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The Replacement Dilemma: An Argument for Eliminating a Non-Class Replacement Requirement in the Prima Facie Stage of Title VII Individual Disparate Treatment Discrimination Claims

Marla Swartz
University of Michigan Law School

NOTE

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INTRODUCTION

Although manifestations of discrimination in the workplace have changed greatly over time, employment discrimination continues to be a tremendous problem in society.[1] By enacting Title VII of the Civil Rights Act of 1964 ("Title VII"), Congress shielded employees from arbitrary adverse employment actions arising from discrimination related to race, color, religion, sex, or national origin.[2] Three years

1. *See* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 599-613 (2000) (citing numerous statistical and anecdotal studies that investigate and identify aggregate and individual discrimination in the modern workplace, and concluding that although "discrimination today is more subtle and difficult to identify" it is still a pervasive problem).

2. It shall be an unlawful employment practice for an employer —

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

later, Congress passed the Age Discrimination in Employment Act ("ADEA"),[3] guaranteeing the same protections against discrimination based on age.[4] Finally, the Americans with Disabilities Act ("ADA"),[5] passed in 1990, prohibited discrimination based on personal disability.

Ten years after Congress enacted the Civil Rights Act, the Supreme Court developed a comprehensive framework for presenting and analyzing these cases.[6] In *McDonnell Douglas Corp. v. Green*,[7] the Court outlined a three-part sequence for handling individual disparate treatment claims. First, the plaintiff presents a prima facie case of discrimination.[8] Next, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action.[9] Finally, the plaintiff has the opportunity to prove that the employer's allegedly nondiscriminatory reason is a pretext for discrimination.[10]

In addition to creating this burden-shifting procedure, the *McDonnell Douglas* decision is also widely cited for identifying four factors that a plaintiff may use to establish a prima facie case.[11]

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

42 U.S.C. § 2000(e) (2000).

3. *See* 29 U.S.C. § 621 (2000).

4. The protected group of the ADEA is defined as people over the age of forty. 29 U.S.C. § 631(a) (2000); *see also* David G. Harris, *Employment Law:* O'Connor v. Consolidated Coin Caterers Corp. — *Eliminating the Replacement Outside the Protected Class Element in ADEA Hiring and Replacement Cases*, 50 OKLA. L. REV. 283, 285 (1997) (noting that, other than "age" replacing "race, color, religion, sex, or national origin," the text of Title VII and the ADEA is identical).

5. 42 U.S.C. § 12112(a) (2000).

6. Disparate treatment claims, which occur when an employer intentionally discriminates against an employee because of his protected characteristic, are distinct from disparate impact claims, which center around a facially neutral policy that nonetheless disproportionately affects workers in a protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny apply to disparate treatment cases, the only type of discrimination this Note addresses. *See generally* Harris, *supra* note 4, at 285-86 (defining disparate impact and disparate treatment).

7. 411 U.S. at 792.

8. *McDonnell Douglas*, 411 U.S. at 802 (concluding that the complainant in a Title VII trial carries the burden of establishing a prima facie case of racial discrimination).

9. *Id.*

10. *Id.* at 804.

11. In *McDonnell Douglas*, the plaintiff had to prove:

(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. These factors were directly tailored to fit this particular plaintiff's situation. Mr. Green was a black employee bringing a failure to rehire claim against his employer.

Despite the particularity of this list, the Court was clear that because facts vary in Title VII cases, the specific proofs needed to sustain a prima facie case would vary from plaintiff to plaintiff.[12]

Since *McDonnell Douglas*, the Court has only paused once to consider what exactly a plaintiff must prove to establish his prima facie case of discrimination. In *O'Connor v. Consolidated Coin Caterers Corp.*,[13] the Court held that an ADEA plaintiff is not compelled to show replacement at work by someone outside his protected class in order to maintain a prima facie case of discrimination.[14]

While the *O'Connor* decision assumed that the *McDonnell Douglas* framework applied to the ADEA,[15] the Court in *O'Connor* made no mention of whether this particular ADEA decision applies to other discrimination claims.[16] Thus, the Supreme Court has remained vague in its Title VII jurisprudence regarding exactly what types of evidence a plaintiff must demonstrate to establish a prima facie case. By not confronting the issue of Title VII prima facie requirements directly, the Supreme Court created a void in the body of Title VII jurisprudence regarding what a plaintiff must demonstrate to establish a prima facie case of discrimination.[17]

Lower courts are inconsistent in deciding whether an employee must show that her job replacement is someone outside her protected class to sustain her prima facie burden under Title VII.[18] Several

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Id. at 793-96. It is also important to note that the Court uses the word "may" rather than "must" in delineating these factors. *See id.* at 802; *see also* Abdu-Brisson v. Delta Airlines, Inc., 239 F.3d 456, 467 (2d Cir. 2001) (concluding that although the may/must distinction is usually of no consequence, it should be drawn nonetheless in light of those few situations where it would be relevant).

12. *McDonnell Douglas*, 411 U.S. at 802 n.13 (holding that "the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations").

13. 517 U.S. 308 (1996).

14. *O'Connor*, 517 U.S. at 312 ("Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.").

15. *Id.* at 311 (assuming that the *McDonnell Douglas* framework is transferable from Title VII to the ADEA because the parties did not contest the point).

16. *See infra* text accompanying notes 42-44.

17. Although this Note primarily discusses the impact of a non-class replacement requirement on Title VII plaintiffs, the analysis is equally applicable to ADA plaintiffs alleging simple disparate treatment discrimination.

18. The language "protected class" and "non-protected class" is somewhat misleading in Title VII cases. Unlike the ADEA and the ADA, both of which protect specific groups of people, Title VII simply prohibits discrimination based on several protected characteristics. Because "protected class" is used throughout the jurisprudence and scholarship, this Note will adhere to that language. *See, e.g.*, Williams v. Trader Publ'g Co., 218 F.3d 481, 485 (5th Cir. 2000) (questioning whether a Title VII plaintiff alleging gender discrimination must show that "she was replaced by a member of a non-protected class"); Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1123 (9th Cir. 2000) (characterizing one of the prima facie requirements for a Title VII plaintiff under *McDonnell Douglas* as an identification that

courts require a plaintiff to prove as part of her initial burden that her work replacement is someone not in her protected class.[19] Other courts explicitly reject a non-class replacement requirement, only to impose other formulaic tests and comparative evidence requirements that continue to limit plaintiffs' claims.[20] At the opposite end of the continuum, some courts take more flexible approaches to the plaintiff's prima facie requirements. Under these approaches, while non-

"similarly situated individuals outside his protected class were treated more favorably"). However, it should be noted that in referring to claims brought under Title VII throughout this Note, the term "non-class replacement requirement" more precisely means a requirement that someone with a different variation of a particular protected characteristic replaced the plaintiff.

19. This approach is accepted by the 4th, 11th, and D.C. Circuits. *See, e.g.*, Bass v. Bd. of County Comm'rs., 256 F.3d 1095, 1104 (11th Cir. 2001) (holding that a plaintiff must show "other equally or less qualified employees who are not members of his race were hired"); Brown v. McLean, 150 F.3d 898, 905 (4th Cir. 1998) (holding that a Title VII plaintiff must "ordinarily show that the position was filled by someone not of a protected class"); Klein v. Derwinksi, 869 F. Supp. 4, 8 (D.D.C. 1994) (holding that a plaintiff must show he has been "replaced by a person not in the protected class, or such a person with comparable qualifications and work records was not terminated"). *But see, e.g.*, Willingham v. Abraham, No. 00-5125, 2001 U.S. App. LEXIS 7533, at *3 (D.C. Cir. Mar. 29, 2001) (noting, but not resolving, that *O'Connor* may cast doubt on current phrasing of a requirement to include a non-class replacement); Larebo v. Clemson Univ., No. 98-2234, 1999 U.S. App. LEXIS 4824, at *11 (4th Cir. Mar. 22, 1999) (interpreting the fourth *McDonnell Douglas* requirement simply as an "adverse employment action occurr[ing] under circumstances that raise an inference of discrimination"); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1534 (11th Cir. 1984) (rejecting a per se rule requiring non-class replacement because that fact is not the only way to create an inference of discrimination).

20. These restrictions include a requirement that the plaintiff must show that "the job was not eliminated after his discharge." Kendrick v. Penske Transp. Serv., Inc., 220 F.3d 1220, 1229 (10th Cir. 2000). *But see* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192 (10th Cir. 2000) (requiring only that plaintiffs show that the adverse employment action occurred under "circumstances which give rise to an inference of unlawful discrimination" (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))). Another possibility is a comparative requirement under which plaintiffs must show other similarly situated individuals outside their protected class were treated more favorably than they were treated. *See, e.g.*, Shah v. Gen. Elec. Co., 816 F.2d 264, 268-69 (6th Cir. 1987) (holding that comparative evidence showing that non-protected employees were treated more favorably is "indispensable" to a plaintiff's prima facie case). The Sixth Circuit uses this comparative requirement both as an alternative to non-class replacement, and occasionally as an additional requirement. *Compare* Walker v. Montcalm Ctr. for Behavioral Health, No. 00-1470, 2000 U.S. App. LEXIS 31046, at *4 (6th Cir. Nov. 30, 2000) (holding that a plaintiff must show either non-class replacement or that other similarly situated non-protected employees were treated more favorably), *with* Suggs v. ServiceMaster Educ. Food Mgmt., 72 F.3d 1228, 1232 (6th Cir. 1996) (creating a five-pronged test in which a plaintiff must show both non-class replacement and that similarly situated individuals outside her protected group were treated more favorably). Finally, some circuits employ any variety of multipronged tests. For example, after explicitly rejecting a non-class replacement requirement, the First Circuit replaced it with a prima facie test requiring proof of the *McDonnell Douglas* factors. *See* Cumpiano v. Banco Santander P.R., 902 F.2d 148, 155 (1st Cir. 1990) ("Today we set any uncertainty to rest and rule that in a case where an employee claims to have been discharged in violation of Title VII, she can make out the fourth element of her prima facie case without proving that her job was filled by a person not possessing her protected attribute."); Fernandes v. Costa Bros. Masonry Inc., 199 F.3d 572, 584 (1st Cir. 1999) (listing *McDonnell Douglas* factors as the required prima facie test).

class replacement "may help to raise an inference of discrimination . . . it is neither a sufficient nor a necessary condition."[21] Yet even those courts that regularly adopt flexible approaches to the prima facie stage are inconsistent in articulating, applying, or enforcing the standard.[22] A court might articulate non-class replacement as a requirement, but then simply consider non-class replacement as a factor.[23] Conversely, a court will sometimes use a more strict formulation than that which it normally requires because the plaintiff is able to satisfy the more stringent test, but then deliberately state that the court is expressing

21. Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996); *see also* Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 91 (2d Cir. 1996) (declaring there is no "unbending rule" about what circumstances may be used to raise an inference of discrimination"). Rather than requiring plaintiffs to fit their prima facie evidence "into a set of pigeonholes," *id.*, this approach is a flexible inquiry by which a plaintiff must simply "establish facts adequate to permit an inference of discrimination." Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994); *see also* Simmons v. New Pub. Sch. Dist. No. Eight, 251 F.3d 1210, 1214 (8th Cir. 2001) (requiring only that the plaintiff prove that "there exists evidence that gives rise to an inference of discrimination"); Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 101 (2d Cir. 2001) (requiring the plaintiff simply to show facts that give rise to an inference of discrimination at the prima facie stage); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344 (3d Cir. 1999) (holding that so long as the plaintiff was able to introduce other facts raising an inference of discrimination, she did not have to prove she was replaced by someone outside her protected class).

22. For example, in a four year time span, one circuit described the fourth prong of the prima facie test as requiring everything from a demonstration that "similarly situated individuals outside the protected class were treated more favorably," to a mere showing of replacement by an employee outside the protected class requirement, to a strict non-class replacement formulation. *See Chuang*, 225 F.3d at 1123; Payne v. Norwest Corp., 185 F.3d 1068, 1074 (9th Cir. 1999) (consolidating state and federal discrimination claims and requiring the plaintiff to show that he was replaced by a woman to satisfy the prima facie stage of his sex discrimination claim); Moller v. State Pers. Bd., No. 95-16620, 1996 U.S. App. LEXIS 34005, at *4 (9th Cir. Dec. 31, 1996) (requiring that the plaintiff show that his employer sought a replacement employee with similar qualifications); *see also*, *e.g.*, Roach v. Vallen Safety Supply, No. 00-2709, 2001 U.S. App. LEXIS 6200, at *2-3 (8th Cir. Apr. 11, 2001) (treating non-class replacement as a requirement that can be waived with other circumstances raising an inference of discrimination); Mills v. Health Care Serv. Corp., 171 F.3d 450, 454 (7th Cir. 1999) (listing non-class replacement as a requirement, but then qualifying that an employee can show another logical reason for discrimination to satisfy the prima facie standard); *Pivirotto*, 191 F.3d at 357 (holding that a jury instruction that erroneously included a non-class replacement requirement was not reversible error); Fisher v. Vassar Coll., 114 F.3d 1332, 1335 (2d Cir. 1997) (requiring the plaintiff to show that someone not in his protected class filled the position to sustain a prima facie case). *Compare* Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 513 (5th Cir. 2001) (claiming that the plaintiff is required to "prove that she was replaced by someone outside her protected class"), *and* Byers v. Dallas Morning News, Inc., 209 F.3d 419, 426 (5th Cir. 2000) (holding that the plaintiff must show "that he was replaced by someone outside of the protected group), *with* Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997) (rejecting an earlier circuit precedent which precluded plaintiffs from establishing a prima facie case if they could not show non-class replacement), *and Trader Publ'g Co.*, 218 F.3d at 485 (declaring that the plaintiff's inability to demonstrate non-class replacement does not "necessarily mean that she failed to establish her prima facie case").

23. Elizabeth Clack-Freeman, *Title VII and Plaintiff's Replacement: A Prima Facie Consideration?*, 50 BAYLOR L. REV. 463, 487 nn.171 & 174 (1998) (collecting cases including, for example, *Nieto*, 108 F.3d 621 (5th Cir. 1997), and Johnson v. Philip Morris, Inc., No. 94-5972, 1995 WL 704264, at *7 n.3 (6th Cir. Nov. 29, 1995)).

"no opinion on whether" that is the "proper articulation."[24] Even appellate courts that regularly denounce a non-class replacement requirement will often hold as harmless errors district court formulations of the standard that are more rigid than required, or jury instructions that blatantly misstate the law.[25]

This Note argues that the Supreme Court should explicitly eliminate non-class replacement as a requirement, and establish a multifactor approach to the prima facie stage of the individual disparate treatment inquiry. Under this approach, non-class replacement would merely be one factor in a court's overall inquiry to decide whether the plaintiff has presented evidence sufficient to "give rise to an inference of unlawful discrimination."[26] Part I demonstrates that the principles in *O'Connor* support eliminating non-class replacement as a requirement and adopting a multifactor approach to the prima facie case, and that this analysis is equally applicable in the Title VII arena. Part II suggests that a multifactor approach is compatible with the limited functions the prima facie stage serves within the burden-shifting framework. Part III asserts that a multifactor approach to the prima facie stage is also appropriate because of the overall goals of a burden-shifting regime, which has been interpreted by courts as a flexible procedure. This Note concludes that a multifactor approach to the plaintiff's prima facie burden in Title VII cases, including the elimination of a non-class replacement requirement, most accurately reflects the overall structure and purposes of individual disparate treatment burden shifting, as well as current interpretations of the prima facie stage.

I. SOLVING THE DILEMMA WITH AN EYE TO *O'CONNOR V. CONSOLIDATED COIN CATERERS CORP.*

This Part asserts that eliminating a non-class replacement requirement and adopting a multifactor approach to the prima facie case are consistent with the requirements that the Supreme Court articulated in *O'Connor* regarding both logical connection to discrimination and protection of individual plaintiffs. Section I.A contends that a multifactor approach honors both the logical connection test and the substantially younger requirement detailed by the Court in *O'Connor*.

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24. *See, e.g., Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195.

25. *See, e.g.*, Amro v. Boeing Co., 232 F.3d 790, 797 (10th Cir. 2000) (deciding that "while the district court may have misstated the fourth element of the prima facie case" this mistake did not "necessarily compel reversal" because it was not ultimately central to the decision); *Pivirotto*, 191 F.3d at 351 (clearly eliminating a non-class replacement requirement, describing an instruction mentioning such a requirement as legally erroneous, and then deeming the mistake harmless error).

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

Section I.B argues that given the similarity in statutory language and purpose between the ADEA and Title VII, the multifactor approach to the prima facie stage suggested by the individual protection language in *O'Connor* is equally applicable to all discrimination statutory claims, including Title VII actions.

A. *Bridging the Gap Between the Logical Connection Test and the Substantially Younger Requirement*

This Section shows how eliminating a non-class replacement requirement and adopting a multifactor approach to the prima facie stage synthesizes the logical connection test and the substantially younger requirement articulated by the Court in *O'Connor*.

The *O'Connor* decision articulates two standards that lower courts should consider when making a prima facie assessment of a plaintiff's ADEA claim — the logical connection test and the substantially younger requirement.[27] The best way for lower courts successfully to satisfy both principles is to eliminate a non-class replacement requirement and adopt a multifactor approach to the prima facie stage in all disparate treatment discrimination cases.

The *O'Connor* decision requires "at least a logical connection between each element of the prima facie case" and the eventual finding that the plaintiff has, or has not, raised a sufficient inference of discrimination to carry him to the next stage.[28] In *O'Connor*, the Court found that requiring the plaintiff to demonstrate that someone outside the protected class replaced him was not invariably logically connected to the determination of his case. The Court illustrated this conclusion by creating a hypothetical forty-year-old plaintiff, and reasoning that it would be absurd to determine that a thirty-nine-year-old plaintiff replacing a forty-year-old plaintiff would suggest a greater inference of discrimination than if a forty-year-old plaintiff replaced the fifty-six-year-old O'Connor.[29]

The Court took the argument one step further and declared that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case."[30] The *O'Connor* decision appeared to abolish any possibility of a non-class replacement requirement in future ADEA individual disparate treatment decisions. By creating the logical connection test, the Court eliminated non-class replacement as a dispositive requirement.

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27. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311-13 (1996).

28. *Id.* at 311.

29. *Id.* at 312.

30. *Id.* The rationale behind this exclusion was the Court's conclusion that the protected status of a replacement employee "lacks probative value." *Id.*

Despite the strength with which the logical connection test eliminates non-class replacement as a prima facie requirement in age discrimination, subsequent language in the *O'Connor* decision suggests many circumstances in which considering the characteristics of the employee who replaced the plaintiff would be possible, or perhaps even required. In addition to the logical connection test, the *O'Connor* decision suggested that an inference of age discrimination could not "be drawn from the replacement of one worker with another worker insubstantially younger."[31] Although the Court did not frame this substantially younger factor as a reintroduction of a non-class replacement requirement, lower courts have seized on the "insubstantially younger" language to defend their decisions to continue to include a non-class replacement requirement post-*O'Connor*.[32]

Courts have had difficulty analyzing prima facie cases in a manner that adheres to both the logical connection test and the substantially younger requirement. Courts that require plaintiffs to show that someone outside their protected class replaced them ignore the logical connection test.[33] Not every factual scenario lends itself to the conclusion that there is a logical connection between a plaintiff's replacement and the actual inference of discrimination. If the central purpose of the prima facie stage is for the plaintiff to establish an inference of discrimination, demonstrating replacement by someone outside his protected class is not the only plausible way of reaching this conclusion.[34] Often, an employee can wholly demonstrate such an inference even without any reference to his replacement worker.[35] Non-class replacement as a dispositive factor in Title VII situations is incompatible with the logical connection test in *O'Connor*.

At the other extreme, courts holding that the qualities of the replacement employee are irrelevant ignore the substantially younger

31. *Id.* at 313.

32. *See, e.g.*, Simens v. Reno, 960 F. Supp. 6, 8-9 (D.D.C. 1997) (responding to a plaintiff's contention that *O'Connor* has "completely eradicated" a non-class replacement requirement with the argument that *O'Connor* does in fact consider the "level of age disparity").

33. *See, e.g.*, Wallace v. SMC Pneumatics, 103 F.3d 1394, 1398 (7th Cir. 1997) (holding that a Title VII plaintiff relying solely on the *McDonnell Douglas* framework must always show that another similarly situated non-protected employee was treated more favorably in order to maintain a prima facie case).

34. Jones v. W. Geophysical Co., 669 F.2d 280, 284 (5th Cir. 1982) (declaring that "proof that the employer replaced the fired minority employee with a nonminority employee" is not the only way to raise a sufficient inference of discrimination).

35. Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158-59 (7th Cir. 1996) ("An employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement.").

requirement.[36] Under this view, the characteristics of a replacement employee should never be considered at the prima facie stage because the factor is not helpful to the prima facie inquiry.[37] Courts that refuse to consider non-class replacement at the prima facie stage ignore the practical problem that justifies the creation of a substantially younger requirement. While plaintiffs should not be required to show non-class replacement, neither should they be allowed to create a "prima facie case on the basis of very thin evidence."[38] The prima facie inquiry must always remain focused on the plaintiff raising an actual inference of discrimination through the presentation of evidence — evidence that may or may not include a showing of non-class replacement.

Adopting a multifactor approach at the prima facie stage satisfies both the logical connection test and the substantially younger requirement. Under this approach, the characteristics of an employee replacing the plaintiff could potentially be probative in evaluating the possibility of the inference of discrimination because the identity of the replacement employee often has great probative value in determining whether a plaintiff has indeed raised the required inference of discrimination.[39] If no logical connection could be identified between

36. If factually there is a logical connection between the plaintiff's replacement employee and the inference of illegal discrimination, deciding that replacement is irrelevant may also violate the logical connection test.

37. Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 353 (3d Cir. 1999) (eliminating non-class replacement as a requirement because demonstrating replacement by someone outside the protected class does not eliminate a "common, lawful reason[] for the discharge"); *see also* Clack-Freeman, *supra* note 23, at 482 (summarizing and endorsing the approach of circuits in which the identity of a plaintiff's replacement is irrelevant at the prima facie stage); Harris, *supra* note 4, at 297 (praising the *O'Connor* Court for eliminating the restriction because of "the lack of application to all situations of age discrimination").

38. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996).

39. Age difference is still probative under *O'Connor*, as demonstrated by the substantially younger requirement. The identity of the replacement employee is not "outcome determinative," but it is "material to the question of discriminatory intent." Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997). The Fifth Circuit later reinforced the *Nieto* view in *Byers v. Dallas Morning News*, 209 F.3d 419, 427 (5th Cir. 2000). In that decision the court refused to accept the plaintiff's argument that *Nieto* had made the identity of the replacement employee irrelevant. Instead, the court repeated the *Nieto* "not determinative but still material" language and denied the plaintiff recovery. *Id.*; *see also* Walker v. St. Anthony's Med. Ctr., 881 F.2d 554, 558 (8th Cir. 1989) (citing Giannotti v. Foundry Cafe, 582 F. Supp. 503, 506 (D. Conn. 1984) (arguing that a worker's replacement identity "pertains to the weight of the evidence rather than to legal sufficiency)); Simens v. Reno, 960 F. Supp. 6, 9-10 (D.D.C. 1997) (holding that while age difference, not class membership is probative in the ADEA context, class membership itself is still probative in Title VII situations). In the Title VII arena, class membership is still probative when it is used as a convenient shorthand for "class difference," "religious difference," or "sex difference." *See* Kendrick v. Penske Transp. Serv., 220 F.3d 1220, 1229 n.8 (10th Cir. 2000) (emphasizing that while the plaintiff is not ordinarily obligated to show non-class replacement, neither is he precluded "from providing evidence of this nature as part of his prima facie case").

this factor and an eventual inference of discrimination, however, the factor would no longer be considered.[40]

B. *The Individual Protection Bridge: Applying* O'Connor *Beyond the Boundaries of the ADEA*

This Section delineates the similarities between the ADEA and Title VII, and argues that the multifactor approach to the prima facie stage that is required by the individual protection language in *O'Connor* is equally relevant to Title VII claims of disparate treatment in employment situations.

The *O'Connor* Court was silent on the applicability of the decision to similar Title VII situations.[41] Grafting analysis from one discrimination statute to another is neither difficult nor uncommon. Although the Court created the burden-shifting procedure in *McDonnell Douglas* in a Title VII case, courts have used this method of analysis for deciding discrimination claims under Title VII, the ADEA, and other statutes prohibiting discrimination.[42] In addition, courts often regard the statutes as similar enough to warrant applying precedent from cases involving one statute to the current claims of another.[43]

These transfers are possible and appropriate because of the similarities in statutory language and purpose of Title VII and the ADEA. First, the statutory texts of Title VII and the ADEA are virtually identical. Although the two statutes list different characteristics against which discrimination is prohibited, the protections offered to employees are identical.[44]

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40. Thus, even if a plaintiff demonstrates replacement by someone outside her protected class, if the contextualizing facts still do not amount to an inference of discrimination, then the non-class replacement is not logically connected to the prima facie inquiry and the case may be dismissed at the prima facie stage. *See, e.g.*, Cianci v. Pettibone Corp., 152 F.3d 723, 727 (7th Cir. 1998) (concluding that the plaintiff's evidence that she was replaced by a male was "simply insufficient" to carry her case).

41. Clack-Freeman, *supra* note 23, at 482 ("The Court made no suggestion as to the applicability of the replacement requirement in the Title VII arena.").

42. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (applying burden shifting framework to ADEA claims without discussion); *O'Connor*, 517 U.S. at 311 (same); *see also* Leffel v. Valley Fin. Servs., 113 F.3d 787, 792 (7th Cir. 1997) (applying burden shifting framework to ADA claims); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1178 (6th Cir. 1996) (same).

43. Dominguez-Cruz v. Suttle Caribe Inc., 202 F.3d 424, 428 n.2 (1st Cir. 2000) (regarding all discrimination statutes as "standing *in pari passu* of each other" and endorsing "the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another" (quoting Serapión v. Martínez 119 F.3d 982, 984 (1st Cir. 1997))); *see also* Walton v. Mental Health Ass'n, 168 F.3d 661, 666 (3d Cir. 1999) (accepting practice of using case law interchangeably).

44. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (declaring sections of the two statutes to be almost *in haec verba* with each other); Harris, *supra* note 4, at 285 (demonstrating how the legislative history of the ADEA suggests that Congress intended to provide the same protections with both the ADEA and Title VII, and comparing the statutes and

Additionally, the discrimination statutes share common purposes. Generally, the central purpose of the statutes is "to prohibit discrimination in employment against members of certain classes,"[45] and "eliminate discrimination in the workplace."[46] More specifically, both the ADEA and Title VII emphasize the protection of individual plaintiffs, not entire plaintiff classes.

The Supreme Court addressed the issue of personal protection in Title VII in *Connecticut v. Teal*.[47] The Court found that "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[48] Refusing to focus on the "overall number of minority or female applicants actually hired or promoted," the Court deemed the employer's nondiscriminatory "bottom line" an insufficient defense to allegations of individual discrimination.[49]

The Court used this same individual protection language in *O'Connor* as a justification for eliminating non-class replacement as a prima facie requirement. According to the Court in *O'Connor*, "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*."[50]

The personal protection focus of the ADEA identified in *O'Connor* supports, and perhaps mandates, eliminating a non-class replacement requirement and adopting a multifactor approach to Title VII claims. Similarly, this individual protection logic of *O'Connor* works with equal force to compel the elimination of a non-class replacement requirement, and to endorse a multifactor approach to the prima facie stage in the Title VII arena.[51]

Making non-class replacement the dispositive factor in a plaintiff's case requires the plaintiff to do more than simply raise an inference of the discrimination she has suffered personally. Rather, a non-class replacement requirement forces employees to show that the employer has favored a non-protected employee over all employees with the protected characteristic. Thus, a non-class replacement requirement

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revealing that with the exception of the ADEA substituting age for the prohibited characteristics listed in Title VII, the language of the two statutes is identical).

45. *Walton*, 168 F.3d at 666 (quoting Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 157 (3d Cir. 1995)).

46. *Oscar Mayer*, 441 U.S. at 756.

47. 457 U.S. 440 (1982).

48. *Teal*, 457 U.S. at 453-54.

49. *Id.* at 450.

50. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996).

51. Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996) (stressing that "laws against discrimination protect persons, not classes," and deciding that *O'Connor*'s logic applies with "equal force" under Title VII).

increases the plaintiff's aggregate evidentiary burden, and negates the personal protection focus of discrimination statutes.

Stripped to its barest essentials, an individual disparate treatment inquiry asks whether a particular plaintiff employee is the victim of intentional discrimination.[52] A court must evaluate whether the defendant employer would have taken the "same action had the employee been of a different race (age, sex, religion, national origin, etc.), and everything else had remained the same."[53] A mandatory non-class replacement requirement at the prima facie stage exceeds the scope of this inquiry. With such a requirement, plaintiffs are forced to raise an inference not only that their employer has discriminated against them, but also that their employer discriminates against every member of their protected class.[54] On the other hand, completely ignoring replacement identity does not satisfy the aim of focusing on individual discrimination. In order to allow a plaintiff to sustain a case based only on personal discrimination, courts must eliminate non-class replacement as a requirement and adopt a multifactor approach to the prima facie stage.

A multifactor approach protects the individual because employment discrimination suits are by their nature fact intensive. Given the sheer quantity of facts that a court must consider in making an employment discrimination judgment, there are an endless number of factors that could be relevant in proving a prima facie case of discrimination.[55] Some of these factors might include a formal policy elucidating a pattern of discrimination, or informal comments and actions of authority figures reflecting discriminatory animus. Structural factors, like the redistribution of a discharged employee's duties, or behavioral factors, like a preferential treatment given to non-protected employees, could also be relevant. Additionally, factfinders

52. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (generalizing that this is the ultimate question in every employment discrimination case involving a claim of disparate treatment).

53. *Carson*, 82 F.3d at 158.

54. Perry v. Woodward, 199 F.3d 1126, 1138 n.8 (10th Cir. 1999) (rejecting a non-class replacement requirement in part because plaintiffs would "effectively be required" to demonstrate discrimination against "every other employee or potential employee who shares her protected attribute"). Another potential standard raised by employers takes non-class replacement to the extreme. In this framework, a plaintiff is required to prove he is replaced not only by someone outside his protected class, but outside *any* protected class. *See* Chock v. Northwest Airlines, 113 F.3d 861, 863 n.1 (8th Cir. 1997) (recognizing the absurdity of a standard under which plaintiffs must show "replacement by a person outside any protected class for a prima facie case").

55. The *McDonnell Douglas* Court recognized the need for flexibility resulting from the wide variety of factors by cautioning that the prima facie framework articulated for that case was not automatically applicable to every fact scenario. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973); *see also* Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 91 (2d Cir. 1996) (concluding that the "fourth element set forth in *McDonnell Douglas* is a flexible one that can be satisfied differently in differing factual scenarios").

might gain insight by examining the events preceding the discriminatory action. A pattern of unequal discipline prior to a dismissal, or actions taken after the discriminatory occurrence could substantiate the inference.[56]

With so many potential factors for a court to consider, isolating one factor as necessary to establish a prima facie case is counter productive because it fails to further the goal of individual protection. Replacement by someone outside a plaintiff's protected class is often helpful to create an inference of discrimination, but it is not always necessary.[57] Individual plaintiffs are not protected under an inflexible rule requiring proof of one or more arbitrary specific factors because meritorious claims missing that particular factor are dismissed.[58] On the other hand, a multifactor approach embraces the individual fact intensive nature of individual disparate treatment claims. Plaintiffs are required only to prove those factors that contribute to their personal discrimination suit, not a generalized prototype-discrimination situation. These similarities in text and purpose instruct that a multifactor approach is equally applicable to both the ADEA, as understood by the Court in *O'Connor*, and Title VII.

A multifactor approach to the prima facie stage of any discrimination claim raises some concerns. For example, without clearly delineated standards from the Supreme Court, circuit courts tend to fill in the gaps with their own, often conflicting, interpretations of the prima facie requirements.[59] In order to protect all plaintiffs and defendants equally, even a flexible multifactor approach must culminate in some consistent overarching standard.[60] The factors of a prima facie case

56. This list is compiled from a variety of sources both listing factors that could potentially contribute to an inference of discrimination and describing individual factors that played a key role in particular cases. *See, e.g*, Bellaver v. Quanex Corp., 200 F.3d 486, 494 (7th Cir. 2000); Wallace v. SMC Pneumatics, 103 F.3d 1394, 1398 (7th Cir. 1997); *Chertkova*, 92 F.3d at 91; Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994); Shah v. Gen. Elec. Co., 816 F.2d 264, 269 (6th Cir. 1987); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1535 (11th Cir. 1984).

57. *See, e.g.*, Meiri v. Dacon, 759 F.2d 989, 996 (2d Cir. 1985) (arguing that replacement by an employee from within the class "may weaken, but certainly does not eliminate, the inference of discrimination").

58. Perry v. Woodward, 199 F.3d 1126, 1137 (10th Cir. 1999) (rejecting an inflexible rule as untenable). One commentator has dubbed the inevitable dismissal of meritorious claims that would result from a per se non-class replacement requirement a "parade of horribles." *See* Clack-Freeman, *supra* note 23, at 488; *see also* Beth M. Weber, *The Effect of* O'Connor v. Consolidated Coin Caterers Corp. *on the Requirements for Establishing a Prima Facie Case Under the Age Discrimination in Employment Act*, 29 RUTGERS L.J. 647, 669 (1998) (urging a unified approach because "[w]ithout a precise standard, each circuit will be able to establish its own guidelines").

59. Weber, *supra* note 58, at 669 (finding that a bright-line rule is more appropriate in Title VII cases where the characteristics are not on a continuum).

60. While the more general formulation of a standard, rather than a rule, might upset the "preset balance between permissible and impermissible conduct," ultimately a unified approach (even if this approach is comprised of several factors) is superior to arbitrary rules

may "vary with the circumstances of the alleged discrimination,"[61] but the ultimate prima facie inquiry remains unchanged — the plaintiff must always raise an inference of discrimination. This approach abundantly protects individual plaintiffs — plaintiffs are only required to present the evidence relevant to their particular case, yet are still guided by an unwavering duty to raise an inference of discrimination.

Furthermore, some scholars and courts argue that, even if a multifactor approach is dictated in ADEA situations by *O'Connor*, the decision is patently inapplicable to Title VII not because of dissimilarities in statutory language or purpose, but because of the dissimilarity of the characteristics the statutes shield from discrimination. Thus, according to this viewpoint, *O'Connor* is inapplicable in the Title VII arena because Title VII protected characteristics do not lend themselves to analysis on a continuum like the ADEA protected class of all individuals over forty years old.[62] Rather, Title VII protects binary characteristics that cannot be analyzed with a sliding-scale approach.[63] This perspective concludes that because there can be no varying levels of race, gender, or religion disparity between employees, a bright-line rule requiring non-class replacement is appropriate for the Title VII arena.[64]

This viewpoint overlooks the possibility for variations in the manifestations of these otherwise immutable characteristics between different employees within a single gender, religion, or race. For example, manifestations of race can be seen as a continuum with dark-skinned African Americans being discriminated against in favor of light-skinned African Americans.[65] In the gender context, an employer might preference a woman who is more traditional in her understanding of gender roles over a woman who appears to violate norms

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because of the potential for genuine substantive consistency in judicial decision. Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985).

61. Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (quoting Jones v. Frank, 973 F.2d 673, 676 (8th Cir. 1992) (internal quotation marks omitted)).

62. Congress limited the protected class covered by the ADEA to employees over forty years old. 29 U.S.C. § 631(a) (2000).

63. *See* Clack-Freeman, *supra* note 23, at 490 (concluding that because Title VII characteristics are immutable, the Court will not have the luxury of using a "sliding scale" test when deciding such a case); Harris, *supra* note 4, at 300 (saying that Title VII protects characteristics which are immutable and binary). Also note that under this theory, claims of disparate treatment discrimination based on disability are included within the scope of *O'Connor* because disability, like age, is not uniform. *See, e.g.*, Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1186 n.11 (claiming that "unlike traits such as gender and race which are uniform among members of the protected class, disabilities are diverse").

64. *See, e.g.*, Simens v. Reno, 960 F. Supp. 6, 9 (D.D.C. 1997) ("[T]here can be no issue of the *level* of sex disparity. You are either a woman or you are not.").

65. *See* Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1119 (3d Cir. 1997) (Lewis, J., dissenting) (discussing replacement of dark-skinned blacks with light-skinned blacks in order to make white co-workers and customers more comfortable).

of gender behavior.[66] In contrast, an employer might favor a woman who fits into an "old boys club" over a woman who defied this infrastructure.[67] In terms of religion, an employer could favor an employee who is less observant of his faith over one who requires more accommodations because of religious belief.[68] Finally, discrimination could be based on a combination of protected attributes.[69] In all of these situations, an employee could be replaced by someone from within her protected class, yet still be the victim of impermissible Title VII discrimination. Thus, because the manifestations of Title VII characteristics are not static between employees, but rather exist on continuums similar to age, it is incongruous to deny Title VII plaintiffs the use of the individual protections offered to ADEA plaintiffs under *O'Connor*.

II. SOLVING THE DILEMMA WITH AN EYE TO PRIMA FACIE PURPOSES

The prima facie stage of the burden-shifting inquiry has specific and limited purposes. Given these narrow functions, plaintiffs must satisfy only a low evidentiary burden at the prima facie stage. This Part argues that a multifactor approach is the best way to effectuate this low evidentiary burden, and also helps to further the remaining prima facie goals.

Eliminating a non-class replacement requirement and adopting a multifactor approach to the plaintiff's initial Title VII burden is a viable option because the Supreme Court has continually narrowed the purposes and functions of the prima facie stage. Beginning with *Texas Department of Community Affairs v. Burdine*,[70] the Court has repeatedly stressed that a plaintiff's satisfaction of the prima facie stage only shifts the burden of production, not the burden of persuasion, to the defendant.[71] By consistently stating that the prima facie

66. *See, e.g., id.* (acknowledging the possibility of replacing one woman with another who "more closely resembles a conception of the so-called feminine ideal").

67. *See, e.g.*, Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 321 (3d Cir. 2000) (noting that some females may be preferred in an "old boys network" because they are more like "one of the boys" than other females).

68. *See, e.g.*, Klein v. Derwinksi, 869 F. Supp. 4 (D.D.C. 1994) (plaintiff is dismissed after requesting time off for a religious holiday, but is denied relief because she is replaced by someone of her same religion).

69. *See Goosby*, 228 F.3d at 321 (declaring that proof that a white female replaced a black female does not defeat a claim of race/gender discrimination).

70. 450 U.S. 248 (1981).

71. *Burdine*, 450 U.S. at 254 (holding that only the burden of production shifts to the defendant after the plaintiff successfully demonstrates a prima facie case of discrimination). The distinction between shifting the burden of production and shifting the burden of persuasion was later considered by the Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (refusing to compel judgment when the plaintiff has only produced prima

stage only shifts the burden of production to the defendant, courts have created a structure in which eliminating a non-class replacement requirement and adopting a multifactor approach would not reduce the plaintiff's initial burdens and thus give the plaintiff an unfair advantage.[72]

If satisfying the prima facie stage of the inquiry relieved a plaintiff from the responsibility of persuasion, then eliminating a non-class replacement requirement and adopting a multifactor approach to the prima facie stage would be fundamentally unfair. A plaintiff could shirk the ultimate burden of proof merely by demonstrating a loose collection of insufficient facts. Using a multifactor approach at the prima facie stage makes sense only because the burden of persuasion never shifts to the defendant.

Given that the prima facie stage only serves to shift the burden of production to the defendant, the evidentiary requirement at the prima facie stage can be quite low.[73] A plaintiff may use a variety of evidence to meet her minimal evidentiary burden.

The quantity of evidence a plaintiff must put forth in order to survive the prima facie analysis under *McDonnell Douglas* is modest.[74] A plaintiff's prima facie evidence "need not be overwhelming, or even destined to ultimately prevail" on the discrimination claim.[75]

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facie evidence and rebutted pretextual reasons), and again in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (refusing to preclude judgment when the plaintiff has only produced prima facie evidence and rebutted pretextual reasons). While the Court in *Hicks* and *Reeves* implicitly helped to define the purposes of the prima facie stage by clarifying the exact nature of the burdens that shift as a result of a plaintiff creating a prima facie case, both Courts merely glossed over the prima facie stage itself in their analysis. *See Reeves*, 530 U.S. at 142 (acknowledging that it is "undisputed" that the plaintiff satisfied the prima facie stage in part because "respondent successively hired three persons in their thirties to fill petitioner's position"); *Hicks*, 509 U.S. at 506 (merely mentioning that "minimal requirements of such a prima facie case" had been established by proving, among other elements, "(4) that the position remained open and was ultimately filled by a white man"). Although the *Hicks* Court included non-class replacement on the list of factors establishing the plaintiff's prima facie case, Justice Souter explicitly pointed out in his dissent that this mere mention did not signify a decision that non-class replacement was a required prima facie factor. *See id.* at 527 n.1 (Souter, J., dissenting) (emphasizing that the "Court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today").

72. *But see* Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67, 70 (1993) (arguing that the *McDonnell Douglas* framework is an "audacious and arbitrary" unauthorized act of judicial legislation violating separation of powers principles, and criticizing the Court for construing the prima facie stage as a weak presumption that alters the substantive balance of power in disparate treatment cases).

73. *See, e.g.*, Harris, *supra* note 4, at 289 (concluding that in part the "reason for this relatively low litigation hurdle is because of the important role that the prima facie case serves").

74. *See, e.g.*, Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996) (describing the plaintiff's evidentiary burden at the prima facie stage as "rather modest").

75. Bellaver v. Quanex Corp., 200 F.3d 485, 493 (7th Cir. 2000).

Comparatively, the evidentiary burden of a *McDonnell Douglas* prima facie case is even lower than that which is required at other prima facie stages of non-*McDonnell Douglas* claims.[76] One classic Supreme Court articulation of the plaintiff's prima facie burden under the *McDonnell Douglas* framework is simply that the burden is "not onerous."[77] To maintain a prima facie case, the plaintiff simply must show by a preponderance of the evidence that he was "rejected under circumstances which give rise to an inference of unlawful discrimination."[78]

Also in keeping with the limited purposes of the prima facie stage, requirements about the types of evidence a plaintiff may use to meet his prima facie burden are quite liberal. Plaintiffs have the "full panopoly of circumstantial evidence" at their disposal in meeting their initial prima facie burden of production.[79] This collection includes statistical evidence of systematic disparate treatment, comparative personal evidence of individual disparate treatment, related comments by people in positions of authority, or evidence of replacement at work by a person not in the employee's protected class.[80] Plaintiffs may even meet their evidentiary burdens with a combination of direct and circumstantial evidence that, while not individually sufficient, together create an inference of discrimination sufficient to satisfy the prima facie burden.[81] This low evidentiary burden compels — and is essentially synonymous with — a multifactor approach.

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76. *See* Fisher v. Vassar Coll., 114 F.3d 1332, 1336 (2d Cir. 1997) (comparing the requirements of a prima facie case under *McDonnell Douglas* to the requirements of a prima facie case "in the absence of a special policy-based rule similar to that promulgated by *McDonnell Douglas*").

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

78. *Id.* Furthermore, the inference is often a "relatively weak" one, corresponding to the "small amount of proof necessary to create it." EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1197 (10th Cir. 2000). *But see* Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (holding that the requisite degree of proof necessary to establish a prima facie case is "minimal and does not even need to rise to the level of a preponderance of the evidence").

79. Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581 (1st Cir. 1999).

80. *See id.* (enumerating a nonexhaustive list of types of circumstantial evidence).

81. Burden shifting was originally created in part to compensate plaintiffs for the reality that employers rarely leave an incriminating trail of direct evidence in the wake of discrimination. Hasham v. California State Bd. of Equalization, 200 F.3d 1035, 1044 (7th Cir. 2000) ("Because employers are usually careful not to offer smoking gun remarks indicating intentional discrimination, the Supreme Court established the burden shifting approach as a means of evaluating indirect evidence of discrimination."). Thus, plaintiffs are not required to produce direct evidence of discrimination when using the *McDonnell Douglas* scheme because to do so would blatantly subvert the core purpose of burden shifting. *See* Marzano v. Computer Sci. Corp., 91 F.3d 497, 507 (3rd Cir. 1996) (chastising that "our legal scheme against discrimination would be little more than a toothless tiger if the courts were to require . . . direct evidence of discrimination").

A multifactor approach also supports the established evidentiary burden of the prima facie case because the standard is not limitless. In order to function efficiently, the prima facie case must have some evidentiary burden. Setting the evidentiary bar so low that any plaintiff could automatically meet the standard would strain judicial resources by "open[ing] the judicial floodgates" to the claims of every plaintiff who misinterprets an ordinary business decision as motivated by discriminatory animus.[82] The consequences of such an unreasonably low standard would be far-reaching. Defendants targeted in frivolous discrimination claims could suffer great losses in resources or reputation.[83] Furthermore, without a minimum evidentiary requirement, courts would routinely be forced to function as arbitral boards ruling on the soundness of ordinary business decisions.[84]

This judicial function would overstep the scope of discrimination statutes.[85] These statutes do not guarantee employment or assess business decisions.[86] Their central purpose is simply to eliminate invidious discriminatory barriers in the workplace.[87] Thus, while the strength of a particular plaintiff's prima facie inference of discrimination may vary according to the particular evidence he adduces,[88] under a multifactor approach the evidentiary bar is never set so low so as to negate the necessity of raising an inference of discrimination.[89]

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82. *See Marzano*, 91 F.3d at 509 (arguing that the test articulated in the decision does not reach this low level).

83. *See* Simens v. Reno, 960 F. Supp. 6, 9 n.4 (D.D.C. 1997) (speculating on the consequences of allowing a plaintiff to "shoot into a barrel of fish" and maintain a prima facie case without even "something reasonable on which to rest a claim").

84. *See* Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (refusing to allow courts to become "arbitral boards, ruling on the strength of 'cause' for discharge" and noting that the real question in a discrimination case is "not whether the employer made the best, or even a sound, business decision; it is whether the real reason is race").

85. For example, the clearly articulated purpose of Title VII is to "assure equality of employment opportunity and to eliminate . . . discriminatory practices and devices . . . ." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

86. *See* Kendrick v. Penske Transp. Serv., Inc., 220 F.3d 1220, 1232 (10th Cir. 2000) (emphasizing that "Title VII does *not* make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal" (quoting EEOC v. Fasher Co., 986 F.2d 1312, 1319 (1992) (internal quotation marks omitted))); Smith v. F.W. Morse & Co., 76 F.3d 413, 425 (1st Cir. 1996) ("Title VII is neither a shield against [the] broad spectrum of employer actions nor a statutory guaranty of full employment, come what may.").

87. *See McDonnell Douglas*, 411 U.S. at 801.

88. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2246 (1995) (noting that the "actual strength of the inferences that can be drawn from the prima facie case vary depending on the strength of the evidence that supports it").

89. Some courts are wary that an overly flexible approach will "give complete weightlessness to an already light plaintiff's burden." Simens v. Reno, 960 F. Supp. 6, 9 (D.D.C. 1997). This view fails to appreciate that survival at even a flexible prima facie stage does not preclude the possibility of summary judgment in favor of the defendant. *See, e.g.*, Roach v.

While the functions of the prima facie case are obviously limited by the fact that satisfaction of the prima facie stage only shifts the burden of production to the defendant, within this narrow avenue the first stage of the *McDonnell Douglas* analysis still serves many useful purposes. First, the prima facie stage screens out invalid or incomplete claims.[90] This initial analysis eliminates "the most common nondiscriminatory reasons" for the employer's action.[91] If a plaintiff cannot demonstrate even a prima facie case, then the case is dismissed without wasting judicial resources to complete perfunctorily the *McDonnell Douglas* process.[92]

A multifactor approach is compatible with the screening purpose of the prima facie stage because the prima facie stage is only the first and broadest filter for untenable claims of disparate treatment. The screening benefit is obtained so long as the prima facie stage continues to identify cases in which "discrimination might conceivably have been operating."[93] Some scholars worry that adding more flexibility to the prima facie stage could increasingly waste judicial resources because courts would be forced to look at the circumstances of each case and continually weigh the merits of the individual claim.[94] This view presumes that the purpose of the prima facie stage is to eliminate individual analysis by sorting claims into generalized categories. Quite the

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Vallen Safety Supply Co., No. 00-2709, 2001 U.S. App. LEXIS 6200 (8th Cir. Apr. 11, 2001) (granting summary judgment for the defendant because the plaintiff was unable to produce a link between her employer's actions and discrimination sufficient to give rise to the required level of inference); Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985) (granting summary judgment for the defendant because her wholly subjective beliefs did not give rise to the required level of inference). Furthermore, while eliminating non-class replacement as a requirement, and adopting a flexible approach may result in more plaintiffs surviving the prima facie stage or summary judgment, this does not necessarily lead to the conclusion that more frivolous claims are avoiding elimination at the initial stage of burden shifting. One court has even suggested that more cases go to trial simply because that is "the nature of the evidentiary beast" as applied to disparate treatment situations. *See* Marzano v. Computer Sci. Corp., 91 F.3d 497, 509 (3rd Cir. 1996). In other words, "summary judgment is in fact rarely appropriate in this type of case" because there are genuine issues of material fact which must be sorted out by a full adjudication before a factfinder. *See id.*

90. *See, e.g.*, Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999) (noting that one of the purposes of the prima facie case is to " 'screen out' " cases where " 'the plaintiff fails to distinguish his or her case from the ordinary, legitimate kind of adverse personnel decision' " (quoting Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 134 (7th Cir. 1985))).

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

92. *See, e.g.*, Ang v. Proctor & Gamble Co., 932 F.2d 540, 548 (6th Cir. 1991) ("When a court is convinced that a plaintiff completely failed to allege circumstances from which discrimination can be inferred, the court need not examine all elements of the *McDonnell Douglas* analysis.").

93. Malamud, *supra* note 88, at 2244.

94. *See, e.g.*, Weber, *supra* note 58, at 667-68 (postulating that a lower prima facie standard would require courts to look at the circumstances of each case, and would result in "an increase in the number of claims filed" and "an increase in the amount of time it would take courts to make decisions in each case because of the weighing process they would be required to perform").

contrary, while courts generalize about minimum nondiscriminatory reasons a plaintiff can disprove and still proceed, plaintiffs do not survive the prima facie stage unless they adduce particularized evidence that eliminates these nondiscriminatory reasons and raises an inference of discrimination.[95] Rather than impeding the screening function, a multifactor approach at the prima facie stage actually fosters accurate elimination of nonviable claims.

Second, eliminating a non-class replacement requirement and using a multifactor approach also assists in another central goal of the prima facie stage and burden shifting in general — the practical function of "fine-tuning" the facts and evidence.[96] As burden shifting proceeds, "an initially vague allegation of discrimination is increasingly sharpened and focused, until the ultimate inquiry is one that is amenable to judicial resolution."[97]

This fine-tuning function is fulfilled only if each stage of burden shifting continues to propel the analysis forward. Far from being an ultimate resolution of the discrimination issue, a basic role of the prima facie stage within this structure is merely to "allow the case to reach the next stage of analysis."[98] A key purpose of the prima facie stage is simply to "force [a] defendant to proceed with its case," and offer a nondiscriminatory reason for its action.[99] This moves the analysis forward because often the employer has better access to information regarding the employer's true motivations than the employee.[100]

An approach to the prima facie stage that includes a mandatory non-class replacement requirement stifles this inquiry because a suit could be dismissed where a plaintiff was unable to demonstrate a pre-determined set of prescribed requirements. In contrast, a multifactor approach assists the fine-tuning function because it permits plaintiffs to survive the prima facie stage based only on the particular

95. *Compare* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (holding that elimination of the two most common legitimate reasons for the employment decision is "sufficient, absent other explanation, to create an inference that the decision was a discriminatory one"), *with* Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3rd Cir. 1996) (describing the plaintiff's prima facie burden as ensuring she has "enough evidence to construct the chain of inferences" and that her "factual scenario is compatible with discriminatory intent — i.e., that discrimination could be a reason for the employer's action").

96. *See* Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir. 1985) (suggesting that one of the overarching purposes of a trifurcated inquiry is to inject "a fine-tuning element into the presentation of proof in Title VII cases").

97. *Id.*

98. Harris, *supra* note 4, at 289.

99. Cline v. Catholic Diocese, 206 F.3d 651, 660 (6th Cir. 1999) (quoting EEOC v. Avery Dennison Corp., 104 F.3d 858, 861-62 (6th Cir. 1997) (alteration in original) (internal quotation marks omitted)).

100. *See id.* at 665 (noting "the disparity in access to information between employee and employer" (quoting Walker v. Mortham, 158 F.3d. 1177, 1192 (11th Cir. 1998))).

facts relevant to their individual situations, and allows the inquiry to progress to the critical stage of defendant revelation.

III. SOLVING THE DILEMMA WITH AN EYE TO BURDEN-SHIFTING GOALS

This Part argues that a multifactor approach to the prima facie case is in harmony with courts' overall commitment to interpret the *McDonnell Douglas* framework as a flexible procedural tool intended to facilitate, rather than impede, the ultimate inquiries in discrimination suits.

From its inception, the burden-shifting procedure outlined by the Court in *McDonnell Douglas* was not intended to be a rigid procedural straight jacket.[101] In *Furnco Construction Corp. v. Waters*,[102] the Court emphasized that the burden-shifting procedure of *McDonnell Douglas* "was never intended to be rigid, mechanized, or ritualistic."[103] Instead of treating the burden-shifting procedure as a strict linear progression, a multifactor approach cultivates interdependence between all stages of the inquiry.[104] This more flexible application of the burden-shifting procedure also means using the procedure to different degrees as is dictated by the particular circumstances.[105]

This flexibility is also required because, although burden shifting potentially has implicit substantive consequences,[106] fundamentally it is a procedural device meant to help, not hinder, the ultimate disparate

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101. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (noting that the burden shifting procedure is being laid out in this instance in order to resolve the "notable lack of harmony" amongst lower court opinions by placing the procedure within the "broad, overriding interest, shared by employer, employee, and consumer" in "fair and racially neutral employment and personnel decisions").

102. 438 U.S. 567 (1978).

103. *Furnco Constr. Corp.*, 438 U.S. at 577.

104. *See, e.g.*, Meiri v. Dacon, 759 F.2d 989, 997 n.12 (2d Cir. 1985) (concluding that "the efficacy of employment discrimination law depends upon the interdependence of the *prima facie* case, the employer's rebuttal and proof of pretext"); *see also* Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996) (noting that the "seeming neatness of [the burden shifting] dichotomy is illusory . . . for evidence rarely comes in tidy, geometrically precise packages").

105. *See, e.g.*, Nieto v. L&H Packing Co., 108 F.3d 621, 623 n.5 (5th Cir. 1997) (limiting the use of burden shifting, and proceeding directly to the ultimate question because "strict application of the burden shifting framework is not particularly helpful to our analysis").

106. Burden shifting might substantively assist plaintiffs because the plaintiff's prima facie burden, as defined in *McDonnell Douglas*, is lower than that which is normally required to sustain a prima facie case in non-employment litigation. *See* Fisher v. Vassar Coll., 114 F.3d 1332, 1336 (2d Cir. 1997) (describing the requirements of a prima facie case "in the absence of a special policy-based rule similar to that promulgated by *McDonnell Douglas*"); Daniel W. Zappo, Note, *A Causal Nexus Approach to the Title VII Disparate Treatment Claims*, 50 RUTGERS L. REV. 1067, 1082-83 (1998) (noting that the framework has several substantive purposes including "searching for various kinds of disparate treatment," and assisting "plaintiffs by fleshing out the facts").

treatment inquiry.[107] Essentially, the primary purpose of burden shifting is to facilitate a speedy and just resolution of the final question of intentional discrimination.[108] All the elements of burden shifting should facilitate, not stifle, the substantive resolution of an employment discrimination matter.[109]

When courts implement burden shifting as an inflexible process, they allow form to trump substance.[110] Only by using the stages of burden shifting as flexible procedural tools focused on facilitating the central inquiry can courts achieve the central purposes of the process.

One of the original purposes of burden shifting was to allow plaintiffs to attempt to prove their case by inference when they were unable to offer direct evidence of discrimination.[111] This alternative avenue of proof is especially critical in employment discrimination cases because employers are "usually careful not to offer smoking gun remarks indicating intentional discrimination."[112] Given that modern discrimination is potentially even more difficult to uncover than the more obvious discrimination prevalent at the time burden shifting was originally created, there is a continuing need for an effective procedure for adjudicating these claims.[113] A multifactor approach to burden shifting, carefully and rigorously applied by courts, would fulfill this need.

In addition to requiring thoughtful interplay between stages of the *McDonnell Douglas* process, the Supreme Court has remained firmly committed to flexibility within individual stages, specifically the prima facie stage. Even in *McDonnell Douglas* itself, the Court emphasized that given the factual nature of discrimination cases, the prima facie

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107. *Meiri*, 759 F.2d at 995 (noting that burden shifting is meant to be a procedural tool that focuses an "initially vague allegation of discrimination" into an "ultimate inquiry . . . that is amenable to judicial resolution").

108. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (explaining that "[t]he *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question" of discrimination).

109. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (noting that the allocation of evidentiary burdens should not make the "inquiry even more difficult"); *Fisher*, 114 F.3d at 1358 (Calabresi, J., concurring and dissenting) (emphasizing that "verbal confusions" should not keep courts from the purposes that Title VII seeks to achieve).

110. *See* Smith v. F.W. Morse & Co., 76 F.3d 413, 421-22 (1st Cir. 1996) (declining to follow strict burden shifting guidelines because a "slavish insistence upon process for its own sake serves only to exalt the trappings of justice over its substance").

111. *See, e.g.*, Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1103-04 (11th Cir. 2001) (clarifying that the *McDonnell Douglas* inference of discrimination is only required when cases are being proven by indirect evidence, not when discriminatory intent is demonstrated with direct evidence).

112. Hasham v. California Bd. of Equalization, 200 F.3d 1035, 1044 (7th Cir. 2000).

113. *See Smith*, 76 F.3d at 430 (Bownes, J., concurring) (praising burden shifting as a necessary process for weeding out discrimination that is "as subtle as it is invidious"); Lawton, *supra* note 1.

formulation would vary in accordance with the particular facts of a given situation.[114] The Court clarified this view shortly thereafter in *International Brotherhood of Teamsters v. United States*.[115] Reiterating that *McDonnell Douglas* was not an "inflexible formulation," the Court stressed that the real value of the articulation of the prima facie stage in *McDonnell Douglas* was not the list of specific prima facie evidentiary requirements, but rather the "general principle" behind the prima facie stage.[116] In subsequent decisions, the Court reinforced the notion that the *McDonnell Douglas* formulation of the prima facie stage was simply "an appropriate model for a prima facie case."[117] It was one method of demonstrating a prima facie claim, but was never intended as an inflexible rule.[118]

Recognizing that proof of discrimination often "does not fit into a set of pigeonholes,"[119] lower courts have attempted to heed the Supreme Court's command to embrace flexibility at the prima facie stage of burden shifting. One circuit has been willing to modify its prima facie standard "[i]n certain cases involving discrimination falling outside the more traditional categories of firing and hiring . . . ."[120] Another circuit adapts the requirements "in special cases to reflect more fairly and accurately the underlying reality of the workplace."[121] For example, although plaintiffs must ordinarily prove that their position remained open after they are discharged or rejected, in "reduction in force" cases plaintiffs must prove only that similarly situated employees who were not members of their protected class were treated more favorably.[122] While both of these circuits appear to embrace a commitment to viewing the prima facie stage as a realistic presentation of particular evidence, they fall short of the Supreme

114. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) (explaining that "the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations").

115. 431 U.S. 324 (1977). The factual pattern of this case was not individual disparate treatment, but rather group disparate treatment (pattern and practice of discrimination). Nonetheless, the Court's general comments about *McDonnell Douglas* are applicable to individual disparate treatment situations.

116. *Int'l Bhd. of Teamsters*, 431 U.S. at 358.

117. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981).

118. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978).

119. Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996).

120. Amro v. Boeing Co., 232 F.3d 790, 797 n.3 (10th Cir. 2000).

121. Bellaver v. Quanex Corp., 200 F.3d 485, 494 (7th Cir. 2000).

122. *Id.* at 494. " 'Reduction in force' " ("RIF") is a "term of art in employment law meaning the positions were eliminated and the employees not replaced." *Id.* at 489. Although the court discusses the RIF standard, the court ultimately determined that this particular case was not suitable for the revised RIF prima facie criteria because the employer had potentially manipulated the use of the term RIF as a pretense for impermissible discrimination. *Id.* at 494.

Court commitment to flexibility because they adopt these alternate approaches only in extraordinary cases.

A multifactor approach includes both a realistic view of the interplay between burden-shifting stages, and flexibility at each individual stage — most notably the prima facie step. Only with an attentive eye to both of these aspects can courts heed the Supreme Court's command for flexibility in burden shifting.

CONCLUSION

Thirty years ago the Supreme Court granted certiorari in a discrimination case "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination."[123] The result was the *McDonnell Douglas* burden-shifting procedure, a framework that has survived countless clarifications and challenges.

This Note argues that once again the Supreme Court must step forward and clarify an aspect of this enduring procedure. Specifically, the Supreme Court should eliminate non-class replacement as a prima facie requirement in all individual disparate treatment cases, and explicitly adopt a multifactor approach to a plaintiff's prima facie burden at the initial stage of the *McDonnell Douglas* burden-shifting procedure.

First, a multifactor approach is an appropriate model for Title VII cases because it coherently combines the central principles articulated by the Court in *O'Connor*, principles which are justifiably applicable to the Title VII arena. Additionally, eliminating non-class replacement as a requirement comports with the minimal evidentiary burden accompanying the narrow purposes of the prima facie stage because it does not functionally require plaintiffs to adduce more evidence than otherwise required. Finally, a multifactor approach to the prima facie stage is consistent with the overarching theme of flexibility in the structure of burden shifting, and within the individual stages of burden shifting.

Inherently well-suited to consistent and coherent promulgation because of its simplicity, the Supreme Court's endorsement of a multifactor approach would stabilize the disharmony running rampant throughout the circuits at the prima facie stage. This result is legally compelled, structurally sound, and perhaps, most importantly, would inject a dose of common sense into the procedurally cumbersome employment discrimination arena.[124]

123. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

124. Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997) (stressing that "[a] little common sense is not amiss in a discrimination case").