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NOTES

The Prima Facie Case of Age Discrimination in Reduction-in-Force Cases

Jessica Lind

INTRODUCTION

The Friends Corporation, a distributor of fine coffees, decided to eliminate part of its sales force following a slow-down in its sales. Monica, a 59-year-old saleswoman, had been employed by Friends for 12 years, while Rachel, a 24-year-old with similar job responsibilities, had begun working for Friends only 18 months ago. Both Monica and Rachel had received favorable reviews from their supervisor during their most recent evaluations. As part of its reduction-in-force, Friends's management chose to discharge Monica and to retain Rachel. Monica filed suit against Friends for age discrimination. What evidence must Monica present in order to meet her prima facie burden?

In 1973, the Supreme Court in *McDonnell Douglas Corp. v. Green*¹ created a three-part burden-shifting framework for resolving intentional discrimination suits brought under Title VII of the Civil Rights Act of 1964.² The first part of the framework requires the employee-plaintiff to establish a prima facie case, which consists of four elements. The plaintiff must show that she belongs to a protected group,³ that she applied and was qualified for an open position, that the employer rejected her application, and that the employer continued to seek applicants from persons of plaintiff's qualifications.⁴ If the plaintiff succeeds in establishing her prima facie case, an inference of discrimination arises, and the burden of production shifts to the employer-defendant to come forward with a legitimate, nondiscriminatory reason for its actions.⁵ At the third stage, the plaintiff has a final opportunity to demonstrate that discriminatory animus, rather than the employer's proffered explanation, motivated the employer's actions.⁶

1. 411 U.S. 792 (1973).

2. 42 U.S.C. § 2000e (1988).

3. Title VII recognizes race, ethnic, gender, religious, and national origin distinctions. See 42 U.S.C. § 2000e (1988).

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

5. See 411 U.S. at 802.

6. See 411 U.S. at 804.

Although originally proposed for cases involving discriminatory hiring practices,⁷ the *McDonnell Douglas* prima facie case has been modified to fit other contexts. For example, where the employer has fired the plaintiff and hired a replacement, courts have modified the second and fourth prongs of the prima facie case, requiring that the plaintiff demonstrate that she was qualified for the position she formerly held and that the employer replaced her with an individual outside the protected class.⁸

The *McDonnell Douglas* framework subsequently has been applied to claims brought under the Age Discrimination and Employment Act⁹ (ADEA).¹⁰ Application of the framework to reduction-in-force (RIF) cases brought under the ADEA¹¹ has proven problematic given the particular circumstances of the RIF.¹² A typical RIF case arises when an employer restructures its workforce, eliminating one or more job positions.¹³ Because the employer fires the plaintiff after eliminating her position, the plaintiff cannot show that the employer replaced her with an individual outside the protected class with the plaintiff's qualifications — the fourth prong of

7. See 411 U.S. at 792.

8. See, e.g., *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180-81 (6th Cir. 1983).

9. 29 U.S.C. §§ 621-34 (1994).

10. See, e.g., *Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1164 (8th Cir. 1985); *Loeb v. Textron*, 600 F.2d 1003, 1015-16 (1st Cir. 1979).

11. The vast majority of RIF cases are brought under the ADEA. The arguments presented in this Note, however, apply equally as well to RIF cases brought under Title VII.

12. In some RIF employment discrimination cases, the courts focus their inquiry on whether a RIF actually occurred or whether the employer has claimed falsely a RIF in order to conceal age discrimination. See, e.g., *Hardin v. Hussman Corp.*, 45 F.3d 262, 265 (8th Cir. 1995) (concluding that a RIF did in fact occur); *Oxman v. WLS-TV*, 846 F.2d 448, 456 (7th Cir. 1988) (treating the employer's structural reorganization as a legitimate, nondiscriminatory reason for the plaintiff's termination). The scope of this Note, however, is limited to cases where the parties do not dispute the RIF itself but dispute why, given the RIF, the employer discharged the plaintiff rather than a younger employee. In this context, courts should not consider the RIF the employer's proffered reason, as some courts have done, but should require employers to explain why it chose to discharge the plaintiff. Compare *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1464 (6th Cir.), cert. denied, 498 U.S. 878 (1990) (stating that the most common proffered reason for the discharge is the RIF) with *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 645 (5th Cir. 1985) ("The question is why, given the employer's need to reduce his workforce, he chose to discharge the older rather than the younger employee.").

13. See Robert G. Boehmer, *The Age Discrimination in Employment Act — Reductions in Force as America Grays*, 28 AM. BUS. L.J. 379, 383 (1990). There are two distinct scenarios under which a RIF case arises, although both follow a restructuring of the workforce. Under the first scenario, the employer eliminates the plaintiff's job position. Under the second scenario, the employer eliminates a job position other than the plaintiff's position. Rather than lay off the displaced worker who formerly held the eliminated position, however, the employer instead lays off the plaintiff, replacing her with the displaced employee. In other words, the displaced employee "bumps" the plaintiff. This Note focuses on the former scenario, which has proven problematic for the courts at the prima facie stage. Courts properly may evaluate the latter scenario under the *McDonnell Douglas* framework as applied to the firing context. Hereinafter, I use the term "RIF cases" to refer only to those cases where the employer eliminated the plaintiff's position.

the prima facie case. Consequently, courts have tried to modify the *McDonnell Douglas* prima facie case in order to reflect the particular circumstances of a RIF, but they have not done so in a consistent manner. Some courts ask only that the plaintiff show that the employer retained a younger employee in a position similar to that formerly held by the plaintiff.¹⁴ Other courts employ a flexible fourth element that requires the laid-off worker to present evidence "from which a factfinder might reasonably conclude that the employer intended to discriminate" without specifying what form that evidence must take.¹⁵

This Note proposes that courts require the plaintiff in a RIF case to show, as part of her prima facie burden, that the employer reassigned at least part of her job responsibilities to a younger individual of equal or lesser qualifications. Part I describes the analytical framework applied to most intentional discrimination cases — the *McDonnell Douglas* framework. Part II explains that the RIF plaintiff cannot meet the specific requirements of the prima facie case as articulated in *McDonnell Douglas* because her firing occurs in conjunction with the elimination of her position. This Part then examines two approaches taken by the courts with respect to the prima facie case in the RIF context and concludes that neither approach achieves the primary goal of the *McDonnell Douglas* prima facie case: prospectively refuting the most common legitimate explanations for the employer's conduct. Part III recommends that courts adopt a prima facie case that requires a RIF plaintiff to demonstrate that she possesses equivalent objective qualifications to the retained, younger employee(s) and that her employer did not eliminate completely her job responsibilities but only her position. Together, these elements are sufficient to support an inference of employment discrimination in the RIF context.

I. THE LEGAL FRAMEWORK FOR EMPLOYMENT DISCRIMINATION CASES

Because the ADEA grew out of Title VII of the 1964 Civil Rights Act¹⁶ and because much of the language in the ADEA par-

14. See, e.g., *Healy v. New York Life Ins. Co.*, 860 F.2d 1209 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); *Coburn v. Pan Am. World Airways, Inc.*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir. 1982), *cert. denied*, 464 U.S. 937 (1983).

15. See, e.g., *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); see also *Earley v. Champion Intl. Corp.*, 907 F.2d 1077 (11th Cir. 1990); *Barnes*, 896 F.2d at 1457; *Thornbrough*, 760 F.2d at 633; *Selby v. Pepsico*, 784 F. Supp. 750 (N.D. Cal. 1991), *affd.*, 994 F.2d 703 (9th Cir. 1993).

16. Section 715 of Title VII called on the Secretary of Labor to conduct a study of age discrimination. The Secretary's 1965 report concluded that age discrimination in the workplace was a serious problem that required congressional action. Congress agreed, and

alleles that of Title VII, courts have transferred to the ADEA context the standards and methods of proof developed under Title VII employment discrimination claims.¹⁷ Thus, any evaluation of ADEA disparate treatment claims requires an initial examination of Title VII employment discrimination cases, the most important being *McDonnell Douglas Corp. v. Green*.¹⁸

Under Title VII and the ADEA, a plaintiff who alleges that her employer intentionally discriminated against her may present either direct evidence of a discriminatory motive or circumstantial evidence from which the fact finder can infer intentional discrimination.¹⁹ Evaluation of direct evidence does not pose much difficulty

the ADEA became effective on June 12, 1968. SECRETARY OF LABOR, NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT, 95TH CONG., 1ST SESS. (Comm. Print 1977).

17. See *Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1164 (8th Cir. 1985); *Loeb v. Textron*, 600 F.2d 1003, 1015-16 (1st Cir. 1979).

Plaintiffs can prove employment discrimination under two distinct legal theories — “disparate treatment” or “disparate impact.” A plaintiff who brings her claim under the disparate treatment theory must demonstrate that her employer intentionally treated her less favorably than others because of her race, gender, religion, national origin, or age. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The disparate impact theory addresses employment practices that are facially neutral but allegedly affect members of a protected class more harshly than those outside the protected class. In this context, plaintiffs also must show that the employment practice cannot be justified by business necessity. The disparate impact theory does not require proof of discriminatory motive. See 431 U.S. at 335 n.15; see also *Massarsky*, 706 F.2d at 117. Although ADEA cases can be brought under either one of these two theories, this Note focuses only on disparate treatment claims in the context of RIF cases.

Some courts have held that the ADEA does not recognize disparate impact claims. Compare *DiBiase v. Smith Line Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995) (doubting whether the disparate impact theory is available under the ADEA in light of the Supreme Court’s holding in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993)) with *Houghton v. Sipco, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994) (assuming that disparate impact liability applies under the ADEA) and *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980) (same). For commentators favoring extension of disparate impact liability to cases brought under the ADEA, see Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229 (1990); Peter H. Harris, Note, *Age Discrimination, Wages, and Economics: What Judicial Standard?*, 13 HARV. J.L. & PUB. POLY. 715 (1990); Marla Ziegler, Comment, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984). For commentators opposed to the extension of disparate impact liability to cases brought under the ADEA, see Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 EMPLOYEE REL. L.J. 437 (1985); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982). See generally Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507 (concluding that the Court is unlikely to extend disparate impact liability to cases brought under the ADEA).

18. 411 U.S. 792 (1973).

19. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). “Direct evidence” refers to evidence which, if believed, resolves a matter in issue. In other words, if a factfinder finds the direct evidence trustworthy, the evidence proves the existence of a fact without any inference or presumption. For example, in an age discrimination case where 59-year-old Monica loses her job, a statement by Monica’s boss to the effect “we should fire Monica because she is too old for this type of work” would prove discriminatory animus if believed. In contrast, circumstantial evidence, even if believed, requires additional reasoning before the factfinder can believe the proposition for which the evidence is

for the courts. The vast majority of Title VII and ADEA cases, however, do not involve direct evidence of discrimination because plaintiffs rarely come to court with the "smoking gun" in hand.²⁰ Plaintiffs instead tend to rely on circumstantial evidence of employment discrimination.

In *McDonnell Douglas*, the Supreme Court established guidelines for evaluating circumstantial evidence of employment discrimination. In deciding *McDonnell Douglas*, the Supreme Court set forth a three-stage analytical framework for the evaluation of employment discrimination claims. The plaintiff always retains the ultimate burden of persuading the court that discrimination motivated the defendant's employment decision,²¹ but the burden of production shifts between the plaintiff and the defendant in order "to bring the litigants and the court expeditiously and fairly to this ultimate question."²² This Part briefly describes each of the three stages of the *McDonnell Douglas* burden-shifting framework.

A. The Prima Facie Case

The plaintiff first must establish a prima facie case. In *McDonnell Douglas*, the Court identified four specific conditions that comprise a prima facie case of racially discriminatory hiring practices:

- (i) that [the plaintiff] 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.²³

offered. The truthfulness of circumstantial evidence tends to suggest the existence of some fact, but it does not prove the fact conclusively. To believe the fact for which the circumstantial evidence is offered, the factfinder must make a leap in logic, such as an inference or presumption. In our age discrimination example, testimony from other older co-workers of Monica that they, too, felt discriminated against lends credence to Monica's claim if believed, but the fact that Monica's employer discriminated against Monica's co-workers does not conclusively prove that the employer discriminated against Monica. See generally MCCORMICK ON EVIDENCE §§ 185, 338 (John William Strong ed., 4th ed. 1992).

20. See, e.g., *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (stating that, because employers rarely leave a paper trail or smoking gun indicating a discriminatory intent, plaintiffs often must build their employment discrimination cases from circumstantial evidence which undercuts the employer's proffered explanation); see also *Holzman v. Jaymar-Ruby*, 916 F.2d 1298, 1303 (7th Cir. 1990) (stating that there is no smoking gun in a typical age discrimination case); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989) (same).

21. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

22. 450 U.S. at 253.

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

Satisfaction of these four elements gives rise to a rebuttable presumption of discrimination.²⁴

The Supreme Court made clear in *Texas Department of Community Affairs v. Burdine*²⁵ that it intended for the prima facie case to include "circumstances which give rise to an inference of unlawful discrimination."²⁶ If there exists little connection between the prima facie case and the presumption of discrimination, the risk that the employer must defend itself against a frivolous claim increases.²⁷ The second and fourth elements support an inference of discrimination by eliminating the two most common nondiscriminatory reasons offered by employers in defense of their actions²⁸ — the plaintiff's "lack of qualifications or the absence of a vacancy in the job sought."²⁹ The second element of the *McDonnell Douglas* prima facie case therefore requires the plaintiff to demonstrate that she was qualified for the job sought,³⁰ and the fourth element requires evidence showing that the employer continued to solicit applicants for the position.³¹ Elimination of these explanations for

24. See *Burdine*, 450 U.S. at 254 n.7; *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 641 n.9 (5th Cir. 1985). Thus, under the *McDonnell Douglas* approach, if the plaintiff satisfies the requirements of the prima facie case, the factfinder *must* infer, in the absence of rebuttal evidence, the truth of the alleged discrimination. This should be distinguished from the more general prima facie case required to avoid summary judgment or a directed verdict, where the plaintiff need only produce evidence sufficiently probative of the issue in dispute so as to permit the trier of fact to find for the plaintiff. See MCCORMICK ON EVIDENCE, *supra* note 19, §§ 338, 342. In other words, a plaintiff establishes a prima facie case in this second, less stringent sense when a reasonable jury may infer from the evidence, if it so chooses, that the alleged fact is true.

25. 450 U.S. 248 (1981).

26. 450 U.S. at 253.

27. See Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1213 (1982).

28. See *Burdine*, 450 U.S. at 253-54.

29. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). The first and third elements of the *McDonnell Douglas* prima facie case satisfy the statutory standing requirements of Title VII — that the plaintiff belong to the protected class and that she have suffered a harm.

30. "Qualified" may have two different meanings: it may mean simply the minimum objective credentials or skills necessary for a particular position; or it may also encompass subjective qualifications, such as "leadership" and "likability." The Supreme Court has not explicitly chosen between these two alternatives with respect to the prima facie case in the employment discrimination context. For a discussion of which meaning courts should adopt at the prima facie stage in RIF cases, see *infra* notes 89-102 and accompanying text.

31. It may be debated whether satisfaction of the second and fourth elements supports an inference of discrimination strong enough to support a mandatory presumption of discrimination. Compare *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2751 (1993) (Scalia, J.) ("[W]hat is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands.") with *Hicks*, 113 S. Ct. at 2758 (Souter, J., dissenting) (stating that proof of the prima facie case implies discrimination and raises not only an inference of discrimination but also creates a mandatory presumption in favor of the plaintiff). At a minimum, however, satisfaction of these elements identifies a plaintiff's case as one in which the factfinder reasonably might infer that discrimination underlies the employer's actions. See also Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93

the employer's actions increases the probability that a discriminatory motive lay behind the employer's actions. As the Supreme Court explained in *Furnco Construction Corp. v. Waters*:³²

A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.³³

Consequently, the courts require the plaintiff to present evidence at the prima facie stage which directly bears on the two most common nondiscriminatory reasons for the employer's actions.

In recognition of the varying factual scenarios among employment discrimination cases, the Court stated that all the elements of the prima facie case as prescribed in *McDonnell Douglas* need not be applied uniformly in every type of case.³⁴ Accordingly, the courts have adapted the four elements as circumstances require.³⁵

B. The Employer's Burden

Once established, the prima facie case gives rise to a mandatory presumption³⁶ that discriminatory reasons motivated the employer's actions.³⁷ The burden of production then shifts to the defendant to produce evidence rebutting the presumption of

MICH. L. REV. 2229, 2243-54 (1995) (concluding that the *McDonnell Douglas* prima facie case does no more than identify the plaintiff's claim as one in which discrimination may have occurred).

32. 438 U.S. 567 (1978).

33. 438 U.S. at 577 (citations omitted).

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

35. For example, where the employer has fired the plaintiff and hired a replacement, courts have modified the second and fourth prongs of the prima facie case, requiring that the plaintiff demonstrate that she was qualified for the position she formerly held and that the employer replaced her with an individual outside the protected class. See, e.g., *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180-81 (6th Cir. 1983).

36. While most presumptions rest on considerations of probability, see generally MCCORMICK ON EVIDENCE, *supra* note 19, § 343, sometimes courts create a presumption when the opposing party has superior access to the relevant proof. As the decisionmaker, the employer can explain best why it retained an employee younger than the plaintiff. See Clara B. Burns, Comment, *The Prima Facie Case of Age Discrimination in Reduction-In-Force Layoffs: A Flexible Standard*, 20 TEX. TECH. L. REV. 841, 857 (1989). Thus, in the employment discrimination context, some commentators justify the presumption on the ground that it is necessary to shift the burden of production to the employer. See Bartholet, *supra* note 27, at 1216. Although this argument may have proved persuasive in 1993, the recent liberalization of discovery rules renders the argument significantly less convincing because the employer can be forced to state the reason underlying its actions through the use of interrogatories or requests for admissions. See FED. R. CIV. P. 26(b). See generally Malamud, *supra* note 31, at 2269-74.

37. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

discrimination raised by the *prima facie* case.³⁸ Specifically, the employer must articulate a legitimate, nondiscriminatory reason for its actions.³⁹ The defendant need not prove that its articulated reason actually motivated its actions; rather, the defendant need only raise a genuine issue of fact as to whether its proffered reason or a discriminatory one motivated its employment decision. Once the employer meets this burden, the presumption of discrimination raised by the *prima facie* case drops out.⁴⁰ If the employer fails to meet its burden of proof, the presumption remains, and the court will enter summary judgment or a directed verdict for the plaintiff.⁴¹

C. *The Pretext Stage*

After the employer articulates a legitimate, nondiscriminatory reason for its actions, the focus shifts to the third and final stage of the analysis — the pretext stage.⁴² The plaintiff now has the opportunity to demonstrate that the employer's proffered reason was not the true basis for its decision. To meet this burden, the employee either may present evidence demonstrating that a discriminatory reason more likely motivated the employer or may attack directly the employer's proffered reason by presenting evidence that raises doubt as to the truth of the employer's explanation.⁴³ Although the presumption of discrimination established by the *prima facie* case has been dropped at this point, the factfinder still may consider the evidence used to establish the *prima facie* case in determining whether the plaintiff can meet her ultimate burden of proof.⁴⁴

38. See 450 U.S. at 254.

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

40. See *Burdine*, 450 U.S. at 255.

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

42. See *McDonnell Douglas*, 411 U.S. at 804.

43. See *Burdine*, 450 U.S. at 256. In *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2754 (1993), the Supreme Court held that disproof of the employer's proffered reason does not entitle the plaintiff to judgment as a matter of law. In interpreting *Hicks*, courts have split over how high a burden the plaintiff now carries. Some courts have held that although disproof of the employer's proffered reason does not entitle the plaintiff to judgment in her favor, it does give rise to a *permissible* inference of discrimination. See, e.g., *United States v. McMillon*, 14 F.3d 948 (4th Cir. 1994); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993); *Moham v. Steego Corp.*, 3 F.3d 873 (5th Cir. 1993). In contrast, other courts have held that a showing of pretext in the absence of additional evidence of discrimination is *never* sufficient to sustain the plaintiff's burden of proof. See, e.g., *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836 (1st Cir. 1993); *Bodenheimer v. PPG Indus.*, 5 F.3d 955 (5th Cir. 1993). See generally Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

44. See *Burdine*, 450 U.S. at 255 n.10.

II. CURRENT APPLICATIONS OF THE *McDONNELL DOUGLAS* PRIMA FACIE CASE TO RIF CASES

The realities of a RIF render strict application of the *McDonnell Douglas* prima facie case impractical. Laid-off employees whose job positions have been eliminated cannot possibly show that their employer replaced them⁴⁵ or sought applicants for a now nonexistent position, as required by the fourth element of the *McDonnell Douglas* prima facie case. Nevertheless, an employer still can engage in age discrimination when reducing its workforce. Employers who consider age when determining whom to lay off violate the ADEA.⁴⁶ Thus, the replacement requirement affords no protection against age discrimination in the RIF scenario,⁴⁷ rendering the ADEA incapable of providing remedies for subtle forms of discrimination. Most courts recognize this reality and wisely have chosen not to require ADEA plaintiffs to show that they were replaced by a younger employee following a RIF.⁴⁸

In eliminating the replacement element, the courts are left with the first three elements of the *McDonnell Douglas* prima facie case, which alone do not support an inference of discrimination.⁴⁹ Unfortunately, courts have not been consistent in determining what additional showing is necessary to support an inference of age discrimination in RIF cases. Section II.A examines the *Coburn*⁵⁰ approach, which simply requires that the employer have retained a younger employee whose job responsibilities parallel those previously held by the plaintiff, and argues that it fails to support an inference of age discrimination. Section II.B evaluates the *Williams*⁵¹ approach, which modifies the fourth element of the *McDonnell Douglas* prima facie case so as generally to require evidence supporting an inference of discrimination, and argues that

45. The Sixth Circuit defined "replacement" as "when another employee is hired or reassigned to perform the plaintiff's duties." However, "a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties [already being performed], or when the work is redistributed among other existing employees already performing related work." *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990); *see also Kesselring v. United Technologies Corp.*, 753 F. Supp. 1359, 1364 (S.D. Ohio 1991) (quoting *Barnes*).

46. 29 U.S.C. §§ 621-34 (1994).

47. *See McCuen v. Homes Ins. Co.*, 633 F.2d 1150, 1151 (5th Cir. 1981).

48. Courts properly may require a RIF plaintiff to show replacement when the plaintiff challenges whether a RIF actually occurred. If the employer sought a replacement for the plaintiff, the employer clearly did not eliminate the plaintiff's position. Under such circumstances, the employer's explanation for the plaintiff's discharge — the RIF — may be pretextual, an attempt to cover up a discriminatory reason for the discharge.

49. *See Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988).

50. *See Coburn v. Pan Am. World Airways, Inc.*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

51. *See Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

this approach raises several procedural difficulties which confuse the analysis of the plaintiff's claim.

A. *The Coburn Prima Facie Case*

This Section examines one approach to the prima facie case in RIF cases, first espoused by the D.C. Circuit in *Coburn v. Pan American World Airways*,⁵² and concludes that it is not an adequate reformulation of the *McDonnell Douglas* prima facie case because it cannot support an inference of age discrimination. The *Coburn* prima facie case simply requires RIF plaintiffs to show that a similarly situated younger employee⁵³ was treated more favorably than the plaintiff.⁵⁴ Plaintiffs often meet this requirement by showing that the employer dismissed the plaintiff while retaining one or more younger employee(s) in a position similar to that formerly held by the plaintiff. Plaintiffs need not demonstrate that they were more qualified than the younger employee(s) but must show only that they were qualified for the positions they formerly held.⁵⁵ Courts following the *Coburn* approach justify their position by pointing to the Supreme Court's dictum that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous."⁵⁶ One also could argue that the replacement element of the *McDonnell Douglas* prima facie case serves the purpose of demonstrating inherently "suspicious circumstances" which give rise to an inference of discriminatory animus⁵⁷ and that requiring plaintiffs to show retention of a younger employee serves a parallel purpose in the RIF context.⁵⁸ Neither justification for a low-burden prima facie case is persuasive.

The *Coburn* prima facie case does not function adequately as a preemptive strike against the employer's most common proffered

52. 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

53. A retained employee is "similarly situated" to the plaintiff if her job responsibilities resembled those performed by the plaintiff and if her position required similar qualifications and afforded the same status as that held by the plaintiff. *Cf. Hill v. Bethlehem Steel Corp.*, 729 F. Supp. 1071, 1075 n.6 (E.D. Pa. 1989) (stating that the plaintiff must show that those retained were similarly situated in terms of qualifications and position).

54. *See Coburn*, 711 F.2d at 342; *see also Healy v. New York Life Ins. Co.*, 860 F.2d 1209 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987).

55. *See Coburn*, 711 F.2d at 343; *see also Healy*, 860 F.2d at 1214; *Chipollini*, 814 F.2d at 897; *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir. 1982), *cert. denied*, 464 U.S. 937 (1983).

56. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). For example, the Third Circuit in *Healy v. New York Life Insurance Co.* held that the prima facie case is easily made out because the focus of age discrimination cases centers on the defendant's articulated business reasons for its actions and the plaintiff's evidence of pretext. *See Healy*, 860 F.2d at 1214; *see also Massarsky*, 706 F.2d at 118.

57. *See Boehmer*, *supra* note 13, at 400.

58. *See id.* at 430.

legitimate reasons for its conduct because it does not establish that the plaintiff was at least as qualified as the retained younger employee(s).⁵⁹ In the RIF scenario, employers commonly justify their dismissal of an older plaintiff by explaining that the plaintiff was less qualified than the retained younger employee.⁶⁰ Simply requiring plaintiffs to show more favorable treatment of a younger employee does not refute prospectively the possibility that the employer believed the younger employee was more qualified than the plaintiff. Consequently, under the *Coburn* approach, an employer who properly focused on the relative qualifications of the employees when deciding whom to discharge during a RIF nevertheless may be presumed to have discriminated against the plaintiff.⁶¹

In addition, the *Coburn* prima facie case fails as a modification of the *McDonnell Douglas* prima facie case because it does not support an inference of discrimination. Although the burden of establishing a prima facie case should not be onerous, the burden must be high enough to support an inference of discrimination in order to protect employers from having to defend themselves against frivolous claims.⁶² In the RIF context, the suspicion aroused when an employer discharges an older worker instead of a younger worker is not strong enough to support an inference of discrimination.⁶³ Unlike non-RIF cases, where courts assume that an employer does not fire qualified employees, discharges pursuant to a RIF are not inherently suspicious in light of the employer's economic circumstances. Nor should the retention of younger employees be inherently suspicious. Because employers almost invariably retain some younger employees in a workforce reduction, especially in a large-scale reorganization, this fact itself is not suggestive of age

59. See *supra* text accompanying notes 28-33 (explaining that the prima facie case serves as a preemptive strike against the employer's most common proffered legitimate reasons for its conduct).

60. See, e.g., *Earley v. Champion Intl. Corp.*, 907 F.2d 1077, 1084 n.5 (11th Cir. 1990) (noting that plaintiffs were discharged upon a determination that they were the least effective employees in their department); *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 646 (5th Cir. 1985) (referring to employer's claim that the plaintiff was a less effective worker than retained employees); *LaGrant v. Gulf & W. Mfg. Co.*, 748 F.2d 1087, 1089 (6th Cir. 1984) (describing a supervisor's testimony that a younger employee was retained over plaintiff upon a determination that the younger employee had higher performance evaluations).

61. To raise a presumption against an employer who focused on relative qualifications defeats the explicit purpose of the ADEA — "to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 621(a)(4) (1994).

62. See *supra* notes 26-27 and accompanying text.

63. See *Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1167 (8th Cir. 1985) (stating that the fact that a younger employer assumed plaintiff's duties was insufficient to establish a prima facie case). But see *Coburn v. Pan Am. World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir.) (rejecting the district court's conclusion that retention of a younger employee does not support an inference of discrimination), *cert. denied*, 464 U.S. 994 (1983).

discrimination.⁶⁴ Other highly plausible explanations may account for the retention of the younger employee over the older one, such as superior qualifications, personality, or higher seniority. In the absence of additional evidence, the factfinder cannot determine whether a discriminatory motive is a highly probable explanation for the retention of a younger employee. Therefore, a presumption of age discrimination is inappropriate when the plaintiff shows only that the employer retained a younger, similarly situated employee.⁶⁵

B. *The Williams Approach*

Rather than require the RIF plaintiff to demonstrate that the employer chose to retain a similarly situated younger employee, the Fifth Circuit in *Williams v. General Motors Corp.*⁶⁶ adopted a more flexible approach in reformulating the prima facie case in the context of a RIF. The Fifth Circuit held that in order to establish a prima facie case, the RIF plaintiff need only produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue."⁶⁷ This requirement simply asks the plaintiff to produce evidence sufficient to support an inference that the employer did not treat age neutrally, as required by the ADEA.⁶⁸ Once the plaintiff meets this requirement, the court proceeds to stage two and, if necessary, to stage three of the *McDonnell Douglas* framework. Several courts have followed the *Williams*

64. See *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 644 (5th Cir. 1985) (explaining that the discharge of qualified, older workers pursuant to a RIF is not inherently suspicious because unlike ordinary discharge cases, where the discharge of a qualified worker raises suspicion because courts assume employers simply do not fire qualified employees, the discharge in a RIF case readily can be explained in terms of the employer's economic situation); see also *Burns*, *supra* note 36, at 856 (stating that the mere fact of discharge of a qualified employee pursuant to a RIF does not create an inference of discrimination because the employer must discharge certain qualified individuals while retaining other qualified individuals).

65. Public policy also argues against a low burden prima facie case in the RIF context. An easily established prima facie case invites laid-off employees to file suit whenever the employer retains a younger employee, regardless of whether the plaintiff can provide any additional evidence of discrimination. This result in turn may induce employers to lay off younger, more qualified employees instead of older workers in order to avoid litigation. See *Thornbrough*, 760 F.2d at 647 ("[A]llowing an employee to bring suit merely because an employer fires him rather than a younger, allegedly less well-qualified employee . . . may, to some degree, induce employers to lay off younger employees instead of older ones."). This practice undermines the ADEA's prohibition against consideration of an individual's age in its employment decisions. See 29 U.S.C. § 623(a) (1994).

66. 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

67. 656 F.2d at 129. The plaintiff also must establish that she is a member of the protected class, has been discharged or demoted, and was qualified to assume another position at the time of the discharge or demotion. See 656 F.2d at 129.

68. See 656 F.2d at 130.

holding.⁶⁹ Unfortunately, the *Williams* approach causes several procedural problems because it effectively collapses the pretext stage into the prima facie case.

For many plaintiffs, the only evidence they can offer to demonstrate that the employer relied upon age in making its decision is "pretext" evidence. "Pretext" evidence takes two forms. The first asserts the fallacy of the employer's proffered reason for dismissing the plaintiff rather than the younger employee. The second demonstrates the employer's general tendency to discriminate against older workers, such as statistics that indicate an age disparity in the employer's decisions, off-hand remarks that disparage older workers, or age-biased treatment of co-workers in the protected class.⁷⁰ Under the traditional *McDonnell Douglas* framework, pretextual evidence is immaterial if the plaintiff fails to eliminate prospectively the most commonly proffered reasons for the adverse employment decision.⁷¹ However, under the *Williams* formulation, the plaintiff may introduce pretextual evidence in support of the initial inference of discrimination. For example, in *Stumph v. Thomas & Skinner, Inc.*,⁷² the 55-year-old plaintiff met his prima facie burden by introducing a statement by the company chairman that the company wished to eliminate its older workforce and by presenting affidavits from two older employees who voluntarily retired only after they experienced age animus from the defendant-employer.⁷³

In effect, the approach of the *Williams* court elevates the pretext stage to the prima facie stage if the plaintiff chooses to present pretextual evidence in meeting her prima facie burden.⁷⁴ This approach, however, causes confusion by leaving unanswered several

69. See, e.g., *Earley v. Champion Intl. Corp.*, 907 F.2d 1077, 1081-84 (11th Cir. 1990); *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 95-97 (7th Cir. 1985); *Thornbrough*, 760 F.2d at 641-45.

70. See *Zick v. Verson Allsteel Press Co.*, 644 F. Supp. 906, 911 (N.D. Ill. 1986) (stating that pretext evidence can take two forms: "1. through statements or other evidence expressing an employer's discriminatory animus, notwithstanding any reasons the employer has articulated, or 2. through evidence otherwise undercutting the credibility of the employer's proffered reasons"). Although evidence demonstrating general age animus on the part of the employer does not relate directly to the *specific* employment decision affecting the plaintiff, it does increase the likelihood that age animus underlay the specific decision at issue.

71. See *Malamud*, *supra* note 31, at 2290, 2298-99; see also *Selby v. Pepsico, Inc.*, 784 F. Supp. 750, 756 (N.D. Cal. 1991) (holding that evidence which indicates that the employer's explanation for laying off the plaintiff rather than a younger employee is not the true reason for its actions properly cannot be considered by the court until after the plaintiff has established the prima facie case), *aff'd*, 994 F.2d 703 (9th Cir. 1993).

72. 770 F.2d 93 (7th Cir. 1985).

73. See *Stumph*, 770 F.2d at 97; see also *Hardin v. Hussman Corp.*, 45 F.3d 262 (8th Cir. 1994) (denying defendant's motion for summary judgment because there remained a material issue of fact regarding whether the employer's stated reasons for dismissal were pretextual).

74. See Frank J. Cavaliere, *The Recent "Respectability" of Summary Judgment and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Analysis Through the Supreme Court's Summary Judgment "Prism,"* 41 CLEV. ST. L. REV. 103 (1993).

procedural questions. In elevating the pretext analysis to the prima facie stage should the court consider *all* pretextual evidence at the prima facie stage or just enough to support an inference of discrimination, leaving the larger pretextual analysis for stage three? In regard to the allocation of proof, should the burden of production still shift to the defendant once the plaintiff presents enough evidence to support an inference of discrimination or is such a shift justified *only* when the plaintiff eliminates the most common proffered reasons for the adverse employment action? If the burden of production does shift to the defendant, what specifically must the defendant show if the plaintiff has disproved already the employer's proffered reason for dismissing the plaintiff at the prima facie stage?⁷⁵

Moreover, the *Williams* approach ignores the fact that in structuring the *McDonnell Douglas* framework, the Supreme Court limited consideration of pretextual evidence to the third stage of the analysis, *after* the plaintiff already has established a prima facie case. In collapsing these stages, *Williams* ignores the Court's carefully crafted procedural framework for employment discrimination cases.⁷⁶ To help courts avoid this confused analysis, Part III proposes a more logical and coherent approach that adheres to the function served by the *McDonnell Douglas* prima facie case — raising an inference of discrimination by prospectively rebutting the two most common, nondiscriminatory explanations for an employer's discharge of the plaintiff.

III. RECOMMENDED REFORMULATION OF THE *McDONNELL DOUGLAS* PRIMA FACIE CASE

This Part argues that the *McDonnell Douglas* prima facie case should be reformulated in the RIF context to require a plaintiff to show the following: 1) she is a member of the protected class; 2) she was terminated pursuant to a RIF; 3) her duties were reassigned to a younger, similarly situated employee;⁷⁷ and 4) that the younger employee was less qualified than the plaintiff. The first two requirements simply meet the standing requirements of the ADEA

75. For example, in *Hardin*, the plaintiff raised an inference of discrimination by presenting evidence which suggested that the employer's proffered reason for his termination — that plaintiff had one of the two worst performance records in the department — was pretextual. *Hardin*, 45 F.3d at 265-66. Assuming the plaintiff presented such evidence as part of his prima facie case, can the employer meet its burden of production at stage two by again stating that the plaintiff was dismissed because he possessed an inferior performance record or must the employer come forward with some other explanation or can the employer meet its burden by attacking the plaintiff's pretextual evidence?

76. Cf. *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1344 (9th Cir. 1981) (stating that the collapse of the third stage into a single stage "would defeat the purpose underlying the *McDonnell Douglas* process").

77. For a definition of "similarly situated employee," see *supra* note 53.

— that the plaintiff is covered by the ADEA and has suffered a harm. The third and fourth requirements follow the principles of *McDonnell Douglas* by prospectively refuting the most common legitimate reasons for the employer's decision to terminate the plaintiff⁷⁸ and by requiring the plaintiff to come forward with evidence giving rise to an inference of discrimination.⁷⁹

A. Reassignment Element

The requirement that plaintiffs show reassignment⁸⁰ of their work responsibilities parallels the fourth prong of the *McDonnell Douglas* prima facie case — that plaintiffs show that their employer either replaced them or continued to accept applications for the position. In the hiring-firing context, the fourth prong serves the purpose of rebutting an employer's claim that it eliminated the position for which the plaintiff applied or which the plaintiff previously held, a commonly offered, legitimate explanation for the employer's decision to terminate the plaintiff.⁸¹ Evidence of replacement or the acceptance of employment applications demonstrates the employer's continued need for the work previously performed by the plaintiff. In the RIF context, reassignment of the plaintiff's responsibilities to others serves the same function. When the employer reassigns the plaintiff's responsibilities, the ultimate question remains unanswered — why did the employer discharge the plaintiff rather than one of the employees who assumed the plaintiff's responsibilities? In contrast, the *complete* elimination of the duties previously performed by the plaintiff suggests that business necessity required the discharge of the plaintiff, thereby explaining why the employer chose to lay off the plaintiff rather than another employee.⁸²

78. See *supra* section I.A for a discussion of why the *McDonnell Douglas* prima facie case supports a presumption against the employer.

79. In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the Supreme Court made clear that at a minimum, the prima facie case must identify "circumstances which give rise to an inference of unlawful discrimination."

80. "Reassignment" occurs either when the employer reassigns some or all of the plaintiff's responsibilities to another employee who previously did not hold these responsibilities or when the employer eliminates the plaintiff's position but retains another employee who was assigned duties similar to those performed by the plaintiff before the RIF.

81. *Cf. International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (stating that one of the most commonly offered reasons relied upon by the employer includes "the absence of a vacancy in the job sought").

82. Some plaintiffs may argue that the employer made a bad business decision in deciding to eliminate the plaintiff's job. See *Selby v. Pepsico, Inc.*, 784 F. Supp. 750, 756 (N.D. Cal. 1991) (rejecting the plaintiff's argument that the employer should have reduced its workforce through attrition and not by firing the plaintiff), *aff'd*, 994 F.2d 703 (9th Cir. 1993). However, Congress did not intend for the ADEA to protect employees against their employer's bad employment decisions. See *Jorgensen v. Modern Women of Am.*, 761 F.2d 502, 505 (8th Cir. 1985) ("The ADEA is not intended to be used as a means of reviewing the propriety of a

The reassignment element also requires the plaintiff to show that her work responsibilities were reassigned to a *younger* employee.⁸³ This requirement parallels the fourth element of the *prima facie* case of most hiring-firing cases — that the employer replaced the plaintiff with an individual outside the protected class.⁸⁴ An employer who replaces the plaintiff with an individual who is also a member of the protected class dispels any possible inference of discrimination. For example, an employer who replaces a fired female employee with another woman in all likelihood did not harbor discriminatory animus against the fired employee on account of her gender. Similarly, an employer who reassigns an older employee's responsibilities to another older employee probably did not discharge the older worker on account of her age.

B. *Relative Qualification Element*

This section explains why courts should examine the plaintiff's relative qualifications as part of the *prima facie* case in ADEA cases arising out of a RIF. Section III.B.1 argues that an inference of age discrimination arises in the RIF context only after the plaintiff demonstrates that she was at least as qualified as the employee retained by the employer. Section III.B.2 explains why the assessment of relative qualifications should focus only on objective criteria at the *prima facie* stage, ignoring subjective criteria.

1. *Advantages of Assessing Relative Qualifications*

Requiring the plaintiff in a RIF case to present evidence comparing her qualifications to those of the retained employee(s) parallels the second element of the *McDonnell Douglas* *prima facie* case — evidence that the plaintiff possessed the necessary qualifications for the position. In non-RIF cases, courts require the plaintiff to

business decision on the part of [the employer]."). Instead, the ADEA only requires that the employment decision be based on factors other than age.

83. Rather than require plaintiffs to show reassignment, courts simply could ask that the plaintiff demonstrate more favorable treatment of a younger employee in a position for which the plaintiff was qualified. Specifically, courts could require that employers who have eliminated positions transfer affected employees to other positions in the corporation for which they are qualified, even if this entails "bumping" the less qualified or less senior employees currently in these positions. See Boehmer, *supra* note 13, at 429 (stating that the ADEA plaintiff can establish a *prima facie* case where the employer fails to "bump other employees"). Although the employer's failure to bump younger employees may suggest preferential treatment, most courts have not treated the absence of a bumping policy as discrimination. See, e.g., *Earley v. Champion Intl. Corp.*, 907 F.2d 1077, 1083 (11th Cir. 1990); *Barnes v. GenCorp., Inc.*, 896 F.2d 1457, 1469 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990); *Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934, 939 (N.D. Ga. 1994).

84. Where the employer has not yet replaced the plaintiff, it is sufficient that the plaintiff show that the employer continued to accept applications for the position from persons outside the protected class.

show that she was qualified for the position because such evidence prospectively rebuts an employer's claim that the plaintiff lacked the necessary qualifications for the position, thereby increasing the likelihood that a discriminatory motive underlay the employer's actions. In the RIF context, because presumably all employees are qualified, employers commonly justify their discharge of the plaintiff not by arguing that the plaintiff was unqualified but by pointing to the younger employee's *superior* qualifications.⁸⁵ Therefore, in anticipation of this explanation, evidence that the plaintiff is at least as qualified as the retained employee(s) is necessary to support an inference of discrimination and justify a mandatory presumption of age discrimination.⁸⁶

In addition, the relative qualification element protects an employer from exposure to age discrimination claims every time it reduces the size of its workforce. Because employers almost invariably retain a younger employee during a RIF, a *prima facie* standard that requires only that the plaintiff show retention of a younger employee invites litigation every time an employer lays off an older worker. This result in turn may cause employers to retain older workers over younger, more qualified workers in an attempt to avoid litigation.⁸⁷ By increasing the burden placed on plaintiffs in establishing a *prima facie* case, the relative qualification prong lowers the likelihood that discharged employees will bring suit without adequate evidence supporting their claims of discrimination. Consequently, employers will not be exposed to litigation every time they lay off an older worker due to a RIF. Employers

85. See *Barnes*, 896 F.2d at 1466 (stating that one of "the most obvious explanations for the discharge of any one employee [is] lower proficiency").

86. However, where an employer was unaware of the plaintiff's inferior qualifications, courts should allow the plaintiff to satisfy her *prima facie* burden if the evidence suggests that the employer may have relied upon age in making its decision. For example, in *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995), the plaintiff, a 51-year-old research engineer who was terminated pursuant to a RIF, never proved that he was more qualified than similarly situated younger employees who were retained by the employer. Although the defendant claimed that the plaintiff had a performance record worse than the retained employees, the court reversed the district court's dismissal of the plaintiff's claim. The individual responsible for determining who among the 54 employees in the plaintiff's department would be terminated met with his immediate subordinate for only 30 minutes, failed to consult the plaintiff's immediate supervisor, and did not review any employee personnel records. Suspicious of the method in which the termination decision was made, the court determined that the plaintiff raised a material issue of fact with regard to whether the employer impermissibly relied on age in terminating the plaintiff. See 45 F.3d at 265-66.

87. Cf. Alisa D. Shudofsky, Note, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553, 564 (1982) (stating that employers may favor less-qualified minority individuals in order to avoid litigation if the *prima facie* case requires only that the plaintiff was qualified, rather than equally or more qualified than the nonminority individual).

then may focus on the relative qualifications of their employees, thereby realizing the purpose of the ADEA.⁸⁸

2. Objective Comparison

Although under *Burdine* the specific elements of the prima facie case must include "circumstances which give rise to an inference of unlawful discrimination,"⁸⁹ this objective must be balanced against the Court's additional instruction that the plaintiff's prima facie burden not be onerous.⁹⁰ Courts can balance *Burdine*'s competing objectives effectively by requiring proof of relative objective qualifications only, ignoring subjective qualifications until the pretext stage.

When assessment of a given trait can lead to only one conclusion, such a trait is called an objective qualification. For example, when adducing an individual's educational background and previous employment experience, the personal biases of the evaluator do not influence her evaluation of such traits. Thus, objective qualifications are readily comparable, and courts can easily determine the more objectively qualified individual. In contrast, personal biases do affect the evaluation of subjective traits, such as leadership abilities and interpersonal skills. Reasonable people may differ in their comparison of two individuals with respect to subjective characteristics.

Those who favor a comparison of objective *and* subjective qualifications at the prima facie stage argue that employment decisions rarely rely on purely objective comparisons among individuals but also require an assessment of subjective characteristics, such as interpersonal skills and leadership abilities. Thus, a judicial evaluation of relative qualifications that ignores subjective traits does not parallel real-life decisionmaking and therefore cannot as accurately

88. 29 U.S.C. § 621(b) (1994). In hiring, firing, and promotion cases, the courts remain split over whether the plaintiff meets her prima facie burden simply by demonstrating that she possessed the minimum qualifications required by the position or whether the plaintiff must demonstrate that she possessed substantially equivalent qualifications relative to the individual subsequently hired or promoted. Compare *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1342 (9th Cir. 1981) (requiring only that the plaintiff meet the employer's minimum requirements) and *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 347-48 (10th Cir. 1975) (same) with *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 136-37 (7th Cir. 1985) (requiring substantially equivalent qualifications) and *United States v. Hazelwood Sch. Dist.*, 534 F.2d 805, 814 (8th Cir. 1976) (same) and *Oliver v. Moberly Mo. Sch. Dist.*, 427 F. Supp. 82, 86 (E.D. Mo. 1977) (same). Although the Supreme Court had the opportunity to resolve this issue in *United States Postal Service Board of Governors v. Aikens*, it chose not to do so. See 460 U.S. 711 (1983). In *Aikens*, a promotion case, the D.C. Circuit overruled the district court's conclusion that the plaintiff must demonstrate that he was more qualified than other individuals promoted by the defendant. See *Aikens v. United States Postal Serv. Bd. of Governors*, 642 F.2d 514 (D.C. Cir. 1980), *vacated and remanded*, 460 U.S. 711 (1983).

89. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

90. See 450 U.S. at 253 ("The burden of establishing a prima facie case . . . is not onerous.").

assess which of two individuals is more qualified.⁹¹ However, two practical considerations weigh heavily on the side of focusing exclusively on objective qualifications at the prima facie stage.

First, to require plaintiffs to obtain evidence of their own subjective qualifications, as well as those of the retained employee(s), places too onerous a burden upon plaintiffs. The personal observations of supervisors or co-workers may be the only evidence available with respect to subjective characteristics such as motivation, leadership abilities, and interpersonal skills. Plaintiffs, if required to demonstrate superior subjective qualifications, would have to spend considerable time and effort interviewing and deposing supervisors and co-workers. Moreover, both conscious and unconscious prejudices may color supervisors' and co-workers' assessments of plaintiffs' subjective qualifications.⁹² One easily can imagine a supervisor, believing that older people tend to be stodgy and slow-witted, wrongly evaluating an older employee as inflexible and slow to adapt to changes in the workplace. Alternatively, in anticipation of a RIF, an employer purposely may give an older worker a negative evaluation in order to justify her dismissal when the RIF actually occurs.⁹³ In such circumstances, a plaintiff will be unable to establish a prima facie case because she cannot show that she possessed equal or superior subjective qualifications relative to the retained employee.

Second, in addition to the evidentiary difficulties of demonstrating relative subjective qualifications, the plaintiff may have to speculate as to which traits the employer most highly valued, identifying all possible qualifications the employer may have considered. This requirement places upon the plaintiff a very high burden.⁹⁴ The employer, in contrast, has ready access to such information and easily can bear the burden of identifying the qualities it considered and

91. See, e.g., *Aikens*, 642 F.2d at 522 (Wilkey, J., dissenting).

92. See Faye Crosby & Susan Clayton, *Affirmative Action and the Issue of Expectancies*, 46 J. Soc. Issues 61, 66-67 (1990); see also *Lewis v. AT&T Technologies, Inc.*, 691 F. Supp. 915, 919 (D. Md. 1988) (stating that evidence that less qualified engineering associates were kept on at the facility is particularly hard to come by where layoffs are based on subjective performance ratings that may have been influenced by bias); Mack A. Player, *Applicants, Applicants in the Hall, Who's the Fairest of Them All? Comparing Qualifications Under Employment Discrimination Law*, 46 OHIO ST. L.J. 277, 294 (1985).

93. For example, in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the plaintiff's new supervisor moved to discharge the plaintiff, an international sales manager. The company's president blocked this action on the grounds that there was a lack of documentation to support termination of the plaintiff and suggested that the plaintiff be given specific assignments so that his performance could be evaluated better. The plaintiff's responsibilities were changed, and he became area manager of Latin America. The supervisor fired the plaintiff a few months later on the grounds that he had not generated enough business in Latin America to justify his salary, noting "involuntary termination — poor job performance" on plaintiff's personnel records. 600 F.2d at 1008.

94. See Player, *supra* note 92, at 289.

the manner in which it assessed those qualities as between the plaintiff and the retained employee.⁹⁵ Hence, it makes more sense to put this burden on the employer at stage two, rather than on the employee at the *prima facie* stage.

Arguably, the discovery process provides the plaintiff with the means by which to discover the qualifications most highly valued by the employer, thereby eliminating the necessity of shifting the burden of production to the employer. This argument, however, ignores the realities of employment discrimination litigation. First, in response to an interrogatory asking the employer to explain its decisionmaking process, the employer has little incentive to be completely forthcoming in its answer and may offer the plaintiff only vague explanations.⁹⁶ In contrast, defendants, in all likelihood, will explain in some detail their selection process during stage two of the *McDonnell Douglas* burden-shifting framework.⁹⁷ Although technically the employer need do no more than articulate a legitimate reason for its decision,⁹⁸ the fear that the factfinder will believe the plaintiff should the employer make only a minimal showing will motivate the employer to present detailed evidence.⁹⁹

Second, employers have an incentive to offer misleading or dishonest responses to plaintiffs' interrogatory requests. For example, suppose the plaintiff demonstrated superior leadership potential while the retained employee possessed better organization skills, and the employer was aware of their respective abilities. If in answer to the interrogatory, the employer states that it values organizational skills over leadership potential, the plaintiff will be unable to establish a *prima facie* case. The employer thus has an incentive to emphasize organizational skills over leadership skills, regardless of whether it truly values the retained employees' strengths more than it values the plaintiff's strengths, in order to thwart the plaintiff's attempt to establish a *prima facie* case. Consequently, if courts require plaintiffs to prove that they possessed equivalent subjective as well as objective qualifications relative to the retained employee(s), many plaintiffs will be unable to establish a *prima fa-*

95. See *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985); *Bartholet*, *supra* note 27, at 1211-12; cf. *Player*, *supra* note 92, at 289 ("[R]equiring the employer to articulate the precise reason it selected a particular person when confronted with a choice between two objectively qualified candidates is logical and relatively easy.").

96. See, e.g., *Bartholet*, *supra* note 27, at 1216; *Player*, *supra* note 92, at 289.

97. See *Bartholet*, *supra* note 27, at 1217.

98. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (stating that the defendant's burden is to produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason, and not to persuade the court that it was actually motivated by the proffered reason).

99. See *Bartholet*, *supra* note 27, at 1217.

cie case and will be denied a fair opportunity to show that age animus motivated their employer's actions.¹⁰⁰

Arguably, a showing that the plaintiff possessed equal or superior objective *and* subjective qualifications relative to the retained employee supports a stronger inference of discrimination than where the plaintiff only shows equal or superior objective qualifications. However, in light of the practical difficulties in demonstrating subjective qualifications, fairness to the plaintiff requires ignoring subjective qualifications until the pretext stage of the analysis. Moreover, by requiring plaintiffs to demonstrate equivalent objective qualifications to the retained employee(s), courts can dismiss those cases where plaintiffs are clearly less qualified than the retained employee(s).¹⁰¹ Courts thus can protect adequately employers from having to defend themselves against frivolous claims, a primary purpose of the prima facie case.¹⁰²

CONCLUSION

Employers will continue to lay off older workers as they restructure and reduce the size of their workforce in response to increased global competition. Many discharged workers over the age of forty will challenge their employer's decision under the ADEA. Some approaches currently taken by the courts in RIF cases, however, have not given due consideration to the interests of employers in avoiding frivolous litigation. Employers who must streamline their production often cannot afford the litigation costs of defending against frivolous lawsuits. Consequently, if the prima facie case for RIF discrimination cases does not offer employers adequate protection from such lawsuits, many personnel choices unfortunately may be based on fears of litigation, rather than ability. On the other hand, some employers impermissibly will rely on age in deciding

100. When a plaintiff cannot show equivalent objective qualifications, she may want to establish an inference of discrimination and thus a prima facie case, by showing pretext. Specifically, the plaintiff may wish to support an inference of discrimination by presenting pretextual evidence which suggests that either age bias or deceit entered into an employer's assessment of her performance. Alternatively, the plaintiff may seek to show pretext by challenging the employer's articulation of its selection criteria. In essence, the plaintiff will want to follow the *Williams* approach. However, as discussed *supra* section II.B, this approach poses numerous difficulties.

101. Because of the evidentiary difficulties faced by the plaintiff in showing subjective qualifications, the hurdle faced by plaintiffs at the prima facie stage should require only that plaintiffs show that they possessed equivalent or superior objective qualifications to the retained employee(s). However, in those rare cases where the plaintiff does not possess equivalent or superior objective qualifications but can manage to overcome the higher evidentiary hurdle of showing clearly superior subjective qualifications, the courts should adjust the prima facie case and examine both subjective and objective qualifications.

102. See *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134 (7th Cir. 1985) (stating that the prima facie case serves to screen out unsubstantiated claims, thereby sparing the employer unnecessary litigation expense).

which employees to lay off. We cannot set the prima facie standard so high as to render the ADEA meaningless. The challenge, therefore, is to set a standard in the RIF context that offers employers protection against frivolous lawsuits while, at the same time, offering relief to those who have been discriminated against.

Accordingly, this Note has argued that courts should require plaintiffs, as part of their prima facie burden, to 1) show that the employer had a continuing need for the work previously performed by the plaintiff, and 2) present evidence demonstrating that the plaintiff possessed substantially equivalent objective qualifications relative to younger employees retained by the employer. This prima facie burden protects employers from having to defend themselves against frivolous claims. At the same time, this approach also accomplishes the primary goal of the ADEA by ensuring that those RIF plaintiffs with legitimate claims are given a fair opportunity to demonstrate that discriminatory action was taken against them.