TITLE VII AND REVERSE DISCRIMINATION: THE PRIMA FACIE CASE

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INTRODUCTION

In recent years, the number of claims filed under Title VII has virtually exploded.[1] Although most envision discrimination as an evil directed against minorities and women, a substantial number of recent claims have involved "reverse" discrimination.[2] Despite the number of reverse discrimination claims, the circuits have been unable to agree upon the requirements of the *McDonnell Douglas*[3] prima facie case for a reverse discrimination claim. The disagreement has centered around the first element of the prima facie case. The issue must be resolved because a recent decision which severely restricted the permissible scope of affirmative action programs may further increase the number of reverse discrimination claims filed.[4] This Note analyzes how the Supreme Court of the United States will resolve the issue.

Section I discusses the Court's decisions addressing Title VII. It outlines the

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1. 42 U.S.C. § 2000e-2(a) (1994) provides that "[i]t 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, color, religion, sex, or national origin." In fiscal 1995, the Equal Employment Opportunity Commission received approximately 87,500 complaints. About 34% of those cases involved race discrimination, and 30% involved sex discrimination. Blacks filed 86% of the approximately 30,000 charges based upon race, and the remaining 14% involved reverse racial discrimination claims. Sheila M. Poole & Gertha Coffee Braxton, *Personal Business Bias in the Workplace, Two High-Profile Lawsuits Chill Companies, Give Workers Support*, ATLANTA J. & CONST., Dec. 9, 1996, at E1.

2. The term "reverse" discrimination is used throughout this Note for convenience. It refers to discrimination against members of groups which have not traditionally been subjected to discrimination, such as nonminorities and males. The author does not intend to imply that a claim of discrimination by a nonminority or male plaintiff is less legitimate than a claim by a minority or female plaintiff. This Note will focus on reverse discrimination claims involving denial of employment opportunities due to race and sex discrimination; however, other types of reverse discrimination exist. *See* David E. Rovella, *Accused Sexual Harassers Strike Back With Suits, Men Are Alleging Reverse Discrimination, Claiming Management Failed to Punish Women For Similar Actions*, NAT'L L.J., Aug. 28, 1995, at B1.

3. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

4. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all governmental affirmative action programs, whether federal, state, or local, will be subject to strict scrutiny review). Thirty-four percent of the race discrimination cases decided by the Court during the first five years of Chief Justice Rehnquist's term were asserted by whites. This increase may be due to a perception on the part of whites that the Court is friendly toward reverse discrimination claims. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1275 (1990).

basic framework for disparate treatment claims established in *McDonnell Douglas* and highlights the Court's important decisions elaborating upon the framework which will serve as a basis for arriving at a conclusion.[5] Section II examines the various approaches which courts have taken in analyzing the prima facie case in reverse discrimination claims and the reasoning underlying those approaches. Section III analyzes the Court's previous discrimination decisions in the context of reverse discrimination, and applies that analysis to the prima facie case in reverse discrimination claims. Section IV concludes that the Court should not alter the prima facie case established in *McDonnell Douglas* when it is applied in reverse discrimination cases.

I. THE *MCDONNELL DOUGLAS* FRAMEWORK[6]

In *McDonnell Douglas Corp. v. Green*, a black employee sued his employer under Title VII for racial discrimination. The employee was not rehired by the defendant after he participated in and was partially responsible for organizing protests against the defendant. The Court ruled that the plaintiff could establish a prima facie case of race discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[7]

The Court acknowledged that the facts necessary to prove a prima facie case will vary and that the above formulation will not apply in every case.[8]

After the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate "some legitimate, nondiscriminatory reason for the employee's rejection."[9] If the defendant is able to do so, then the plaintiff must

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5. A disparate treatment claim is one in which the plaintiff claims that the employer treated him differently because of a characteristic protected under Title VII. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The cases relevant to the resolution of the question are not limited to claims involving disparate treatment under Title VII. Claims involving affirmative action are also relevant to the question insofar as they demonstrate the court's overall approach to discrimination claims and questions of race and sex. *See infra* Parts I & III.

6. For a survey of the Court's race discrimination in employment cases decided prior to the enactment of Title VII, see THE SUPREME COURT ON RACIAL DISCRIMINATION 225-72 (Joseph Tussman ed., 1963).

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

8. *Id.* at 802 n.13. The court held that the plaintiff successfully established a prima facie case because the defendant sought to hire mechanics, plaintiff was a mechanic, he applied for the job, his qualifications were not disputed, and the defendant continued to seek mechanics after rejecting plaintiff. *Id.* at 802.

9. *Id.* at 802. The court accepted as sufficient the defendant company's statement that the plaintiff's participation in illegal protest activities directed at the defendant was the reason he had

be given an opportunity to show that the stated reason for the rejection was a pretext for intentional discrimination.[10] The Court stated that, in that particular case, the evidence that might be relevant to show pretext included: the defendant's general policy with respect to the employment of minorities including statistics that would show a general pattern of discrimination against minorities, the defendant's past response to the plaintiff's participation in civil rights activities, and the defendant's treatment of the plaintiff during previous employment with the defendant.[11] With respect to statistics showing past discrimination by the defendant, the Court cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision . . . ."[12]

The Court stated that the purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[13] The Court further stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[14] In sum, *McDonnell Douglas* enunciates that the primary purpose of Title VII is to assure neutral employment decisions.

In 1976, the Court revisited the discrimination issue in *McDonald v. Santa Fe Trail Transportation Co.*[15] In that case, two white employees claimed that they had been victims of racial discrimination. The defendant company discharged the plaintiffs after they participated in criminal activity directed against the defendant company, but it retained a black employee who had also participated in the activity. The Court held that Title VII provides protection to majority as well as minority employees.[16] In so holding, the Court stated that "Title VII prohibits racial discrimination against [whites] upon the same standards as would be applicable were they Negroes and [the non-discharged employee] white."[17] In *McDonald*, the Court clearly applied the *McDonnell Douglas* standard when a white claimed race discrimination. *McDonnell Douglas* was the only standard articulated to prove intentional discrimination with circumstantial evidence at the time of the *McDonald* decision. In addition, the legislative history of Title VII shows that Congress intended that it cover all

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not been rehired. *Id.* at 803.

10. *Id.* at 804.
11. *Id.* at 804-05.
12. *Id.* at 805 n.19.
13. *Id.* at 800 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)).
14. *Id.* at 800-01 (citing *Griggs*, 401 U.S. at 431).
15. 427 U.S. 273 (1976).
16. *Id.* at 280.
17. *Id.*

employees, not just members of historically disadvantaged groups.[18] In discussing the applicability of Title VII to whites claiming racial discrimination and males claiming sex discrimination, Congress did not indicate that the standards used to establish discrimination should differ in any way from those to be used by minorities and females.

The Court rejected the *McDonald* defendant's argument that discrimination in favor of minorities in isolated cases, when it does not place a heavy burden on whites as a group, is permissible. "There is no exception in the terms of [Title VII] for isolated cases . . . ."[19] The Court does not require that a Title VII plaintiff show discrimination against other members of the group to which the plaintiff belongs, and the fact that no previous discrimination has occurred is not determinative on the question of whether it occurred in any specific case.

With respect to the elements of the prima facie case laid out in *McDonnell Douglas*, the Court stated that the requirement that the plaintiff belong to a racial minority, "was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination."[20] If the Court had intended at that time to alter the prima facie case for reverse discrimination claimants, it could have easily done. However, it did not do so, and its statement above indicates that the only purpose of the first element is to establish that the claim is for discrimination on the basis of race, rather than sex or religion.

In a later case, the Court stated that:

> [a] prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. (citations omitted) And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.[21]

The Court's language is not limited to any particular racial group. Instead, it shows that, in a business setting, the Court will presume that the employer acted out of consideration of some illegitimate factor when no legitimate motivation can be found that will account for the action in question.

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18. *Id.* (quoting 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler) (Title VII was intended to cover "white men and white women and all Americans"); 110 CONG. REC.7218 (1964) (memorandum of Sen. Clark) (Title VII creates an "obligation not to discriminate against whites")).

19. *Id.* at 280 n.8.

20. *Id.* at 279 n.6.

21. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

The Court also emphasized that the fulfillment of the prima facie case is not the equivalent of a factual finding of discrimination; it only gives rise to an inference of discrimination which can be rebutted.[22] Because of that inference, the defendant must be able to introduce evidence relevant to its motive. The Court found that, although statistical evidence cannot be determinative, a defendant may introduce statistical evidence showing a racially balanced workforce in order to show the lack of a discriminatory motive.[23]

The purpose of the *McDonnell Douglas* framework is to focus efficiently upon the question of discrimination.[24] The Court has emphasized that the burden of proving intentional discrimination rests at all times with the plaintiff.[25] However, the Court noted that the burden of establishing a prima facie case is "not onerous"; its purpose is to eliminate the most common causes for the rejection of the plaintiff.[26] To rebut the presumption, the defendant only must articulate a nondiscriminatory reason for its action. It does not have to persuade the court that it was actually motivated by that reason.[27] The purpose of the defendant's burden of production is to provide the plaintiff with sufficient information so that he or she may demonstrate pretext.[28] Once the defendant satisfies its burden of production, the inference created by the establishment of the prima facie case "drops from the case."[29] Nevertheless, if, after the plaintiff has established a prima facie case, the employer cannot articulate a legitimate, nondiscriminatory reason for its action, a court must enter judgment for the plaintiff.[30]

Another purpose of the *McDonnell Douglas* framework is to ensure that the plaintiff survives summary judgment and has an opportunity to prove his or her case in court "despite the unavailability of direct evidence."[31] If the plaintiff can present direct evidence of discrimination, the *McDonnell Douglas* framework is unnecessary. However, because it is difficult to prove intentional discrimination with only circumstantial evidence, the *McDonnell Douglas* framework is available to assist plaintiffs.[32]

The Court further elaborated upon the *McDonnell Douglas* standard in *St.*

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22. *Id.* at 579-80.

23. *Id.* at 580.

24. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

25. *Id.*

26. *Id.* at 253-54.

27. *Id.* at 254.

28. *Id.* at 255-56.

29. *Id.* at 256 n.10. The Court justified the imposition of such a light burden by the facts that the defendant's explanation must be clear and specific and that the defendant will have an incentive to present additional evidence in order to show that it was not motivated by discrimination.

30. *Id.* at 254.

31. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985). The claim in *Thurston* was brought under the Age Discrimination in Employment Act, however, the *McDonnell Douglas* framework also applies in that context. *Id.*

32. *Id.*

Mary's Honor Center v. Hicks.[33] In that case, the Court established the "pretext-plus" analysis.[34] The basic premise of the pretext-plus standard is that it is not enough for the plaintiff to show that the defendant's stated reason for the action was false. The plaintiff must also show that the real reason for the action was discrimination.[35] Thus, even if the plaintiff can show that the defendant put forth a false reason to explain the action, the plaintiff cannot prevail unless he or she can also show that the action was actually motivated by intentional discrimination. The plaintiff can satisfy the requirement using circumstantial evidence. Although the Court stated that the requirements of the prima facie case are "minimal,"[36] the plaintiff may present sufficient evidence to justify an inference of intentional discrimination.[37] However, in the vast majority of cases, the plaintiff must present evidence beyond that required to establish a prima facie case. *Hicks* thus reinforces the Court's earlier statements that the prima facie case does not establish discrimination. It is a tool designed to help the plaintiff, but the plaintiff must ultimately prove intentional discrimination to prevail.

The Court's decisions regarding affirmative action plans will also be helpful in determining the proper form of the prima facie case for reverse discrimination claims. With respect to voluntary affirmative action programs,[38] the Court decided that they are permissible if designed to remedy a "manifest racial imbalance" in "traditionally segregated job categories" if they do not "unnecessarily trammel" the interests of nonminorities.[39] The Court reasoned that such plans would provide minorities with access to positions which had traditionally been closed to them. Evidence of statistical disparity between the proportion of black workers in the local labor force and black workers in skilled positions within the company were sufficient for the Court to approve the plan.[40]

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33. 509 U.S. 502 (1993).

34. Some commentators consider *Hicks* a controversial decision. *See, e.g.*, Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67 (1993) (describing the decision as "one of the most controversial decisions the Court handed down in . . . [the] 1992-93 term.").

35. *Hicks*, 509 U.S. at 511.

36. *Id.* at 506.

37. J. Hagood Tighe, *The Refined Pretext-Plus Analysis: Employees' and Employers' Respective Burdens After Hicks*, 46 S.C. L. REV. 333, 351 (1995). For example, in some extreme cases, it may be sufficient to show that the plaintiff was performing his or her job in a manner far superior to the performance of members of different groups and that only the plaintiff was fired.

38. For thorough discussions of the philosophy underlying affirmative action plans, see ALAN H. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 65-140 (1979) (justifying affirmative action plans as "compensation for the past," but noting that those who benefit most from the programs will be those who have not been victims of discrimination in the past); KENT GREENWALT, DISCRIMINATION AND REVERSE DISCRIMINATION 49-84 (1983) (finding that a "simple racial criterion" may be most appropriate for manual labor jobs).

39. United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979).

40. *Id.* at 209; Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1426 (1990).

However, the Court later reversed its reliance upon statistical disparities alone. In *Firefighters Local Union No. 1784 v. Stotts*,[41] the Court invalidated an affirmative action program adopted pursuant to a consent decree because "there was no finding that any of the blacks protected from layoff had been a victim of discrimination."[42] The Court changed its focus from the relative positions of minorities and nonminorities to the inequity of benefitting individuals who had not been victims of discrimination. Most recently, in *Adarand Constructors, Inc. v. Pena*, the Court ruled that affirmative action programs imposed by any governmental entity must pass strict scrutiny in order to be constitutional.[43] However, confusion still exists regarding the permissible scope of both voluntary and involuntary plans.[44]

The Court also removed procedural barriers that formerly made challenging affirmative action programs more difficult. In *Martin v. Wilks*, the Court granted white city employees the right to challenge a consent decree entered into by the city providing for affirmative action.[45] The decision allowed whites to challenge affirmative action programs pursuant to consent decrees when, despite an opportunity to do so, they did not intervene in the litigation in order to bring a reverse discrimination challenge. The case implies that reverse discrimination is a such a serious problem that it must be subject to challenges in court regardless of the lack of a history of discrimination against whites.[46]

II. THE CIRCUITS' APPROACHES TO REVERSE DISCRIMINATION

The federal courts have not been able to agree upon the correct formulation of the prima facie case for reverse discrimination claims. Although one circuit has stated that *McDonnell Douglas* does not apply in reverse discrimination cases, most circuits apply *McDonnell Douglas* in some form. Among circuits which apply *McDonnell Douglas*, two main views have developed as to the proper form of the prima facie case. They are (1) that a reverse discrimination plaintiff must demonstrate "background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority,"[47] and (2) that a reverse discrimination plaintiff need only state class membership to fulfill the first element of the prima facie case. The difference between the two views is due to divergent beliefs about the purpose of Title VII

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41. 467 U.S. 561 (1984).

42. *Id.* at 579.

43. 515 U.S. 200, 227 (1995).

44. Steven G. Reade & Rosemary Maxwell, *Federal Affirmative Action Programs, Following* Adarand, *Are Being Revamped to Promote Diversity Through Measures that Don't Use Racial or Gender Preferences*, NAT'L L.J., Feb. 19, 1996, at B6. For instance, questions remain whether national findings of past discrimination or findings particular to industries or geographical areas are required, and whether gender-based preferences will be subjected to strict scrutiny. *Id.*

45. 490 U.S. 755, 762-63 (1989).

46. Freeman, *supra* note 40, at 1432.

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

and the purpose of the presumption created by the prima facie case.

A. McDonnell Douglas *Does Not Apply*

In *Ustrak v. Fairman*, the Seventh Circuit held that the *McDonnell Douglas* framework does not apply to discrimination claims brought by nonminorities.[48] The court reasoned that the *McDonnell Douglas* method "is designed for the protection of minorities and women rather than of whites. Racial discrimination against whites is forbidden, it is true, but no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black."[49] However, this conclusion is contrary to the Supreme Court's holding in *McDonald*, that Title VII applies to protect whites "upon the same standards" as it protects minorities.[50] The *Ustrak* court did not acknowledge the Supreme Court's language in this respect.

Contrary to *Ustrak*, the *McDonnell Douglas* framework should apply to reverse discrimination cases for several reasons. First, the Court had already established the burden-shifting framework at the time it decided *McDonald* and did not strike it down in *McDonald*. When *McDonald* was decided, the burden-shifting framework was the only established standard for proving intentional discrimination with circumstantial evidence. In fact, in *McDonald*, the Court referred to the framework, stating that the first element did not indicate any substantive limitation upon the reach of Title VII.[51] Second, the Court explicitly allowed majority plaintiffs to use the *McDonnell Douglas* framework in a case involving a challenge to an affirmative action plan.[52] Thus, the *McDonnell Douglas* framework applies in reverse discrimination cases. No court has agreed with the Seventh Circuit's refusal to apply the framework, and the Seventh Circuit itself later applied *McDonnell Douglas* in a reverse discrimination case while expressly declining to decide whether it is properly applied to such a case.[53]

B. McDonnell Douglas Does Apply

The vast majority of courts have held that *McDonnell Douglas* applies to reverse discrimination cases. However, these courts do not agree upon the proper form of the prima facie case. The disagreement centers around the first element. The District of Columbia, Sixth and Tenth Circuits require a reverse discrimination plaintiff to show background circumstances indicating that the defendant discriminates against majority groups. The plaintiff must make that showing in lieu of the statement that he is a member of a minority group. The

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48. 781 F.2d 573, 577 (7th Cir. 1986).

49. *Id.*

50. McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 280 (1986).

51. *Id.* n.8; *see supra* note 20 and accompanying text.

52. Johnson v. Transportation Agency, 480 U.S. 616, 642 (1987).

53. Pilditch v. Board of Educ., 3 F.3d 1113, 1116 (7th Cir. 1993); *see infra* note 73 and accompanying text.

Fourth, Fifth, Eighth and Eleventh Circuits and some district courts do not require additional proof for reverse discrimination plaintiffs. The plaintiff need only state class membership to fulfill the first element of the prima facie case.

1. The Requirement of "Background Circumstances."—In 1981, the United States Court of Appeals for the District of Columbia Circuit decided *Parker v. Baltimore and Ohio Railroad Co.*[54] In that case, a white railroad employee sued under Title VII for discrimination because the railroad failed to promote him.[55] The court ruled that a majority claimant may use the *McDonnell Douglas* framework to prove intentional discrimination when "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority."[56] Under this test, a majority plaintiff must show background circumstances in lieu of the requirement that he or she be a member of a minority group.[57]

The court reasoned that the *McDonnell Douglas* test is "not an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination."[58] Therefore, the presumption exists for minorities and women only because of the history of societal discrimination that we have yet to overcome. However, in a case brought by a majority plaintiff, the factors which establish a prima facie case under *McDonnell Douglas* give rise to a presumption of discrimination only if background circumstances indicate a reason for such a presumption. The court acknowledged that whites are a protected group under Title VII but stated that "it defies common sense" to suggest that an inference of discrimination should arise from the fact that a minority was hired or promoted instead of a white.[59] According to the court,

> Membership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can it be stated as a general rule that the "light of common experience" would lead a factfinder to infer discriminatory motive from

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54. 652 F.2d 1012 (D.C. Cir. 1981).

55. The plaintiff's repeated efforts to obtain a promotion to the position of locomotive firemen were thwarted, and minorities and women were frequently chosen to fill the positions. The defendant company acknowledged the existence of an affirmative action program designed to increase participation of women and minorities. *Id.* at 1015-16.

56. *Id.* at 1017. *Accord* Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993); Bishopp v. Dist. of Columbia, 788 F.2d 781 (D.C. Cir. 1986); Martin-Trigona v. Board of Trustees, 668 F. Supp. 682 (D. D.C. 1987); Dougherty v. Barry, 607 F. Supp. 1271 (D. D.C. 1985).

57. *Id.* at 1018. The court cited as support for its ability to modify the framework the Supreme Court's statement in *McDonnell Douglas* that the prima facie case would require modification to fit specific factual situations. For instance, the elements may be somewhat different in cases of discriminatory refusals to hire and cases of discriminatory refusal to promote. *Id.* at 1017.

58. *Id.* at 1017.

59. *Id.*

the unexplained hiring of an outsider rather than a group member.[60]

The court recognized that background circumstances sufficient to give rise to an inference of discrimination would include proof that the defendant company had unlawfully considered race as a factor in its employment and promotion decisions in the past.[61] However, courts requiring background circumstances, even those within the District of Columbia, have been unable to establish uniform standards that will meet the requirement.

In a later District of Columbia reverse discrimination case, the court upheld the *Parker* background circumstances requirement, with different factors making up the test. In *Bishopp v. District of Columbia*,[62] several white plaintiffs claimed racial discrimination in failure to promote them to the position of Assistant Fire Chief when a black was promoted instead. The court restated the rule announced in *Parker*. It required white males claiming racial discrimination to show "particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate against them."[63] The court found that the plaintiffs had presented a strong prima facie case.[64] The case which the court in *Bishopp* found sufficient to establish background circumstances included the facts that (1) both of the plaintiffs' superiors who would choose the new Assistant Fire Chief were black, (2) an affirmative action plan was being drafted at the time of the decision, and (3) there was evidence of political pressure to hire a black to fill the position.[65] The court did not specify the weight it assigned to each of these facts; it only stated that the three facts together made a strong case of discriminatory intent.[66] The court acknowledged that the fact that the plaintiffs' superiors were black was weak evidence of discriminatory intent.[67] Therefore, the court either considered the drafting of the affirmative action plan as evidence of discriminatory intent or placed heavy emphasis upon disputed

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60. *Id.*

61. *Id.* at 1018.

62. 788 F.2d 781 (D.C. Cir. 1986).

63. *Id.* at 786.

64. *Id.* The lower court disagreed, finding that the plaintiffs had only established a prima facie case because the defendants had conceded it. The concurring justice agreed largely with the lower court. *Id.* at 790-92 (Wald, J., concurring).

65. *Id.* at 787.

66. Keith Beauchamp, *Employment Discrimination—Title VII*, 55 GEO. WASH. L. REV. 845, 854 (1987). The court did state, however, that the fact that a plaintiff's superiors are black will not be sufficient alone in a reverse discrimination case to establish background circumstances showing that the employer discriminates against the majority. *Bishopp*, 788 F.2d at 788 n.7 (citing Plummer v. Bolger, 559 F. Supp. 324 (D.D.C.), *aff'd without opinion*, 721 F.2d 1424 (D.C. Cir. 1983)). The court also stated that "it is not clear whether a lawful, promulgated affirmative action plan can nonetheless provide a link in a prima facie case that would justify the inference of discrimination." *Id.* at 784 n.3. However, clearly the court used the fact that a plan was being drafted as a link in the prima facie case.

67. *Bishopp*, 788 F.2d at 787.

evidence of political pressure to hire a black.[68] Either way, the case shows the uncertainty of the factual showing sufficient to meet the requirement of background circumstances. Although the court stated that the plaintiffs established a strong prima facie case, the three factors enumerated above do not meet the requirement established in *Parker*, that the plaintiff show the defendant has used race as a criterion for decision making in the past.

The Sixth and Tenth Circuits have followed the District of Columbia's example and explicitly adopted the background circumstances requirement in reverse discrimination cases. The Sixth Circuit reasoned that the *McDonnell Douglas* framework "stems from Congressional efforts to address this nation's history of discrimination against racial minorities, a legacy of racism so entrenched that we presume acts, otherwise unexplained, embody its effects."[69] The reasoning is similar to the *Parker* court's reasoning. Because discrimination against blacks is so prevalent in society, blacks are entitled to a presumption that a decision was motivated by race. Because nonminorities have not been subjected to such prevalent discrimination, they must prove more to justify the presumption. However, in its most recent case on the subject, the Sixth Circuit expressed doubts about imposing more onerous requirements upon majority plaintiffs to establish a prima facie case.[70]

In *Logan v. Express, Inc.*,[71] the male plaintiff claimed that his discharge from a managerial position was due to reverse sex discrimination. The evidence revealed that Express stated that it feared a male might make the largely female clientele uncomfortable and that it wanted female salespersons in the clothing store. The Sixth Circuit found these statements insufficient to establish background circumstances where the former, but not the latter, statement was made eight years prior to the plaintiffs's discharge.[72] The Sixth Circuit has never articulated the facts necessary to meet the background circumstances requirement. However, the facts in *Logan* seem to lead naturally to a suspicion

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68. Beauchamp, *supra* note 66, at 856. The evidence of political pressure was not accepted by the district court, but was credited by the Court of Appeals. *Id.*

69. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985) (citing Furnco Constr. v. Waters, 438 U.S. 567, 577 (1978)). The Tenth Circuit Court of Appeals has also adopted the requirement of a showing of background circumstances indicating discrimination for majority plaintiffs. Notari v. Denver Water Dep't, 971 F.2d 585, 588-89 (10th Cir. 1992). The Tenth Circuit reasoned that "the presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group." *Id.* at 589 (quoting Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986)). *Accord* Rhoads v. Wal-Mart Stores, Inc., No. 95-1313, 1996 WL 194854, at *1 (10th Cir. Apr. 23, 1996); Sims v. KCA, Inc., No. 93-2053, 1994 WL 266744, at *3 (10th Cir. June 17, 1994).

70. Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts.").

71. No. 92-4363, 1993 WL 515492 (6th Cir. Dec. 10, 1993).

72. *Id.* at *3.

that the defendant had used gender as a basis for decision making in the past, and thus the plaintiff would have fulfilled the requirement as enunciated in *Parker*.

The reasoning adopted by the District of Columbia, Sixth, and Tenth and Circuits shows that the additional requirement for a majority plaintiff in a reverse discrimination case is due to a belief that the presumption established by the *McDonnell Douglas* prima facie case exists solely because of the race or gender of the plaintiff. That is, the presumption exists for minorities and women because historically they have been victims of discrimination and thus, in the absence of another explanation, the presumption that they continue to be the victims of discrimination is justified. Whereas, in the case of majority and male plaintiffs, the inference is not justified, because in the past, such persons have not generally been victims of discrimination. Although these courts agree upon the reasoning behind the background circumstances requirement, they do not agree upon what particular facts should meet that requirement.

However, many courts have not adopted the background circumstances requirement in reverse discrimination cases. These courts have taken three different approaches: (1) The Fourth and Seventh Circuits have avoided deciding the issue because the cases presented to them did not require the resolution of the question; (2) the Fifth and Eleventh Circuits decided reverse discrimination cases without mention of the additional requirement; and (3) two district courts have sharply criticized the background circumstances requirement. These courts allowed reverse discrimination plaintiffs to fulfill the first element of the prima facie case by stating class membership.

2. "Background Circumstances" Avoided.—The Seventh and Fourth Circuits have refused to decide whether background circumstances are necessary. For instance, the Seventh Circuit, after first finding that the *McDonnell Douglas* framework would not apply to reverse discrimination cases,[73] decided a reverse discrimination case by removing the first element from the prima facie case altogether.[74] The court noted that in the latter case, the result would be the same whether or not the additional showing was required because the defendant had advanced a legitimate, nondiscriminatory reason for the failure to renew a teacher's contract; thus the *McDonnell Douglas* framework became irrelevant. The court required the plaintiff to show only that he was meeting the employer's legitimate expectations, that he was qualified for the job, that he was not rehired, and that he was replaced by a person of a different race.[75]

Similarly, the Fourth Circuit refused to decide whether a showing of background circumstances was necessary in a reverse discrimination claim. In *Lucas v. Dole*,[76] a white employee alleged racial discrimination. The court noted that the case differed from the usual *McDonnell Douglas* case because the position sought by the plaintiff did not remain open after she was rejected. In

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73. *Ustrak*, 781 F.2d 577; *see supra* note 47 and accompanying text.

74. Pilditch v. Board of Educ., 3 F.3d 1113, 1116 (7th Cir. 1993).

75. *Id.*

76. 835 F.2d 532 (4th Cir. 1987).

such a case, the Fourth Circuit requires the plaintiff to produce "'some other evidence that [her] race was a factor considered by [her] employer in not granting [her] the promotion.'"[77] In this case, the plaintiff was required to make a showing similar to that which would be required by the background circumstances standard. However, that showing was required by a different rule. Nevertheless, the court stated, "we expressly decline to decide at this time whether a higher burden applies."[78]

The Seventh and Fourth Circuits avoided the difficult question of whether reverse discrimination plaintiffs must make an additional showing to establish a prima facie case. The issue is a difficult one because some courts have viewed the presumption established by the prima facie case as a reflection upon predominant attitudes in society. By relying upon the structure of the framework, i.e. the fact that the presumption drops from the case when the employer articulates a nondiscriminatory reason for its action, the Seventh Circuit avoided what might be viewed as a statement about the nature of society. The Fourth Circuit accomplished the same result by relying on another rule peculiar to its jurisdiction. They were able to avoid the question only because the particular cases before them presented special circumstances. Because they acknowledged the issue at all, they will eventually have to decide whether reverse discrimination plaintiffs must meet an additional requirement to establish a prima facie case.

3. "Background Circumstances" Not Required.—Other courts have decided reverse discrimination cases without even mentioning the requirement of background circumstances which indicate discrimination. The Eleventh Circuit stated the first element of the prima facie case for a reverse discrimination plaintiff as proof "that he belongs to a class."[79] The Fifth Circuit also decided a reverse discrimination case without mention of background circumstances. It stated that, to fulfill the first element of the prima facie case, a reverse discrimination plaintiff only need show that "he belongs to a protected class."[80]

4. "Background Circumstances" Criticized.—Still other courts have overtly rejected the background circumstances requirement. In *Collins v. School District of Kansas City*, the court allowed a reverse sex discrimination plaintiff to attempt to prove a prima facie case without a showing of background circumstances.[81]

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77. *Id.* at 533 (quoting Holmes v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986)).

78. *Id.* at 534.

79. Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991). In this case, the plaintiffs successfully established a prima facie case, as conceded by the defendants.

80. Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990). The Supreme Court established in *McDonald* that whites are a protected class under Title VII. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 280 (1986). The plaintiff in *Young* did not attempt to establish a prima facie case. Instead, he produced evidence of the use of racial epithets such as "white token" and "white faggot." The court found that such racial epithets constitute direct evidence of race discrimination. *Young*, 906 F.2d at 180.

81. 727 F. Supp. 1318, 1322 (W.D. Mo. 1990) (Plaintiff was able to establish a prima facie case because, outside of its challenge to the appropriate legal standard, defendant conceded the

The court cited the Supreme Court's decision in *Griggs v. Duke Power Co.*[82] for the proposition that "[d]iscriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed."[83] According to the district court, the *McDonnell Douglas* framework was intended to "'bring the litigants and the court expeditiously and fairly' to the ultimate question of whether the defendant intentionally discriminated against the plaintiff in violation of Title VII."[84]

The court in *Collins* disagreed with the reasoning supporting background circumstances, that membership in a disfavored group is the assumption underlying the *McDonnell Douglas* framework. Instead, the court stated that "[t]he *McDonnell Douglas* framework was a procedural embodiment of the recognition that employment discrimination is difficult to prove with only circumstantial evidence."[85] According to the *Collins* court, the framework exists because plaintiffs rarely have direct evidence of discriminatory intent. In the absence of direct evidence, plaintiffs will be forced to rely upon circumstantial evidence, which imposes a heavy burden upon plaintiffs. To alleviate the extreme difficulty of proving intentional discrimination with circumstantial evidence, the framework is used to create a presumption which is intended "to force the employer to come forward with a legitimate explanation for his conduct."[86]

To support that position, the *Collins* court cited the Supreme Court's statement that the *McDonnell Douglas* framework was intended to be flexible.[87] Permissible changes are not limited to changes that reflect different employment actions.[88] In a reverse discrimination claim, the first element can be changed to require a mere statement of class membership.

The court also noted that the framework,

> is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for

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issue.). The Eighth Circuit has not decided the issue.

82. 401 U.S. 424 (1972).

83. *Collins*, 727 F. Supp. at 1319 (quoting *Griggs*, 401 U.S. at 429).

84. *Id.* at 1319-20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

85. *Id.* at 1321.

86. *Id.* at 1322.

87. *Id.*

88. *See infra* note 127 and accompanying text.

> rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.[89]

The fact that the plaintiff is a member of a majority group does not change the inference.[90] It is just as likely that an improper consideration such as race motivated the decision to reject a majority plaintiff as a minority plaintiff when the employer is unable to articulate a nondiscriminatory reason for his or her conduct.[91]

The court in *Collins* also argued that the background circumstances requirement undermines the purposes of *McDonnell Douglas* because it forces the majority plaintiff to make a showing on the ultimate issue of the case, discrimination, in order to establish a prima facie case.[92] *McDonnell Douglas* established a test that explicitly relieved plaintiffs of such a burden. According to *Collins*, requiring background circumstances shifts the entire burden to the plaintiff at the phase of the prima facie case, and such a radical departure from the *McDonnell Douglas* framework cannot be justified by the Supreme Court's recognition that the proof necessary to establish a prima facie case will vary with different factual situations.[93] Courts which require background circumstances believe that recognition justifies the imposition of a heavier substantive burden. The *Collins* court, however, recognized that the Court merely acknowledged that the prima facie case would be applied to different situations such as discharge, failure to promote, and failure to hire. Therefore, the *Collins* court rejected the requirement of background circumstances and allowed the plaintiff to meet the first element of the prima facie case by merely stating his gender.

Another district court criticized the background circumstances requirement, refusing to impose a higher standard upon reverse discrimination claimants. The court stated that "[t]he principal focus of the statutes is the protection of the individual employee, rather than the protection of the protected group as a whole."[94] Implicit in the court's statement is the view, similar to that expressed in *Collins*, that the higher burden imposed by the background circumstances requirement forces a reverse discrimination claimant to prove discrimination

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89. *Collins*, 727 F. Supp. at 1322 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

90. *Id.* at 1321.

91. *Id.*

92. *Id.*

93. *Id.* The court in *Parker* relied upon the Supreme Court's statement that the test laid out in *McDonnell Douglas* would not necessarily apply in every case. Parker v. Baltimore & Ohio R.R. Co., 652 F.2d at 1017.

94. Ulrich v. Exxon Co., 824 F. Supp. 677, 684 (S.D. Tex. 1993). The plaintiff in that case was not able to establish a prima facie case of race discrimination because the only evidence was his own deposition testimony that minorities with lesser qualifications were promoted ahead of him. *Id.* at 684, 686.

against the entire class of which he or she is a member. Thus, if reverse discrimination plaintiffs must demonstrate background circumstances indicating discrimination, Title VII only protects whites and males as groups, rather than as individuals. Only when the entire group has been subjected to discrimination can an individual recover. The court further pointed to the Supreme Court's decision that the *McDonnell Douglas* analysis applied to a reverse discrimination claim involving a challenge to a voluntary affirmative action plan.[95]

In sum, the courts which explicitly reject the background circumstances requirement assume that the *McDonnell Douglas* framework exists because it is difficult to prove discrimination in the absence of direct evidence. Therefore, any plaintiff, regardless of class membership, should be able to establish a prima facie case without showing background circumstances that indicate discrimination. In the view of these courts, the additional requirement is onerous and unjustifiably limited to majority plaintiffs. It also imposes the burden of proving intentional discrimination upon the plaintiff before the employer is required to articulate a nondiscriminatory reason for the action at issue. Furthermore, the plaintiff is forced to prove discrimination against other members of his or her class. Therefore, these courts require no additional showing from reverse discrimination plaintiffs.

III. ANALYSIS

The Court should not require reverse discrimination plaintiffs to demonstrate background circumstances indicating discrimination. This section analyzes the Court's approach to discrimination from several viewpoints. First, in light of the Court's statements about the purpose of the *McDonnell Douglas* framework, the requirement should not be imposed. Second, the requirement is inconsistent with the purposes of the prima facie case. Third, the requirement is unnecessary in view of the Court's most recent modification of the framework. Fourth, it is inconsistent with the Court's general approach to Title VII and affirmative action cases. Therefore, the Court should not require reverse discrimination plaintiffs to demonstrate background circumstances.

A. The Purpose of the Framework

One issue that divides the courts in deciding whether a reverse discrimination plaintiff must make an additional showing is the purpose of the *McDonnell Douglas* framework. While some believe that the burden-shifting method is a procedural device designed to ease the burden on the plaintiff who often has only circumstantial evidence with which to prove intentional discrimination,[96] others believe that the framework reflects the fact that our society has not yet freed itself from a legacy of discrimination on the basis of race and sex.[97] The Court

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95. *Id.* at 684 (quoting Johnson v. Transportation Agency, 480 U.S. 616, 626 (1987)).

96. *Collins*, 727 F. Supp. at 1321; *Ulrich*, 824 F. Supp. at 683 (characterizing the additional requirement as an "arbitrary barrier"); *see supra* note 85 and accompanying text.

97. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985); Bishopp v.

has provided insight into the purpose of the framework in several cases.

In *Texas Department of Community Affairs v. Burdine*, the Court stated that the framework is designed to focus litigation efficiently upon the central question, discrimination, even in the absence of direct evidence.[98] Later, in *Trans World Airlines v. Thurston*, the Court articulated the framework's purpose as helping the plaintiff survive summary judgment so that he or she has an opportunity to prove the case in court despite the absence of direct evidence.[99] Because these two comments were made in race-neutral language, without any limitation relating to the race or gender of the plaintiff, and demonstrate the purely procedural value of the framework, they show that the Court views the framework as a procedural device, rather than as any reflection upon society in general.

The requirement of background circumstances undermines the purposes which the Court has articulated.[100] By placing upon the plaintiff the burden of showing background circumstances at the outset, courts prevent the effective functioning of one of the Court's recognized purposes in establishing the framework. That purpose is to force the defendant to come forward with a legitimate, nondiscriminatory reason for its actions.[101] If the reverse discrimination plaintiff lacks direct evidence and cannot show past discrimination against members of his or her class, the employer is never forced to justify its actions, and may escape liability even if it has intentionally discriminated against the plaintiff.[102] Furthermore, in courts that require a showing of background circumstances, a plaintiff who does not have direct evidence of discrimination is denied the opportunity to show discrimination in this particular case through circumstantial evidence unless members of his or her class have been victims of discrimination by the defendant in the past or unless the plaintiff can prove one of the other formulations which establish background circumstances.[103] It is certainly possible that an individual plaintiff can be a victim of discrimination although the defendant did not discriminate against members of the plaintiff's class in the past. Courts which require background circumstances do not recognize this possibility.

Requiring a showing of background circumstances also undermines the purposes of *McDonnell Douglas* by forcing the reverse discrimination plaintiff to prove discrimination at the outset.[104] The framework is designed to assist the

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Dist. of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986); Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (6th Cir. 1985).

98. 450 U.S. at 253-54.

99. 469 U.S. at 121.

100. *Collins*, 727 F. Supp. at 1321; *see supra* note 85 and accompanying text.

101. *Burdine*, 450 U.S. at 254.

102. *Collins*, 727 F. Supp. at 1321.

103. *See* Ulrich v. Exxon Corp, 824 F. Supp. 677, 684 (S.D. Tex. 1993) (stating that the additional requirement undermines the statute's focus upon the individual rather than the group); *see also supra* Part II.B.1.

104. *Id.*

plaintiff by creating a presumption of discrimination despite the fact that the plaintiff has not actually proven discrimination. The reverse discrimination plaintiff must come much closer to proving discrimination than members of historically disadvantaged groups. In effect, the reverse discrimination plaintiff must justify the presumption where a minority plaintiff need not do so. The reverse discrimination claimant does not receive the benefits of surviving summary judgment and receiving his or her day in court that are granted to minority claimants. Courts which advocate the additional requirement provide no reason to justify the denial of an opportunity to prove intentional discrimination against the individual plaintiff.

Furthermore, the facts which the courts have found necessary to fulfill the background circumstances requirement are similar to those which the Court recognized as relevant to pretext in *McDonnell Douglas*.[105] Those facts include a pattern of discrimination against the members of the plaintiff's class, precisely the fact which the *Parker* court recognized as necessary to show background circumstances indicating a reason for a presumption of discrimination. In *McDonnell Douglas*, the Court also recognized that statistics showing a pattern of discrimination against the plaintiff's class may be relevant but not controlling.[106]

However, in a reverse discrimination case, the fact that statistics showing a pattern of discrimination may be considered necessary to the establishment of a prima facie case means that they are controlling in a case in which the plaintiff does not have direct evidence of discrimination. The plaintiff cannot proceed beyond the prima facie stage without such evidence. Thus, the reverse discrimination plaintiff is forced to make a factual showing which the Court has specifically stated is relevant to pretext at the prima facie stage of the litigation. A minority plaintiff does not have to make that showing to receive the benefit of the presumption. When a summary judgment motion is filed and the reverse discrimination plaintiff cannot show background circumstances indicating discrimination, the defendant is not forced to meet the relatively light burden of putting forth a nondiscriminatory reason for his action, and the plaintiff loses the opportunity to prove the case in court.

The courts have continually added confusion to the issue of the factual showing necessary to establish the background circumstances requirement. The *Bishopp* court stated three facts which it found together made up a strong showing of background circumstances indicating discrimination.[107] None of the three facts amounted to a showing of a pattern of past discrimination against members of the plaintiff's class, which the same court required in *Parker*. Furthermore, each of the three facts which the *Bishopp* court found made up a

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105. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973); *see supra* note 11 and accompanying text.

106. *Id.* at 805 n.19.

107. Bishopp v. Dist. of Columbia, 788 F.2d 781, 787 (D.C. Cir. 1986); *see supra* note 64 and accompanying text.

strong prima facie case had been in some way discredited by the court.[108] Thus, the District of Columbia Circuit has not established a concrete standard to guide plaintiffs in fulfilling the requirement.

In *Murray v. Thistledown Racing Club*, the plaintiff was not able to show background circumstances supporting the suspicion that the defendant discriminated against the majority.[109] The court did not clarify the facts that would have fulfilled the requirement. It only stated that the facts that no affirmative action program existed and that the majority of the employees holding the same position as the plaintiff were members of the same class as the plaintiff meant that she had not fulfilled the requirement.[110] The court did not state that these facts will always be either necessary or sufficient to fulfill the requirement.

Moreover, in *Logan v. Express, Inc*., the court also failed to state what kind of factual showing will establish background circumstances indicating discrimination against the plaintiff's class. It appears that the plaintiff attempted to show a pattern of discrimination by the defendant against males. The court found the facts insufficient to establish background circumstances but did not state what might have been sufficient.[111] It is not clear whether the court found that a showing of past discrimination will not establish background circumstances or that the proof presented by the plaintiff in that case was not sufficient to establish a pattern of past discrimination. Regardless, even though the plaintiff was able to meet the other three elements of the prima facie case, the proof was not sufficient to allow him to survive the summary judgment stage of litigation. That result runs contrary to one of the stated purposes of the *McDonnell Douglas* framework.

The factual showing necessary to meet the requirement of background circumstances is unclear; it changes with each individual case and the individual judges deciding each case. This leaves open the possibility that a court may choose whether or not to find the requirement fulfilled depending upon its belief about the merit of the reverse discrimination plaintiff's claim. This possibility of abuse by the judge could be seriously detrimental to the reverse discrimination claimant's possibility of success. Not only will a reverse discrimination claimant often be denied the procedural benefits of the *McDonnell Douglas* framework, but the decision whether the claimant receives those benefits will be subject to the virtually unbridled discretion of the individual judge deciding the case. While judges are generally fair people, even judges may not be able to overcome their own views on a subject as controversial and divisive as race and sex discrimination. Those views are likely to affect a judge's perception of the merits of a reverse discrimination claim. Thus, to protect the reverse discrimination claimant from the judge's view of society and discrimination, the additional requirement should not be imposed upon reverse discrimination

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108. *Id.* at 784; Beauchamp, *supra* note 66 and accompanying text.

109. 770 F.2d 63, 68 (6th Cir. 1985).

110. *Id.*

111. No. 92-4363, 1993 WL 515492, at *3 (6th Cir. Dec. 10, 1993).

claimants.

Moreover, the lack of clear standards poses difficulty for employers trying to establish policies in the workplace. At least two courts have implied that proof of the existence or drafting of an affirmative action program may partially fulfill the background circumstances requirement.[112] The fact that such programs may help reverse discrimination plaintiffs establish a prima facie case may discourage employers from using them, even in their milder forms. A clearly established standard for the additional requirement would assist employers in policymaking. However, removing the additional requirement altogether will be even more beneficial to employers because their past actions will not be taken into account in a reverse discrimination case. The question in each case will remain whether the employer discriminated against the individual employee who brought the case.

The purposes of the framework are not fulfilled by the imposition of the requirement of background circumstances indicating discrimination. The plaintiff is required to show discrimination by the defendant against members of his class generally, and the plaintiff must do so at the prima facie stage in order to receive the stated benefits of the burden-shifting test. Moreover, no court has clearly and consistently articulated the kind of factual showing which will meet the requirement. That leaves reverse discrimination plaintiffs in a difficult situation, at the mercy of a trial judge who may decide whether the burden has been met without any standard to guide that decision. Furthermore, employers will benefit from the removal of the additional requirement because the litigation will remain focused upon the question of discrimination against the individual plaintiff, rather than employers' actions in any other context.

B. The Purpose of the Prima Facie Case

The issue which most divides the courts in deciding the proper form of the prima facie case in reverse discrimination claims is the reasoning behind the presumption created by the prima facie case.[113] The courts are divided based upon the same reasoning which divides the courts about the framework in general. Courts which require a showing of background circumstances reason that the presumption exists only because of the history of discrimination against women and minorities. Thus a reverse discrimination claimant cannot receive the benefit of the presumption in the absence of a showing of a history of discrimination by the defendant.[114] Courts which impose no additional

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112. *Bishopp*, 788 F.2d at 787; *Murray*, 770 F.2d at 67.

113. For criticism of the presumption, see Tighe, *supra* note 37, at 337 (finding that "the McDonnell Douglas presumption is based, not upon the accumulation of experience of the coincidence of one set of facts with another, but upon an ideology which posits that relationship without proof. . . . The application of the presumption is a political decision intended to affect out-of-court behavior, in this case by punishing the failure to favor those in a 'protected' class in employment decisions.").

114. 770 F.2d at 67; 788 F.2d at 786; Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012,

requirements upon reverse discrimination claimants consider the presumption a procedural device designed to help the plaintiff who has only circumstantial evidence of discrimination.[115] In order to receive the benefit of the presumption, a reverse discrimination claimant need only meet the same elements that a member of a historically disadvantaged group must meet.

The purpose of the prima facie case is to assist plaintiffs who do not have direct evidence of discriminatory intent. In *United States Postal Service Board of Governors v. Aikens*,[116] the Court stated that the presumption exists because "[t]here will seldom be 'eyewitness' testimony to the employer's mental process."[117] Furthermore, in *Burdine*, the Court stated that the prima facie case is designed to eliminate the most common, nondiscriminatory reasons for the employer's actions.[118] The presumption does not arise merely because of the plaintiff's race or gender, rather, it arises because intentional discrimination is difficult to prove and because no ordinary and legitimate reason for the action exists. If the plaintiff cannot eliminate the common reasons such as inadequate job performance or lack of sufficient credentials to qualify for the job, no presumption arises regardless of the race or gender of the plaintiff.

When a reverse discrimination plaintiff eliminates the most common reasons for the action, the presumption is as justified as when it occurs in the case of a minority or female plaintiff because the reasoning behind the presumption is the apparent lack of a legitimate reason for the action, not the race or gender of the plaintiff. This conclusion is supported by the fact that the defendant has the opportunity to explain his actions. Furthermore, the burden imposed upon the defendant to rebut the presumption is light. The defendant only has to articulate a nondiscriminatory reason; it need not persuade the court that the reason provided was the actual reason for the action.[119] Thus, although a presumption is created, it is a presumption which is easily rebutted in the absence of intentional discrimination. That is true for a reverse discrimination claim as well as for a claim brought by a member of a historically disadvantaged group. Therefore, no additional requirement should be imposed upon a reverse discrimination claimant.

Courts which require background circumstances cite *Furnco* for support. In that case, the Court stated that the presumption arises as a result of the prima facie case because "in light of common experience" employers only act with some reason.[120] If no legitimate reason for the action can be found, then the court will presume a discriminatory reason. The courts which require background

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1017 (D.C. Cir. 1981); *see supra* note 53 and accompanying text.

115. Collins v. School Dist., 727 F. Supp. 1318, 1321 (W.D. Mo. 1990); Ulrich v. Exxon Corp., 824 F. Supp. 677, 683 (S.D. Tex. 1993) (characterizing the additional requirement as "an arbitrary barrier"); *see supra* note 79 and accompanying text.

116. 460 U.S. 711 (1983).

117. *Id.* at 716.

118. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

119. *Id.* at 255.

120. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

circumstances argue that the presumption is justified in light of common experience only when the plaintiff is a member of a historically disadvantaged group. Those courts fail to acknowledge two facts.

First, discrimination against minorities and women is decreasing in society.[121] Courts which advocate the additional requirement do not articulate the point at which the presumption ceases to be valid for minorities and women. If the presumption rests upon the fact that these groups are frequently victims of discrimination, courts advocating that rationale must draw a line. There must be a point at which the presumption is no longer valid because the group members are no longer the most frequent victims of discrimination. However, courts are not in a position to make judgments about trends in society generally; courts focus upon individual cases.[122] Therefore, to avoid an inappropriate judicial determination which is necessary to the rational operation of the background circumstances requirement, courts should not impose the requirement.

Second, imposing a higher standard upon reverse discrimination plaintiffs is fundamentally unjust. It is true that minorities and women have been subjected to discrimination on a massive scale. That fact does not, however, justify the imposition of a much higher standard upon other groups. The reverse discrimination plaintiff, who may bear absolutely no personal responsibility for discrimination against minorities and women, must meet a much higher burden because members of the same group have discriminated in the past. The value of Title VII and other antidiscrimination legislation is the prevention of discrimination. Title VII defines discrimination as treating employees differently "because of" the protected characteristics.[123] Yet courts which impose the background circumstances requirement treat reverse discrimination plaintiffs differently "because of" those very characteristics. In the interests of justice and the spirit of Title VII, the Court should not impose the background circumstances requirement.

Courts which require background circumstances also ignore the fact that the establishment of a prima face case creates only a presumption of discrimination.

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121. PHILLIP PERLMUTTER, DIVIDED WE FALL: A HISTORY OF ETHNIC, RELIGIOUS, AND RACIAL PREJUDICE IN AMERICA 307 (1995) (finding a "steady decrease in religious, racial and ethnic discrimination . . . ."); *A Hopeful Check on Ethnic Prejudice*, CHICAGO TRIB., Jan. 15, 1992, at 12; *see also Real Racial Progress*, AUSTIN AM. STATESMAN, Nov. 19, 1996, at A10 (finding that ascending income and education levels among minorities will result in a decrease in racism); *Single, Salaried Women Are Buying Homes at a Record Pace*, ABOUT WOMEN & MARKETING, June 1, 1996, at 15 (finding that women are now able to buy their own homes more frequently because of a decrease in lending discrimination); Jeff Rowe, *Wage Gap Narrowing, Study Says*, THE ORANGE COUNTY REG., Apr. 13, 1995, at A7 ("Pay gaps between men and women have practically disappeared in some occupations . . . .").

122. *See* Donald H. Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFF. L. REV. 871, 876-77 (1986) (finding that the "transactional justice" view, which values the rights of individuals, is a dominant theme in American law).

123. 42 U.S.C. § 2000e-2(a) (1994).

A presumption is not equivalent to a factual showing of discrimination.[124] The burden of actually showing intentional discrimination remains at all times with the plaintiff.[125] As long as the defendant is able merely to point out some legitimate reason for the action, the presumption drops from the case.[126] Thus, an additional showing to establish a presumption that is so easily rebutted and which is necessary to continue litigation is unjustifiable.

Courts requiring background circumstances also rely upon the Court's statement that the proof necessary to establish a prima facie case will vary with different factual situations.[127] However, that statement also does not justify imposing an additional burden upon certain plaintiffs because of their class membership. Rather, the more likely interpretation is that the Court recognized that the framework would be applied to different employment actions, such as refusal to hire, refusal to promote, and discharge. Thus, different formulations of the second and third elements of the prima facie case are used. In *McDonnell Douglas*, a case involving discriminatory failure to hire, the Court required a showing that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants" and that "despite his qualifications, he was rejected." [128] In a discriminatory discharge case, the second and third elements of the prima facie case are fulfilled by showing that the plaintiff "was doing her job well enough to meet her employer's legitimate expectations" and that "despite her performance, she was discharged."[129]

However, adding an additional burden in place of the first element is a change of a different character. Rather than requiring a mere statement of class membership, courts which require a showing of background circumstances impose a heavy substantive burden on the reverse discrimination plaintiff. The purpose of the first element of the prima facie case, as the Court noted in *McDonald v. Sante Fe Trail Transportation Co.*, is to establish the character of the discrimination as racial.[130] The first element, as articulated by the Court, does not provide justification for the presumption. The other elements of the prima facie case eliminate common reasons for the action and thus, to some extent, they justify the presumption. However, the first element merely establishes the type of discrimination claimed. Courts which require a showing of background circumstances fail to acknowledge the Court's statements and instead of merely changing the element to require the reverse discrimination plaintiff to state class membership, require an additional showing which is not required of members of other groups. Those courts go beyond the stated purpose of establishing the type of discrimination at issue to require substantive proof which often amounts to a

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124. *Furnco*, 438 U.S. at 579-80.

125. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

126. *Id.* at 255.

127. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

128. *Id.* at 802.

129. Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1261 (7th Cir. 1993).

130. 427 U.S. 273, 279 n.6 (1976).

showing of past discrimination against the members of the plaintiff's class.[131]

Moreover, the purpose of the prima facie case is to allow the plaintiff to get past the summary judgment stage of litigation. Therefore, the burden imposed upon the plaintiff in establishing the prima facie case is "not onerous".[132] The factual showing required to meet it is "minimal."[133] However, when the plaintiff is required to show background circumstances indicating discrimination against the class to which the plaintiff belongs, the burden of establishing a prima facie case becomes onerous, especially in light of the uncertainty and apparent discretion of the judge in determining whether the requirement has been met.[134] The reverse discrimination plaintiff is required to do more than eliminate nondiscriminatory reasons for the action, the plaintiff must use the first element to justify the inference, a requirement not imposed upon members of historically disadvantaged groups.

The background circumstances requirement does not honor the purposes of the prima facie case articulated by the Court. It requires the reverse discrimination plaintiff to do more than eliminate legitimate nondiscriminatory reasons for the defendant's actions; the plaintiff must justify the inference by making a factual showing without clear standards to provide guidance as to what facts must be shown. It also unjustly forces the plaintiff to bear responsibility for the discriminatory acts of others. Furthermore, the courts which impose the requirement fail to recognize that the establishment of the prima facie case merely creates an easily rebuttable presumption of discrimination; it does not actually establish the existence of discrimination. The burden imposed by those courts to establish the rebuttable presumption is unjustifiably heavy in view of the Court's recognition that the function of the first element is to establish the type of discrimination being claimed in the case. Therefore, in light of the purposes of the prima facie case, courts should not impose a requirement of a showing of background circumstances supporting the suspicion that the defendant discriminates against the majority.

C. Modifications to the Framework

The Court has continued to modify the framework since its establishment in *McDonnell Douglas*. In *St. Mary's Honor Center v. Hicks*, the Court ruled that after a defendant articulates a legitimate, nondiscriminatory reason for its action,

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131. *See* Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1018 (D.C. Cir. 1981) (requiring a showing that the defendant had unlawfully discriminated against members of the plaintiff's class in the past).

132. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The initial elements of the prima facie case are simple to prove and designed to allow the plaintiff to get past summary judgment without direct evidence. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 24 n.19 (1991).

133. St. Mary's Honor Ctr. v. Hicks, 509 U.S 502, 506 (1993).

134. *McDonnell Douglas*, 411 U.S. at 805 n.19.

the plaintiff must show intentional discrimination.[135] The plaintiff cannot merely show that the defendant's reason was false, but must also show that the real reason for the action was discrimination.[136] This modification is significant to the resolution of the proper form of the prima facie case for reverse discrimination claimants.

In a reverse discrimination case where the court requires a showing of background circumstances and the plaintiff survives a summary judgment motion, the plaintiff will already have produced some evidence showing intentional discrimination.[137] Although that will put a reverse discrimination plaintiff who has survived summary judgment in a strong position, it prevents those plaintiffs who cannot show background circumstances indicating discrimination at the early summary judgment stage from later proving the case in court. According to *Hicks*, the plaintiff must be able to show discrimination to win the case; however, it is unjust to require a majority or male plaintiff to make a similar but broader showing merely to survive summary judgment.[138]

The purpose of the requirement in *Hicks* is to prevent abuse of Title VII.[139] There is a risk of abuse when all the plaintiff needs to do to win the case is to show that the employer advanced a false reason for its action. However, the requirement in *Hicks* eliminates that risk by requiring proof of intentional discrimination. The protection against abuse applies equally to reverse discrimination claims. Neither a member of a majority class nor a member of a historically disadvantaged class can prevail using the *McDonnell Douglas* framework in the absence of a showing of intentional discrimination against the plaintiff. Therefore, there is no reason to require a reverse discrimination plaintiff to show that the defendant has discriminated against members of his or her class in the past. In light of the requirement of explicit proof of discrimination against the individual plaintiff, the requirement of additional proof of discrimination at the outset of litigation places an unduly heavy burden upon a reverse discrimination plaintiff.

D. The Court's Approach to Discrimination

Some of the Court's discrimination decisions which did not specifically address the *McDonnell Douglas* framework are also informative in determining the proper form of the prima facie case for reverse discrimination plaintiffs. These decisions reveal the Court's general approach to antidiscrimination

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135. *Hicks*, 509 U.S. at 511.

136. *Id*. at 511 n.4. For a complete discussion of the implications behind the *Hicks* decision and the arguments against and in favor of the holding, see Tighe, *supra* note 37, at 339-49.

137. The plaintiff may meet the burden of proving intentional discrimination using circumstantial evidence. Tighe, *supra* note 37, at 352.

138. *But see* Tighe, *supra* note 37, at 355 (stating that the application of either the original version of *McDonnell Douglas* or that requiring a showing of background circumstances is suspect because *McDonnell Douglas* "is not a color-blind test").

139. Tighe, *supra* note 37, at 352-53.

litigation.[140] They include decisions addressing the purposes of Title VII itself and affirmative action decisions.

1. The Purposes of Title VII.—The Court has found that, in enacting Title VII, Congress did not intend to allow discrimination against some employees on the basis of race or gender merely because the employer treated other members of the same group favorably.[141] "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[142] Title VII focuses upon individual employees, not groups of employees. Because of that focus, the Court should not impose the background circumstances requirement upon majority plaintiffs. To do so would be to focus upon the employer's treatment of the group of employees to which the plaintiff belongs, rather than upon the treatment accorded to the individual employee bringing suit.

According to the *Parker* court's formulation of the background circumstances requirement, the plaintiff must show a pattern of discrimination against the entire class of employees to which he or she belongs.[143] The facts that the *Murray* court required, an affirmative action plan and that the other employees holding the plaintiff's position be of the opposite race, also relate, not to the employer's treatment of the individual, but to its treatment of the plaintiff's class of employees.[144] Similarly, the facts which the *Bishopp* court found made up a strong showing of background circumstances related to the employees' class, not to the plaintiff employees as individuals.[145] The courts which require background circumstances focus upon the plaintiff's class, not upon the individual plaintiff. However, Title VII protects individuals.

Furthermore, in *McDonald*, the Court rejected the defendant's argument that isolated incidents of discrimination against whites were acceptable.[146] The fact that the employer generally does not discriminate against members of the plaintiff's class does not determine whether it discriminated against the plaintiff. Even if an employer generally does not discriminate against whites or males, it may be liable under Title VII for discrimination against an individual white or male. This further shows that the Court should not require the plaintiff to prove anything additional in establishing the prima facie case; rather, the plaintiff only

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140. Title VII has traditionally been criticized as economically unsound because it decreases net income, calculated to include monetary and psychic value. John J. Donohue II, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1420 (1986). However, commentators have begun to see that, although Title VII may have short-term adverse economic effects, it has long term economic benefits. *Id.* at 1431 (finding that "to the extent one prefers to see the costs of discrimination borne by the discriminators rather than the victims (who are undoubtedly less affluent), the normative appeal of the civil rights legislation is enhanced commensurately.").

141. Connecticut v. Teal, 457 U.S. 440, 455 (1982).

142. *Id.* at 453-54.

143. Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1018 (D.C. Cir. 1981).

144. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 68 (6th Cir. 1985).

145. Bishopp v. Dist. of Columbia, 788 F.2d 781, 787 (D.C. Cir. 1986).

146. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n.8 (1976).

need eliminate the usual legitimate, nondiscriminatory reasons for the action.

Courts which require a showing of background circumstances argue that the Court has stated the purpose of Title VII in a way that indicates that it was primarily intended to protect minority and female employees.[147] Thus, they argue that imposing an additional burden upon male and majority plaintiffs to receive the protections of Title VII is justified. However, it is logical that some of the Court's statements were made in terms of the protection of minority and female plaintiffs[148] because the majority of cases brought under Title VII are brought by those groups. Nevertheless, very few of those statements were made in race or gender-oriented terms. Most were made in race and gender-neutral terms. Furthermore, the Court has explicitly stated that majority and male employees are protected groups under Title VII.[149]

In addition, the Court is now moving toward what has been called the "perpetrator perspective" in Title VII litigation.[150] The perpetrator perspective focuses upon the behavior of the employer accused of discrimination, rather than focusing upon the history of discrimination against a particular class protected under Title VII.[151] Under this viewpoint, Title VII is a "colorblind" statute. Its focus on nondiscrimination, rather than the protection of groups that were historically victims of unlawful discrimination.[152] The Court no longer focuses upon overcoming the effects of past discrimination, but upon ensuring that employers presently treat their employees equally, without regard to race, sex, or any other impermissible consideration.[153] "Race neutrality" is the overarching

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147. Murray v. Thistledown Racing Club, Inc., 770 F.2d at 67 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

148. Collins v. School Dist., 727 F. Supp. 1318, 1321 (W.D. Mo. 1990).

149. *McDonald*, 427 U.S. at 278-79.

150. Freeman, *supra* note 40, at 1411-12.

151. *Id.* at 1412. For a discussion of the impact of employment discrimination upon racial minorities, see DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 591-94 (1980).

> In a society where both well-being and worth are judged by what one has and what one does, the denial of the opportunity to work inevitably results in the loss of motivation to work and lays the basis for these predictable syndromes: individual despair, family dissolution, aberrant behavior, and welfare dependency; all of which in the public mind boomerang back to blacks as characteristics that manifest their inferiority, inability, or at least unreadiness, for opportunities that whites take for granted.

Id. at 594.

152. ABRAHAM L. DAVIS & BARBARA LUEK GRAHAM, THE SUPREME COURT, RACE, AND CIVIL RIGHTS 373-79 (1995) (referring to the Court's 1988-89 terms as portraying a "cramped" view of Title VII litigation); Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1333-34 (1992).

153. In fact, one commentator remarked that "[t]he claims of white plaintiffs claiming 'reverse discrimination' receive an impassioned defense, while black victims of discrimination are treated with cool reserve." Michael C. Dawson, *Black Power in 1996 and the Demonization of African Americans*, POL. SCI. & POL'Y, Sept. 1, 1996, at 459.

concern of the Court.[154] The goal of Title VII is to establish "a truly colorblind society."[155] Thus, reverse discrimination claims have received equal treatment from the Court.[156]

Given this shift in the Court's perspective away from the historical discrimination against minorities and women and toward the actions of the individual defendant, the Court should not impose additional requirements upon reverse discrimination claimants in establishing a prima facie case. To do so would be inconsistent with the general thrust of its recent decisions. Title VII is intended to protect individual plaintiffs, rather than groups defined by class. Because the Court no longer views the history of discrimination against certain groups as the underlying rationale of Title VII, it would be illogical to impose different requirements upon majority and male plaintiffs due to the fact that these were historically favored groups. Furthermore, the values of nondiscrimination and a colorblind society virtually foreclose the application of different standards to reverse discrimination claimants. According to those values, the race or gender of the plaintiff would not change the viability of the presumption established by the prima facie case. Moreover, to impose more onerous standards solely upon the basis of the race or sex of the claimant would amount to the discriminatory application of an antidiscrimination statute. Therefore, the Court's overall view of Title VII shows that it should not require reverse discrimination plaintiffs to demonstrate background circumstances supporting a suspicion of discrimination.

2. Affirmative Action Decisions.[157]—In *Adarand Constructors, Inc. v. Pena*,

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154. Landsberg, *supra* note 152, at 1306. *But see* Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195, 197 (1995) ("Whites who are presumed to be competent, such as Alan Bakke, frequently prevail upon a showing that race was a factor in an adverse decision. Blacks who are presumed to be incompetent, such as Melvin Hicks, rarely prevail upon a showing that race was a factor unless they can also present evidence of racial slurs or epithets."). Colker recommends that "courts must develop healthy skepticism toward the claims of reverse discrimination brought by white men." *Id.* at 225.

155. Michael Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1749 (1989).

156. Freeman, *supra* note 40, at 1412. Freeman criticizes this aspect of the Court's approach to race discrimination. He states that equal treatment of reverse discrimination claims would only be appropriate if our society had completely eliminated race discrimination. *Id.* However, discrimination against minorities remains predominant in our society. According to one study, discrimination against blacks is three times more common than discrimination against whites. MARGERY TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING 75 (1991).

157. Authorities disagree upon the issue of the popularity of affirmative action plans. One study found that 75% of Americans oppose affirmative action plans. Joan O'Brien, *Affirmative Action: Is it Fair? Affirmative Action in Utah Facing a Test*, THE SALT LAKE TRIBUNE, March 27, 1995, at D1. Another study found that 55% of Americans favor affirmative action. William L. Kandel, *Affirmative Action and the Glass Ceiling: Contract Compliance and Litigation Avoidance*,

the Court decided that all governmental affirmative action programs will be subject to strict scrutiny review.[158] Prior to that decision, only the affirmative action programs of state and local governments had been subject to strict scrutiny.[159] The Court is thus moving toward a more restrictive view of the scope of permissible affirmative action programs. The imposition of the highest standard of review shows that the Court strongly opposes preferences granted on the basis of race or gender as a form of reverse discrimination.[160] The Court's treatment of discrimination claims challenging affirmative action programs is the same as its treatment of claims of discrimination against minorities and females.[161] In light of this attitude, it seems unlikely that the Court will make it more difficult for reverse discrimination claimant under Title VII to prove discrimination.

Adarand shows that the Court no longer gives great weight to the societal background against which discrimination takes place. The fact that certain groups were historically the victims of discrimination much more frequently than were members of other groups is not important to the determination of whether discrimination occurred in a particular case. Therefore, a history of discrimination by a particular employer will not be relevant to the establishment of intentional discrimination against the plaintiff. What is important is that the plaintiff in the individual case shows that discrimination occurred in that case. Thus, the requirement of background circumstances as formulated by the *Parker* court would not be significant in proving discrimination.[162]

Adarand also highlights two assumptions underlying the Court's race jurisprudence. Not only does the Court focus firmly upon discrimination by the

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21 EMPLOYEE REL. L.J., Autumn 1995, at 109, 112. Some people refer to affirmative action programs as reverse discrimination. Carl Senna, *The Ambiguities of Affirmative Action*, THE PROVIDENCE J.-BULL., Aug. 22, 1996, at B7.

158. 515 U.S. 200, 227 (1995). For a summary of the historical development leading to present affirmative action law, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION 200-10 (1992). The Clinton administration has offered an opinion on the permissible scope of affirmative action plans. A recent memorandum warned that the only legitimate reason for an affirmative action plan is to remedy past discrimination. Promoting diversity is not sufficient. Steven G. Reade & Rosemary Maxwell, *Federal Affirmative Action Programs, Following Adarand, Are Being Revamped to Promote Diversity Through Measures That Don't Use Racial or Gender Preferences*, NAT'L L.J., Feb. 19, 1996, at B6.

159. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-25 (1989) (Scalia, J., concurring). For criticism of the reasoning underlying the decision, see Freeman, *supra* note 40, at 1432-33.

160. Even before the *Adarand* decision, commentators noted that the Court was "eas[ing] the burdens on whites seeking to show that race-conscious decisions discriminate against them . . . ." Landsberg, *supra* note 152, at 1272.

161. *Id.* at 1304.

162. Parker v. Baltimore, 652 F.2d 1012, 1018 (D.C. Cir. 1981). The court in *Murray* implied that proof of the existence of an affirmative action program will fulfill the background circumstances requirement. *See supra* note 109 and accompanying text.

defendant presently but it also sees Title VII as a vehicle to establish equality of opportunity, rather than equality of results.[163] Furthermore, the Court views the differences in racial and gender composition of different industries and positions, not as a reflection of past or present discrimination, but as a reflection of different preferences due to race and gender.[164] Thus, the formulations of the background circumstances requirement which require the plaintiff to show that the employees holding the plaintiff's position are predominantly of another race or gender will not be considered important. Race and gender composition may reflect many factors other than those impermissible under Title VII. It may reflect different group preferences rather than a lack of opportunity to fill certain positions.

Similarly, with respect to voluntary affirmative action plans, the Court has given little consideration to statistical disparities in the workforce.[165] Statistical disparities are similar to the *Murray* court's requirement that persons holding the plaintiff's job be of the opposite race or gender. Those disparities do not make the existence of discrimination more or less likely. Therefore, a reverse discrimination plaintiff should not be required to show statistical disparities to establish a prima facie case. The heavy burden imposed upon reverse discrimination plaintiffs is not balanced by a substantial benefit of rooting out claims which lack merit.

The Court has also removed procedural barriers which formerly prevented minorities from challenging affirmative action programs.[166] The change demonstrates that the Court believes reverse discrimination is such an important problem that it must be subject to challenge even when the plaintiffs have not acted at the first opportunity.[167] Because the Court believes that reverse discrimination is such a serious problem, it should not require reverse discrimination plaintiffs to bear a heavier burden in establishing a prima facie case. To impose the requirement would make reverse discrimination much more difficult to establish.

Recent developments in affirmative action law show that the Court should not impose an additional burden upon reverse discrimination plaintiffs. The Court now subjects all governmental affirmative action programs to strict scrutiny. In addition, the nation's history of discrimination against minorities and women is no longer considered important in determining whether discrimination has occurred in a specific case.[168] Disparities in the workforce are also not important, and the Court has removed procedural barriers that formerly prevented reverse discrimination challenges to affirmative action plans. These changes in the Court's approach to discrimination claims by majority plaintiffs show that the Court views the validity of such claims as equal to the validity of

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163. Freeman, *supra* note 40, at 1413.

164. Landsberg, *supra* note 152, at 1301-02.

165. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984).

166. Martin v. Wilks, 490 U.S. 755, 763 (1989).

167. Freeman, *supra* note 40, at 1432.

168. Landsberg, *supra* note 152, at 1272.

discrimination claims by minorities and women. Therefore, the Court should not impose a more onerous burden upon majority plaintiffs in establishing a prima facie case under Title VII.

CONCLUSION

The federal courts have been divided on the issue of the proper form of the prima facie case in a reverse discrimination claim for more than fifteen years. However, the recent growth in the number of reverse discrimination claims filed will require the Court to provide an answer to the question. The Court's previous decisions addressing the *McDonnell Douglas* framework and the prima facie case show that the Court should not impose any additional requirement upon reverse discrimination plaintiffs. The focus of Title VII is upon discrimination against individuals not groups. However, the background circumstances requirement forces the reverse discrimination plaintiff to prove discrimination by the defendant against members of the plaintiff's class generally in addition to discrimination against the plaintiff specifically. The lack of a clear standard to determine whether a plaintiff has met the requirement subjects the plaintiff to the risk of serious injustice due to a judge's beliefs about the merits of a particular case.

Furthermore, the additional requirement also forces the reverse discrimination plaintiff to do more than eliminate the most common, nondiscriminatory reasons for the defendant's action. The plaintiff must present substantive proof of discrimination to receive the benefit of the presumption. Minority and female plaintiffs do not have to meet that heavy burden to receive the same benefit. The requirement also ignores the fact that the purpose of the first element of the prima facie case is merely to establish the type of discrimination claimed. The background circumstances requirement converts the first element of the prima facie case into a requirement of substantive proof of discrimination.

In addition, the Court's decisions under affirmative action doctrine reveal a trend toward recognizing the validity of reverse discrimination claims upon the same terms as more traditional discrimination claims. The focus of antidiscrimination legislation is equality of opportunity rather than equality of result. A history of discrimination by the defendant employer is not important to the question of discrimination in the present case. Similarly, the historical patterns of discrimination in society are not pertinent to whether it has occurred in a particular case. Thus, the Court should not require a reverse discrimination plaintiff to demonstrate background circumstances indicating that the defendant discriminates against the majority.