

AFTER *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*:
**IS PRETEXT PLUS STILL THE RULE OF LAW
IN THE SECOND CIRCUIT?**

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On June 12, 2000, the United States Supreme Court, in a unanimous decision, handed down *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000). Lawyers regularly representing plaintiffs in employment discrimination cases employing the burden-shifting analysis discussed in *Reeves* declared a major victory. The pretext-plus rule for proving intentional discrimination had been rejected.¹ Indeed, the Supreme Court stated it had granted certiorari to resolve a conflict among the Courts of Appeal "as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." The Second Circuit's decision in *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2nd Cir. 1997) (*en banc*), was listed with those Courts of Appeal, including the Fifth Circuit, from which *Reeves* originated, where proof of the prima facie case and pretext alone was not enough. The Official Reporter's note in *Reeves* states the Court's holding as follows: "prima facie

¹ "Pretext-plus" in discrimination law refers to the need for the plaintiff to offer evidence beyond a combination of the prima facie case and a showing that the employer's explanation is false in order to sustain a jury's verdict of intentional discrimination. Under a pretext-plus rule, a plaintiff must introduce

case and sufficient evidence of pretext may permit trier of fact to find unlawful discrimination, without additional, independent evidence of discrimination, though such showing will not always be adequate to sustain jury's finding of liability, abrogating *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (C.A.2 1997)."

Following *Reeves*, a panel of the Second Circuit, which included Judge Leval, one of the authors of the *Fisher* opinion, reviewed its decision in *Fisher* in light of *Reeves*. The panel considered whether the rule adopted in *Fisher* had been overturned by *Reeves* and concluded "that the Supreme Court's reasoning in *Reeves* is wholly compatible and harmonious with our reasoning in *Fisher*. There is no inconsistency between the two rulings." *James v. New York Racing Association*, 233 F.3d 149, 155 (2nd Cir. 2000). Focusing on the Supreme Court's characterization of the *Fisher* decision, Judge Leval suggested that "the Supreme Court in *Reeves* introduced some confusion as to the meaning of the *Fisher* opinion" and declared: "With all respect the Court was mistaken." *James v. New York Racing Association*, 233 F.3d at 156 n.3. Judge Leval stated, "In conclusion, upon careful study of the *Reeves* opinion, we can find no indication in it that the Supreme Court has rejected what we said in *Fisher*." *Id.* This paper will first briefly review three of the United States Supreme Court's decisions that pre-dated *Fisher* and formed the basis for the burden shifting analysis discussed there. Having established the baseline, this paper will set forth the holdings in *Fisher* and *Reeves*, along with the new rule for indirect proof of discrimination in the Second Circuit following *Reeves*. It is hoped that the juxtaposition of all of these opinions will help to answer the question: "Did the Supreme Court mistakenly characterize *Fisher* as a pretext plus decision?"

evidence sufficient for a jury to find "both that the employer's reason is false and the real reason was discrimination. *Fisher v. Vassar College*. 114 F.3d 1332, 1339 (2nd Cir. 1997) (*en bane*).

In *McDonnell Douglas Corp. v. Green*, Percy Green, described by the Court as "a black civil rights activist," brought a race discrimination claim against his employer based upon discharge and the subsequent refusal to hire him. Referring to the policy behind Title VII of the Civil Rights Act of 1964, which "tolerates no racial discrimination, subtle or otherwise," the Court set forth the elements of "the initial burden under the statute of establishing a prime facie case of race discrimination."² *Id.* at 802. Once the prima facie case is established, the "burden must shift to the employer to articulate some legitimate, nondiscriminatory reasons for the employee's rejection." *Id.* After the employer articulates the reason for rejection, the Court stated the inquiry does not end there, because while Title VII does not compel rehiring of the employee, "neither does it permit [the employer] to use [the employee's] conduct as a pretext for the sort of discrimination prohibited by" Title VII. *Id.* at 804. Therefore, the employee must "be afforded a fair opportunity" to show that the employer's stated reason for refusing to hire was in fact "pretext." Especially relevant to this inquiry would be evidence of comparable treatment of other white employees who had engaged in similar conduct, the attitude of the company toward civil rights activities and whether there was a statistical pattern of discrimination against blacks. *Id.* at 804-05. In short, the employee must be given the "full and fair opportunity" to show that the presumptively valid reasons for rejection were in fact "a coverup for a racially discriminatory decision." *Id.* at 805.

Eight years later, the Supreme Court returned to the question of allocation of proof in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct.

² "This may be done 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." *Id.* at 802. The Court also pointed out that the elements of the

1089, 67 L. Ed.2d 207 (1981).³ In this case, Joyce Ann Burdine, a female clerk, brought a discrimination suit claiming she had been denied promotion and terminated based on gender. Generally, the Court held that the employer's burden to produce a nondiscriminatory reason did not also impose a burden of proof on the employer. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Id.* at 253. The Court explained that the burden of establishing the prima facie case "was not onerous." A qualified plaintiff need only show that she was rejected under circumstances that "give rise to an inference of unlawful discrimination." *Id.* at 253.

The function of the prima facie case serves two purposes. First, by raising an inference of discrimination, if the employer does not otherwise explain the decision, then the challenged decision is "more likely than not based on the consideration of impermissible factors." *Id.* at 254, quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L. Ed.2d 957 (1978). The establishment of the prima facie case creates a presumption. If the trier of fact believes the plaintiff's evidence and the defendant is "silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* at 254.⁴ Second, as noted above, establishing a prima facie case compels the employer to come forward with an explanation sufficient enough to raise a genuine issue of fact. "To

The Court noted that in a "Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n. 8.

The Court referred to the "prima facie case" as creating a "legally mandatory, rebuttable presumption." *Id.* at 254 n. 7.

accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.⁵ *Id.* at 255.

If the defendant carries this burden then the "presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Id.* at 255.

The Court explained the effect of rebutting the presumption as follows:

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish the prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and the inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. *Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*

Id. at 255 n.10. At the new level of specificity, the plaintiff retains the burden of persuasion. With a fair opportunity to prove pretext that "burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence " *Id.* at 256.

The Court revisited the effect of the trier of fact's rejection of the employer's asserted reasons twelve years later, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed.2d 407 (1993), to decide whether the rejection of the employer's explanation (combined with the prima facie case) mandates a finding for the plaintiff. In this case, Melvin Hicks, a black man, claimed he was demoted and discharged from his position as a correctional officer at a halfway house operated by the Missouri Department of Corrections and Human Resources. Unlike the unanimous

⁵ Later in the opinion, the Court stated that the explanation "must be clear and reasonably specific" in order to provide a "full and fair opportunity" to demonstrate pretext." *Id.* at 258, citing *Loeb v. Textron, Inc.* 600

decisions in *McDonnell Douglas and Burdine*, *St. Mary's Honor Center v. Hicks* was decided by a 5-4 split vote with Justice Scalia writing for the majority and Justice Souter writing for the dissent. Adopting the "pre-text plus" approach to proof of intentional discrimination, the Court held that a prima facie case combined with disbelief of the employer's explanation did not *compel* a judgment in plaintiffs favor at the end of the case.⁶ *St. Mary's Honor Center v. Hicks* dictated a rule that henceforth the trier of fact would be required to find the employer's explanation was a "pretext for discrimination." "But a reason cannot be proved to be 'pretext for discrimination' unless it shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515.

Both Justice Scalia and Justice Souter discussed *Burdine* case at length, particularly the language in *Burdine* that stated the plaintiff was given the option of proving discrimination, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. The dissent claimed that by holding plaintiffs to a higher burden of proof, because now, "it is not enough ...to disbelieve the employer," the majority had "turn[ed] *Burdine* on its head." *Id.* at 535.⁷ Justice Scalia admitted the dissent's reading of the language permitted no interpretation other than the disbelief of the employer's explanation alone was enough to prove the case, but that given other language in the *Burdine* and in *McDonnell Douglas, Burdine*

F.2d 1003, 1011-1012 n.5 (CAI 1979).

⁶ In *Hicks*, the case was tried to the District Court in a bench trial. The judge found that the employer's reason for discharge was not worthy of belief, but that he was not persuaded there was race discrimination at the root. The judge noted there was inconsistent evidence on the role race played in the decision since some of the decision makers were black, other blacks were not similarly punished and it appeared that the employer's representative was on a "personal crusade" to fire the plaintiff. The dissenting opinion pointed out that Hicks had not been given the opportunity to rebut the "personal crusade" reason later advanced by the trial judge. *Id.* at 542-43.

⁷ Justice Souter stated, "This 'pretext-plus' approach would turn *Burdine* on its head, ...and it would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that

certainly never meant to be authority for the proposition it states in *dicta*. He dismissed the language as "an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent." *Id.* at 518. The majority opinion viewed the burden-shifting test as merely a procedural device whereby the prima facie case "simply drops out of the picture" after serving as the method that forces the employer to explain its actions. *Id.* at 510-11. The majority explained that the combination of disbelief of the employer's explanation combined with the elements of the prima facie case would permit a finding in the plaintiffs favor; however, that result was not mandated.

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection "[n]o additional proof of discrimination is required," 970 F.2d, at 493 (emphasis added).

Id. at 511. The ultimate burden of persuasion remains with the Title VII plaintiff to prove discrimination because the employer can be lying to coverup something else.⁸

The Second Circuit Court of Appeals decided *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2nd Cir. 1997) (*en banc*), in a 7-4 decision on June 5, 1997.⁹ The issue before the in banc court for consideration is described in the opinion as follows: "whether a finding of discrimination that is based on a prima facie case and a supportable finding

required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence." *Id.* at 535.

s Justice Souter concluded his dissent with the following statement, "Because I can see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent." *Id.* at 543.

⁹ A majority of six judges of the court joined an opinion co-authored by Leval, J. and Jacobs, J, who also filed a concurring opinion. Four judges dissented joining each of the two opinions authored by Chief Judge Jon O.

Newman and Winter, J. Judge Calabresi joined the majority on the issue of the weight to be

of pretext may be reversed on appeal as clearly erroneous, or whether such a finding of discrimination must be upheld absent some quantum of evidence that the employer took the adverse action for some other non-discriminatory reason." *Id.* at 1334.¹⁰ After reviewing the *McDonnell Douglas/Burdine* burden-shifting test in light of *St. Mary's Honor Center v. Hicks*, the majority adopted Justice Scalia's reasoning in the following holding:

Accordingly, a Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext *for discrimination*, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction – or both. And the Supreme Court tells us that "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515, 113 S. Ct. at 2752 (emphasis added). We have recognized again and again that a plaintiff does not necessarily satisfy the ultimate burden of showing intentional discrimination by showing pretext alone. A finding of pretext may advance the plaintiff's case, but a plaintiff cannot prevail without establishing intentional discrimination by a preponderance of the evidence.

Id. at 1339.

As in the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, the opinions of the dissents and the majority and concurring opinions in *Fisher* engage in a spirited debate over the weight which should be afforded to the prima facie case and the finding of disbelief in the employer's explanation. In particular, what weight should be afforded the evidence of inference in the prima facie case, which is the fourth part of the test? What does the inference in the fourth prong of the test add when that evidence is combined with an employer's explanation that is not worthy of credence? It was settled law in *Burdine* that an un rebutted prima facie case will entitle the discrimination plaintiff

afforded a prima facie case once the defendant has come forward with an explanation, and the significance to be afforded to the fact the explanation is found to be pretextual. *Id.* at 1354.

¹⁰ A panel of the Second Circuit Court of Appeals had determined that the District Court's finding that the reasons stated for denial of tenure were pretextual was not clearly erroneous, but the finding of

to judgment based on the prima facie case alone, including the evidence of circumstances which give rise to the inference of a discriminatory motive. Yet, the majority writes that once the presumption disappears, "Discrimination and cause are no longer presumed. To sustain the burden of putting forth a case that can support a verdict in his favor, plaintiff must then (unlike the prima facie stage) point to sufficient evidence to reasonably support a finding that he was harmed by an employer's illegal discrimination." *Id.* at 1337. This holding seems to have the odd effect of placing the employer who comes forward with a false explanation in a better position than the employer who remains silent, in the sense that an un rebutted prima facie case can sustain a finding of discrimination, but a false explanation by the employer combined with the prima facie case, and the inference of discrimination it supported in the first instance, is not always sufficient to prove discrimination." "The point we make here is that evidence sufficient to satisfy the scaled-down requirements of the prima facie case under *McDonnell Douglas* does not necessarily tell much about whether discrimination played a role in the employment decision." *Id.* at 1337.

The question then becomes, what force does the prima facie case have when combined with a false explanation from the employer? According to the majority, if the inference is created by showing that the position was filled by member outside the protected class, then hardly any weight can be added to the disbelief of the employer's explanation and the plaintiff is not entitled to judgment. *Fisher's* view of the effect of a finding of pretext combined with the prima facie case holds that "a finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an ultimate finding of intentional discrimination." *Id.* at 1338. Put another way,

¹ This anomaly is explained by the opinion by reference to the "de minimus" nature of establishing the elements of the prima facie case that the Supreme Court described as "not onerous" *Id.* at 1335, 1340 n. 7

the combination of the two "do[es] not necessarily add up to a sustainable case of discrimination." *Id.* at 1337.

Thus, the court is free to examine the record and consider the evidence as a whole to determine whether there is evidence of intentional discrimination and no particular weight is afforded to initial inference of discrimination and the employer's false explanation, except in some circumstances it will be enough. Chief Judge Newman's dissent referred to the fourth prong of the prima facie case and maintained that the circumstances that give rise to an inference of discrimination could not cease to exist just because the employer offered an explanation. The majority responded that indeed the inference of discrimination intention is a transitory thing. "In other words, the inference wholly depends on the presumption, which disappears once the employer has proffered an explanation." *Id.* at 1341. The ultimate holding is expressed as follows: "Under [the law of discrimination], notwithstanding the minimal requirement of the specially defined prima facie case, once the employer has proffered an explanation, a plaintiff may not prevail without evidence that, on its own, unaided by any artificially prescribed presumption, reasonably supports the inference of discrimination." *Id.* at 1344.

Reeves v. Sanderson Plumbing Products, Inc. supra, took up the issue of the kind and amount of evidence necessary to sustain a jury's verdict of discrimination based on the termination of Roger Reeves who claimed he was terminated based on his age.¹² The Court stated, "Specifically, we must resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Id.* at 2103. *Reeves* came to the

¹² The Supreme Court assumed, without deciding, that the *McDonnell Douglas* framework was fully applicable to the *Reeves* decision. *Id.* at 2105

Supreme Court from the Fifth Circuit Court of Appeals after a panel had reversed the district court's denial of a Rule 50 motion for judgment as a matter of law. The Fifth Circuit decision stated that a reasonable jury's finding of pretext was "not dispositive" of the ultimate issue, namely whether there was sufficient evidence of age discrimination, and reviewed the other evidence in the record against the circumstances of Reeves' discharge. The Supreme Court granted certiorari to resolve the issue of "whether a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Id.* at 2104. Referring to the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff after the employer articulated a nondiscriminatory reason, the Court stated:

[P]laintiff may attempt to establish that he was a victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra*, at 256, 101 S. Ct. 1089. Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, *St. Mary's Honor Center, supra*, at 511, 113 S. Ct. 2742, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom...on the issue of whether the defendant's explanation is pretextual," *Burdine, supra*, at 255, n. 10, 101 S. Ct. 1089.

Id. at 2106. Since the prima facie case was undisputed, the Court then reviewed the evidence which the Fifth Circuit considered, as well as the Fifth Circuit's "assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination."¹³

¹³ The evidence to establish the prima facie case included, in the fourth prong, circumstances giving rise to an inference that Reeves was a victim of the decision to terminate Reeves' employment, which included the fact that

Id. at 2108. The Court stated that the Fifth Circuit "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination by indirect evidence." *Id.* Referring to the decision in *St. Mary's Honor Center*, the Court agreed that while the factfinder's rejection of the employer's nondiscriminatory explanation did not compel judgment for the plaintiff, it was "permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* While acknowledging that an employer's false explanation is "simply one form of circumstantial evidence that is probative of intentional discrimination" which might be quite persuasive, the Court stated:

In appropriate circumstances, the trier of fact can reasonable infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as `affirmative evidence of guilt. Moreover, once the employer's justification has been eliminated, discrimination mat well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Id. at 2108-09 (citations and parenthetical quotation omitted).

The Supreme Court also reaffirmed that the combination of the prima facie case and a showing that the employer's explanation in not worthy of credence will not always be sufficient to establish intentional discrimination. But, those instances seem to be limited to situations where "no rational factfinder could conclude that the action was discriminatory." ¹⁴*Id.* at 2109. "Whether judgment as a matter of law is appropriate in

¹⁴The Court stated that this situation would be limited to those cases where "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* at 2109. In other words, in considering the evidence to support a verdict of discrimination, the court must draw all reasonable inferences in favor of the plaintiff and it may not make credibility determinations or weigh the evidence. *Id.* at 2110.

any particular case will depend on a number of factors. Those include the strength of the *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may properly be considered on a motion for judgment as a matter of law." *Id.* at 2109. The Fifth Circuit Court of Appeals "erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." ¹⁵ *Id.* at 2109.

The Second Circuit addressed the meaning of *Reeves* first in *Schnabel v. Abramson*, 232 F.3d 83 (2nd Cir. 2000). In this case, the court stated that the plaintiff had not "demonstrated that the asserted pretextual reasons were intended to mask age discrimination. In fact, beyond the minimal proof required to state a *prima facie* case, [the employee] has offered *no* evidence that he was discriminated against *because of his age*."¹⁶ *Id.* at 88. The court stated that the decision of the district court would have needed no further review but for the Supreme Court's decision in *Reeves*.¹⁷ After reviewing the principles set forth above, the court concluded:

In examining the impact of *Reeves* on our precedents, we conclude that *Reeves* prevents courts from imposing a *per se* rule requiring in all instances that an ADEA claimant offer more than a *prima facie* case and evidence of pretext. ... But the converse is not true; following *Reeves*, we decline to hold that *no* ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a *prima facie* case and presented evidence of pretext. Rather, we

¹⁵ In a concurring opinion, Justice Ginsburg stated, "evidence suggesting that a defendant accused of illegal discrimination has chosen to give false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation...But the inference remains — unless it is conclusively demonstrated, by evidence that the district court is required to credit on a motion for judgment as a matter of law... that discrimination could not have been the defendant's true motivation." *Id.* at 2112.

¹⁶ The evidence supporting the fourth prong, setting forth circumstantial evidence of age discrimination, consisted of the fact plaintiff (an employee over sixty years of age) was replaced by another individual who was 31 years old. Evidence of pretext consisted of the plaintiff's letter to his supervisor that recounted a conversation on the day before his termination, which a reasonable juror could find as evidence that the reasons given were pretextual. *Id.* at 88.

¹⁷ The court stated it was "[arguable that the Supreme Court's reading of *Fisher* was inaccurate. We read *Fisher* as consonant with *Reeves*: Both hold that the quantum of evidence needed to sustain an inference of discrimination is the same as that needed to sustain the ultimate burden in any other civil case." *Id.* at 89 n.5. The court also allowed that any possible disagreement about whether *Fisher* imposed a *per se* rule requiring more than a *prima facie* case and evidence of pretext was rendered moot by *Reeves*, which now becomes the

principle guide.

hold that the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could easily satisfy his "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.

Id. at 90. The court then ruled that because the plaintiff had presented "no evidence from which the inference could be drawn that he was discriminated against on the basis of age, he cannot meet what the *Reeves* Court reaffirmed was his 'ultimate burden.' *Id.* at 91.

Query, what happened to the circumstances giving rise to an inference of age discrimination represented by the fact the plaintiff was replaced by someone half his age?

Schnabel v. Abramson was quickly followed by *James v. New York Racing Association, supra*. While *Schnabel* was authored by Judge Cabranes, who dissented in *Fisher*, *James v. New York Racing Association* was authored by Judge Leval, one of its co-authors. In *James*, the district court granted the employer's motion for summary judgment in a reduction in force case where the employer replaced at 59-year-old "Assistant Security Director" with a 42 year old "Assistant to the Director of Security" under circumstances where the employer claimed financial problems required downsizing of the work force. The NYRA claimed that the younger worker, who was paid \$5,000 less than James, had assumed some of James' duties and a different grouping of duties. A year and a half prior to the termination of James' employment, the NYRA hired a 67-year-old Security Director. The Security Director initially promoted James, gave him a 30% raise and the use of a company car. He later made the decision to fire James as part of a reorganization where James' duties were transferred to others, including the 42 year old who James claimed replaced him. The NYRA also hired a 66-year-old president two years prior to the termination. The evidence showed that the claim to downsizing was controverted and a reasonable juror could find that explanation false based on a recent hire and promotion. James also offered testimony of remarks from senior management

about the need to save the NYRA for younger workers and about the need for older supervisors to retire.

As the district court judge followed *Fisher* in reaching the conclusion there was not sufficient evidence of discrimination, Judge Leval stated the issue on appeal turned on the question of whether *Fisher* remains good law. *James v. New York Racing Association*, 233 F.3d at 152. After reviewing the evidence summarized here, Judge Leval stated there was "insufficient evidence to support a rational finding of age discrimination." *Id.* at 153. While acknowledging that James had presented a prima facie case and that a juror could find the downsizing explanation pretextual, the opinion frames the discussion of *Fisher* and *Reeves* in the following sentence. "If these elements are sufficient as a matter of law to require that the case go to the jury, notwithstanding the lack of sufficient evidence to support a reasonable finding of prohibited discrimination, then we may be obligated to overturn the grant of summary judgment." *Id.* The opinion then moves to an explanation of the holding in *Fisher* as a rejection of *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2nd Cir 1995) (described by the court as holding a prima facie case combined with pretext always goes to the jury), and then to *Reeves*. The opinion states that *Reeves* holds that once the presumption disappears "the governing standard is simply whether the evidence, taken as a whole, is sufficient to support a reasonable inference that prohibited discrimination occurred." *Id.* at 156. Referring to *Schnabel v. Abramson*'s understanding of *Reeves* – that a court must take a case-by- case approach, examining the entire record for evidence to persuade the trier of fact that intentional discrimination occurred – Judge Leval took note of the factors which *Reeves* identified as bearing on the question of whether the combination of the prima facie case and disbelief was sufficient to allow the jury to decide whether discrimination occurred:

(1) the strength of the plaintiff's prima facie case, (2) the probative value of the proof that the employer's explanation is false, and (3) any other evidence that supports or undermines the employer's case. *Id.* The opinion then sets forth the following test while ruling that the evidence in Raymond James' case was not sufficient under the "*Reeves/Fisher* standard," a standard which "impliedly rejects the *Binder* proposition – that evidence satisfying *McDonnell Douglas's* minimal requirements of a prima facie case plus evidence from which a factfinder could find that the employer's explanation was false necessarily requires submission to the jury." *Id.* at 157.

We believe that both opinions essentially stand for the same propositions – (i) evidence satisfying the minimal *McDonnell Douglas* prima facie case, coupled with evidence of falsity of the employer's explanation, may or may not be sufficient to sustain a finding of discrimination; (ii) once the employer has given an explanation, there is no arbitrary rule or presumption as to sufficiency; (iii) the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove – particularly discrimination.

Id. at 156-57.

Following *Schnabel* and *James*, the affect of *Reeves* on Second Circuit employment discrimination decisions appears to be minimal. The panel decisions state that establishment of the prima facie case and pretext will not end the inquiry on whether there is sufficient evidence to allow the question of intentional discrimination to be decided by the jury. The court will review the record on a case-by-case basis to determine whether there is sufficient evidence of discrimination.¹⁸ See *Roge v. NYP Holdings, Inc.*, 257 F.3d 164, 168 (2nd Cir. 2001); *Slattery Swiss Reinsurance America Corp.*, 248 F.3d 87, 93-94 (2nd Cir. 2001); *Zimmerman v. Associates First Capital*

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In a Westlaw search of *Reeves v. Sanderson Plumbing Products, Inc.*, in the Second Circuit, twenty-four cases were identified. Of these, twelve were unpublished decisions. Out of the twenty-four decisions identified, seventeen were favorable to the employer and seven were favorable to the employee. In the published and unpublished decisions where the court reviewed the evidence of discrimination after the

Corporation, 251 F.3d 376, 381-82 (2nd Cir. 2001); *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 102 (2nd Cir. 2001); *Tolbert v. Queens College*, 242 F.3d 58, 70 (2nd Cir. 2001); *Abdu-Brisson v. Delta Airlines, Inc.*, 239 F.3d 456, 469-70 (2nd Cir. 2001).

In *Zimmerman v. Associates First Capital Corporation*, *supra*, Judge Newman, the author of one of the dissents in *Fisher*, noted the case law has been developing "as to what sort of record will permit a plaintiff who presents evidence of a prima facie case and evidence of pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle the defendant to judgment as a matter of law." *Id.* at 381. Judge Newman noted that the Fifth Circuit has interpreted *Reeves* to mean that a prima facie case and evidence of pretext will take the case to the jury "in the absence of 'unusual circumstances that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII.'" *Id.* at 382-82, quoting, *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001). Another Fifth Circuit opinion cited by Judge Newman emphasized the importance of jury fact finding and reiterated that evidence supporting the prima facie case and pretext may, *and usually does*, establish sufficient evidence for a jury to find discrimination. *Evans v. City of Bishop*, 238 F.3d 586, 592 (5th Cir. 2000). "The Fourth Circuit has observed that if the plaintiff proves a prima facie case and pretext, her claim must go to the jury unless 'there is evidence that precludes a finding of discrimination.'" *Id.* at 382, quoting *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000). Judge Newman then comments, "Our Circuit has not read *Reeves* quite so favorably for Title VII plaintiffs." *Id.*

employee had established the prima facie case, and it was at least assumed that the employer's explanation was pretextual, the employer prevailed in 7 out of the 9 cases. 17

The evidence suggests that the Second Circuit does not believe that *Reeves* made a change to the law in the Second Circuit as it existed after *Fisher* was decided, which the court in *James* declared was "wholly compatible and harmonious" with *Reeves*. Although the Supreme Court characterized *Fisher* as a "pretext plus" case, and presumably "abrogated" that holding in *Reeves*, the Second Circuit has not changed the way it views its role in deciding appeals in employment discrimination cases. The rule of law in the Second Circuit now requires a case-by-case approach to determine whether there is sufficient evidence in the record to sustain a finding of discrimination. Vigilance will be required in order to guard against fact-finding based on what appears in a case record on appeal. The analysis of evidence in the record in *James* clearly invaded the province of the jury by weighing the evidence and deciding the facts added up to one of two possible interpretations. In this respect, the holding in *James* is contrary to the admonition in *Reeves* that reviewing courts are not entitled to rely upon evidence the jury is not required to believe when reviewing a Rule 50 motion for judgment as a matter of law.

Juxtaposition of the Supreme Court's decisions with the decisions in the Second Circuit leads to the conclusion that pretext plus is not a dead issue in the Second Circuit. The Second Circuit's decisions after *Reeves* are not inclined to give weight to the inference created by establishing a "minimal" prima facie case. The Supreme Court in *Reeves* stated the strength of the prima facie case and the probative value of the employer's explanation should be weighed in the process of determining whether the case should go to the jury. Ultimately, the decision to allow the jury to have the final word will reflect an appellate court's bias over whether juries are competent to make the decisions in discrimination cases. Unlike the Fourth and Fifth Circuit decisions cited by

Judge Newman, there is no expectation that the case will go to the jury when pretext is combined with the prima facie case, unless there are unusual circumstances. Employment lawyers representing plaintiffs in discrimination cases in the Second Circuit had better be prepared to develop evidence which will create a strong inference of discrimination beyond simply claiming a person in a protected class was replaced by someone not in the protected class. A combination of a weak prima facie case and pretext will not be enough to allow a jury to decide whether illegal discrimination affected an employment decision.