping in *Price Waterhouse v. Hopkins* bespeaks the Court's familiarity with sex-plus discrimination discourse.[138]

While the Court's analysis of sex-plus discrimination may not always be consistent, that the Court has long been attuned to the existence of sex-plus discrimination suggests that a court will recognize such discrimination when confronted with it. Indeed, so many cases note that sex-plus discrimination is sex discrimination that backsliding on that issue in the wake of *Oncale* would thankfully be difficult. For those skeptical that courts will follow some established rules when given a free hand to redefine discrimination, the extent to which prior cases influence courts writing on a somewhat blank slate can be seen by watching courts engage in nuanced discussions about sex-plus discrimination with respect to same sex harassment and sexual orientation discrimination.[139]

Conversely, in resolving race discrimination cases, the Supreme Court has often focused on whether the plaintiff has proved pure race discrimination, rather than race-plus discrimination. Indeed, the *McDonnell Douglas* test was arguably necessary to reveal pure race discrimination to those who did not want to or could not see it. Thus, the baseline of the Court's race discrimination decisions has been pure race, rather than race-plus, discrimination. Since the conduct described in those decisions was rarely styled as race-plus discrimination, the jurisprudence of race-plus discrimination necessarily has not been fully developed by the Court. Not surprisingly, the Court's apparent conception of what constitutes race discrimination is narrow.

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135. The Court may not always credit sex-plus discrimination, *see* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (finding that pregnancy discrimination was not sex discrimination), it knows what it is. In the Pregnancy Discrimination Act of 1978, Congress altered Title VII to treat pregnancy discrimination as sex discrimination.

136. 400 U.S. 542 (1971).

137. Unfortunately, the Court seemed to entertain the possibility that such conduct might be justified. *Id.* at 544. Justice Marshall noted that antiquated views regarding women with young children should not support a bona fide occupational qualification. *Id.* at 545 (Marshall, J., concurring).

138. *See generally*, 490 U.S. 228 (1989).

139. *See supra* notes 116-127, and accompanying text.

For example, the majority's discussion of race discrimination in *Hicks* is simplistic. The Court does not seem to recognize that the explanation that the trial court may have credited in *Hicks* - that Hicks' supervisor had a personal vendetta against Hicks[140] - may have had racial motivation that would make the explanation discriminatory.[141] Indeed, even a marginally nuanced vision of race discrimination may not fit into the Court's recent jurisprudence. For example, the *Hicks* Court did not seem to recognize the possibility of discrimination by blacks against blacks or even the possibility of discrimination against a particular type of minority worker by an employer with a diverse workforce.[142] This blind spot for race-plus discrimination sets the stage for blindness to race-plus discrimination by trial and appellate courts that may be allowed to reinterpret Title VII.

For example, when an ambitious minority applicant is rejected in favor of a subservient minority applicant, some courts may argue that no discrimination can be proven.[143] While a court might reasonably require a particular type of evidence to convince a factfinder that discrimination has occurred, the possibility of race-plus discrimination makes it clear that discrimination is not automatically disproven merely because someone of the plaintiff's race is hired.[144] However, a lack of substantial precedent encompassing this conclusion may suggest that the immediate refusal to explore the discrimination claim might be appropriate. Conversely, the inappropriateness of this position is obvious in the sex discrimination area. For example, that the mother of a pre-school aged child is passed over in favor of a woman without children hardly suggests that sex

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140. *Hicks*, 509 U.S. at 508.

141. This is particularly disturbing given that discrimination should be deemed to have occurred as long as race is a motivating factor in an employment decision. *See* 42 U.S.C. § 2000e-2(m) (2000) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race,... was a motivating factor for any employment practice, even though other factors also motivated the practice"). Fortunately, some courts understand the notion that a neutral-sounding explanation may hide race discrimination. The court in *Iadimarco v. Runyon*, 190 F.3d 151 (3rd Cir. 1999), demonstrated an understanding of the complexities of discrimination in discussing why the argument that the person hired was the right person for the job" may not suffice to destroy the inference of discrimination that may flow from a prima facie case. *Id.* at 166-67(also noting that the "right person for the job" reason obviously works to the disadvantage of blacks when a decision maker believes that the right person for the job is a white male).

142. *Hicks*, 509 U.S. at 513-14 (suggesting skepticism that a minority hiring officer would ever disfavor a minority applicant because of the applicant's race). While the Court mentioned its incredulity in the course of analyzing the appropriateness of the mandatory presumption of discrimination, the tone of the analysis suggests a deeper skepticism of the mere possibility. As for the notion that an employer with a diverse workforce cannot discriminate, see Connecticut v. Teal, 457 U.S. 440 (1982) (rejecting diversity of workplace as bottom-line defense to disparate impact discrimination).

143. *See, e.g.*, Meachum v. Temple Univ., 42 F. Supp. 2d 533, 536 (E.D. Pa. 1999) ("An employer who has declined to hire an applicant for employment but has subsequently hired a member of the applicant's protected class defeats the applicant's claim because the employer is deemed to have demonstrated that the applicant was rejected for reasons unrelated to the applicants membership in the protected class").

144. *See* Buggs v. Elgin, Joliet & E. Ry. Co., 824 F. Supp. 842, 846 (N.D. Ind. 1993) (noting that an African-American employee's replacement by another African-American employee does not prevent the establishment of a prima facie race discrimination case); *see also* O'Connor v. Consolidated Coin Caterers Corp. 517 U.S. 308, 312 (1996) (noting that proof that employee's replacement was outside of protected class not a prerequisite to establishing prima facie age discrimination claim).

discrimination undoubtedly has not occurred. Rather, the discrimination may be sex-plus and may be based on a preference for women without preschool aged children.[145] While such sex-plus discrimination must then actually be proven, the plausibility of such an argument is clear because courts have faced similar issues so frequently.

The Court's quest for simplification is not necessarily good or bad. However, it does suggest that the Court that determining if it is more likely than not that discrimination has occurred can be relatively simple. This view risks ignoring the history of discerning discrimination that has come from more than 35 years of Title VII jurisprudence. While jettisoning that history in favor of allowing courts and factfinders a freer hand to discern discrimination will not necessarily lead to bad results, it has a great potential to do so, particularly in the race discrimination area. Conversely, we may be entering a new era in which courts are willing to expand notions of sex and race discrimination to cover a larger array of discriminatory behavior that occurs because of sex or race. Whether optimism or pessimism is the more appropriate outlook remains to be seen.

CONCLUSION

The Supreme Court's attempts at simplification have the virtue of making Title VII ostensibly easier to understand. However, that virtue may become a vice if courts do not take the spirit of race and sex discrimination laws to heart. A complete simplification of Title VII could take us back to the late 1960s when Title VII was young and relatively uninterpreted. While such a vision might be appealing to those who believe that Title VII has been misinterpreted for 30-plus years, it hardly pleases those who believe that statutory interpretation reveals, rather than obscures, their meaning.

145. *See* Phillips v. Martin Marietta, 400 U.S. 542 (1971). Of course, a similar situation may arise with respect to race when the wrong kind of minority is not hired by an employer who does hire minorities generally.