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Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases

Catherine J. Lanctot*

I. INTRODUCTION

The Supreme Court's decision in *Reeves v. Sanderson Plumbing, Inc.*¹ was its seventh attempt in nearly thirty years to establish a rule of law for circumstantially proving an individual disparate treatment case.² The Court's inability to provide clear guidance in individual disparate treatment cases, which I will also call "pretext cases," is particularly troubling because such cases are the most common ones brought under employment discrimination laws. Each time the Court has spoken on this question, the lower courts have struggled to make sense of what it said, developing their own versions of the rule the Court purported to establish. The variations in the pretext rules may be called "pretext-plus," "pretext-minus," or even "pretext-maybe." At bottom, however, the disarray of the lower federal courts that has persisted for more than twenty years is the product of the Court's refusal to set down a rule of law that would govern pretext cases.

As a review of the precedent indicates, despite sometimes heated rhetoric in recent opinions, the Supreme Court has adhered to the same basic model for circumstantial proof in pretext cases for nearly thirty years. I will further show that the ongoing confusion in the lower courts over the method of proof has resulted from the Court's unwillingness to provide a definitive rule of law to be applied in all pretext cases. The lower courts have been given ample loopholes through which to limit or expand the scope of pretext cases at will. These loopholes have generated woeful uncertainty for litigants. The *Reeves* case fits

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* Professor of Law, Villanova University Law School. I would like to express my appreciation to my colleague, Ann Juliano, and to the participants in the symposium, for their helpful comments and suggestions.

1. 530 U.S. 133, 120 S. Ct. 2097 (2000).

2. The Supreme Court's prior forays into this area include, in chronological order: *McDonnell Douglas v. Green*, 411 U.S. 792, 98 S. Ct. 1817 (1973); *Fumco Construction Corp. v. Waters*, 438 U.S. 567, 93 S. Ct. 2943 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S. Ct. 295 (1978); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1983); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). The Court had also granted certiorari on the question of pretext twice between *Aikens* and *Hicks*. The parties apparently settled the first case prior to argument. See *Chipollini v. Spencer Gifts, Inc.* 814 F.2d 893 (3d Cir. 1987) (en banc), writ dismissed, 483 U.S. 1052, 108 S. Ct. 25 (1987). The Court actually heard argument on the second case, but dismissed the writ six weeks later as improvidently granted. See *Briecq v. Harbison-Walker Refractories*, 624 F. Supp. 363 (W.D. Pa. 1985), opinion amended upon denial of reconsideration, 705 F. Supp. 269 (W.D. Pa. 1986), *aff'd in part and rev'd and remanded in part*, 822 F.2d 52 (3d Cir. 1987), writ dismissed as improvidently granted, 488 U.S. 226, 109 S. Ct. 546 (1988).

this pattern neatly, and one can easily anticipate that it is likely to produce the same results in the lower courts. For this reason, I advocate the development of a definitive rule in this area. The only way to ensure that the federal antidiscrimination laws are applied uniformly throughout the country is for the Court to stop creating loopholes in its pretext opinions, and instead to establish a fair rule to be applied consistently in pretext cases. In my view, the rule that would be most fair to plaintiffs and defendants, and which best serves the purposes of federal law, is a modified version of the pretext-only rule that some courts used prior to *Hicks*. Under my version of the pretext-only rule, which I call the "pretext-always" rule, a plaintiff is entitled to judgment as a matter of law by successfully proving the following: (1) all the elements of the prima facie case, (2) the falsity of the defendant's proffered explanation, and (3) the falsity of any other explanation reasonably inferred from the record as a whole.

This rule would make it more difficult for federal judges to interpose their own misgivings about employment discrimination laws for the judgments of juries. It also would provide defendants with additional protection against unwarranted findings of unlawful discrimination. The rule would address directly the judicial concern about employers being unfairly penalized for giving pretextual reasons that conceal secret, nondiscriminatory reasons for their actions. In addition, it would also remove the incentive for employers to lie about their true motivation. The pretext-always rule will uphold the national policy of equal treatment in the workplace as expressed through federal antidiscrimination laws. In short, under the pretext-always rule, the employer will no longer be able to avoid liability by relying either on secrets or lies.

II. FROM *MCDONNELL DOUGLAS* TO *HICKS*

If one examines the teachings of the Court in its seven leading pretext decisions, one finds that there has been very little change in the basic framework it established in the landmark case of *McDonnell Douglas Corp. v. Green*.³ Those requirements are familiar to us by now: the establishment of the prima facie case, with a presumption of impermissible discrimination; the rebuttal of that presumption by submitting, although not proving, a legitimate nondiscriminatory reason for the employment action; and the proof by a preponderance of the evidence that the reason advanced was not the true reason, but rather a pretext for discrimination. The Court has refined this analysis over time, to be sure, and in recent years has focused particularly on the requirement that the finding at the pretext stage be a finding of "pretext for discrimination."⁴ Nevertheless, one could safely say that there is little difference between the initial model set forth in 1973 by Justice Powell for a unanimous Court in *McDonnell Douglas* and that reaffirmed in 2000 by Justice O'Connor for a unanimous Court in *Reeves*.

3. 411 U.S. 792, 93 S. Ct. 1817 (1973).

4. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993).

The reason that the Court has had to repeat itself over the last thirty years is that the lower courts have persisted in establishing different rules of proof for pretext cases, producing splits among the circuits that the Court has felt compelled to resolve. The rule of proof that has caused this split is the so-called "pretext-plus" rule, which I identified in 1991 as prevalent in certain courts of appeals.⁵ Under that rule, which emerged after the Court's decision in *Burdine v. Texas Department of Community Affairs*,⁶ a plaintiff may not prevail merely by proving pretext at the third stage of the *McDonnell Douglas* formulation, but rather must have additional "plus" evidence to establish that the pretextual reason offered by the defendant concealed a discriminatory reason, rather than some other unstated reason.⁷ The courts that followed this rule, including the Court of Appeals for the Fifth Circuit, insisted on some "plus" evidence such as comparative evidence, statistical analysis, and even direct evidence, without ever precisely quantifying when such evidence would suffice to prove discrimination.⁸ At times, one could have speculated that nothing short of an employer confession of liability would meet the high threshold set by some pretext-plus courts for proving employment discrimination circumstantially.

The pretext-plus rule was inconsistent with the plain language of *Burdine*.⁹ In that unanimous opinion, authored by Justice Powell, the Court had said quite clearly:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. *She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.*¹⁰

That language appeared to undercut the theory of the pretext-plus courts, which was that it was inappropriate to infer discrimination without more than just a showing of pretext.

In 1993, in an attempt to resolve the deepening split among the circuits, the Supreme Court issued its opinion in *St. Mary's Honor Center v. Hicks*.¹¹ That 5-4 decision has been widely criticized for undermining traditional assumptions about the prevalence of employment discrimination generally, and for imposing too great

5. See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 *Hastings L.J.* 57 (1991)[hereinafter Lanctot, *The Defendant Lies*].

6. 450 U.S. 248, 101 S. Ct. 1089 (1981).

7. Lanctot, *The Defendant Lies*, *supra* note 5, at 81-88.

8. *Id.* at 91-100.

9. See generally, *id.* at 100-30.

10. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095 (emphasis supplied).

11. 509 U.S. 502, 113 S. Ct. 2742 (1993).

a burden on plaintiffs in pretext cases.¹² In particular, *Hicks* flatly rejected the “pretext-only” rule that would mandate entry of judgment for a plaintiff who proved pretext. Justice Scalia’s opinion disavowed various portions of the *Burdine* opinion that would have supported the “pretext-only” rule, including the passage quoted above.¹³ He insisted that “a reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown both that the reason was false and that discrimination was the real reason.”¹⁴ Moreover, the extremely vituperative language used by both Justice Scalia on behalf of the majority and Justice Souter for the four dissenters suggested that the Justices believed they were resolving a controversial issue with far-reaching significance.¹⁵ Reading the harsh debate in *Hicks* over the proper treatment of “lying defendants,” one might easily have concluded that the Court was about to adopt a pro-employer rule of proof that would permanently alter the landscape of disparate treatment cases.

A careful reading of *Hicks* revealed that it had not imposed the pretext-plus rule as a blanket rule of decision in disparate treatment cases, although much of Justice Scalia’s opinion gave comfort to the courts that had adhered to that rule. If one hacks through the hyperbole, hypotheticals, repetitions, and occasional insults that dot the majority opinion, one ultimately uncovers a short passage that seems strangely inconsistent with the rest of the discussion. In language that soon became the focus of litigants and the courts, the *Hicks* majority stated:

The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination,¹⁶

12. Scholarly criticism of *Hicks* abounds and will not be revisited here. The best-known defense of *Hicks* is Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995). Valuable critiques of *Hicks* include Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 Empl. Rts. & Employ. Pol’y J. 37 (2000); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time To Jettison McDonnell Douglas*, 2 Empl. Rts. & Employ. Pol’y J. 361 (1998); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279 (1997); Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality” Excuse*, 18 Berkeley J. Employ. & Lab. L. 183 (1997); Deborah A. Calloway, *St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption*, 26 Conn. L. Rev. 997 (1994).

13. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 515-17, 113 S. Ct. 2742, 2751-53 (1993). Justice Scalia described this language as “dictum [which] contradicts or renders inexplicable numerous other statements, both in *Burdine* itself and in our later case law—commencing with the very citation of authority *Burdine* uses to support the proposition.” *Id.* at 517, 113 S. Ct. at 2752-53.

14. *Id.* at 515, 113 S. Ct. at 2751.

15. See, e.g., *id.* at 511 n.4, 113 S. Ct. at 2749 n.4 (describing dissent’s “confusion-producing analysis” and describing dissenting opinion as “alarum”); *id.* at 530 n.5, 113 S. Ct. at 2759 n.5 (describing majority opinion as “half-hearted”) (Souter, J., dissenting).

16. *Id.* at 511, 113 S. Ct. at 2749 (first emphasis supplied).

One could be forgiven for reading the quotations from *Burdine* and *Hicks* and concluding that the Court had done nothing but repeat itself. It is undeniable that the holding of *Hicks* rejected the mandatory entry of judgment for a plaintiff who successfully proved pretext. Nevertheless, the language I have quoted was equally clear in rejecting the pretext-plus rule that would mandate entry of judgment for a defendant in a pure pretext case. To the extent that the Court changed anything about pretext law in *Hicks*, the five-member majority reemphasized that the ultimate finding must be pretext for discrimination, and that a mandatory finding for plaintiff after proof of pretext was incorrect. At best, I would characterize the *Hicks* rule as "pretext-maybe." Most importantly, all nine members of the Court acknowledged that pretext could, under ill-defined circumstances, suffice to prove impermissible discrimination.

III. HICKS REVISITED—REEVES V. SANDERSON

It did not require great prescience to predict the result of Justice Scalia's uncharacteristically permissive language in *Hicks*.¹⁷ The split among the circuits that preexisted *Hicks* reemerged after 1993, much along the same lines as before.¹⁸ Once again, a number of courts reintroduced the pretext-plus concept, now relying on the phrase "suspicion of mendacity," to enter summary judgment for defendants and even to overturn jury verdicts for plaintiffs in the absence of "plus" evidence. *Reeves* may have been among the most egregious examples of such activism,¹⁹ but it did not stand alone. In *Reeves*, the Court of Appeals for the Fifth Circuit reversed a jury finding for an ADEA plaintiff, on the grounds that there was insufficient evidence that the pretextual reason concealed age

17. In light of the bitterness of the opinions in *Hicks*, I have often wondered whether the need to obtain a fifth vote compelled Justice Scalia to include the permissive language quoted above. This "pretext-maybe" loophole seems inconsistent with the majority opinion's open hostility to proving discrimination by proving pretext. The majority opinion's liberal language is particularly puzzling in light of Justice Scalia's antipathy to circumstantial proof in employment discrimination cases, expressed when he served on the Court of Appeals for the District of Columbia Circuit. See *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1247 (D.C. Cir. 1984) (Scalia, J., dissenting); Lanctot, *The Defendant Lies*, *supra* note 5, at 96-98. It also seems inconsistent with Justice Scalia's often-stated preference for bright-line rules. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); see also, Developments in the Law—Employment Discrimination, 109 Harv. L. Rev. 1569, 1593 (1996) (noting inconsistency). I have argued elsewhere, however, that Justice Scalia's approach to employment discrimination cases is not as predictable as one might expect from his conservative views. See generally Catherine J. Lanctot, *The Plain Meaning of Oncale*, 7 Wm. & Mary Bill of Rts. J. 913 (1999).

18. See generally Catherine J. Lanctot, *Pretext-Plus After Hicks: The Circuit Split Remains*, in 1996 Wiley Employment Law Update 161-99 (H. Perritt, Jr., ed.) (1996).

19. See Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 575 (2001) ("The Fifth Circuit manipulated the conventional structure of individual disparate treatment law to limit very stringently the scope of the law against discrimination.").

discrimination. The court clearly relied on the pretext-plus rule, some version of which had been articulated by that circuit as early as 1988.²⁰

Once again, in *Reeves*, the Supreme Court considered the effect of proof of pretext in a disparate treatment case. Once again, the Court held, this time unanimously, that a plaintiff may prevail in such a case by proving pretext, without additional evidence of discrimination. Once again, the Court explained to the lower courts why the pretext-plus rule was incorrect. After quoting the permissive language from *Hicks*, Justice O'Connor explained:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.*²¹

The highlighted passage is virtually identical in meaning to the language in *Burdine* that had supposedly been rejected by *Hicks*. Indeed, it seems eerily similar to the permissive language included in the *Hicks* majority opinion. To the extent that there is any difference between *Hicks* and *Reeves*, it is the omission of the concept of "mendacity" as a consideration in determining whether or not the "pretext-maybe" rule would be applied. A newcomer to the field might read this language and reasonably believe that the Court finally has established a rule of law in employment discrimination cases that will resolve the twenty-year circuit split over pretext.

Reports of the death of the pretext-plus rule may be greatly exaggerated. In the very next paragraph, Justice O'Connor carves out a cryptic loophole:

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if

20. Lancot, *The Defendant Lies*, *supra* note 5, at 72 n.48 (citing *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988)).

21. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48, 120 S. Ct. 2097, 2108-2109 (2000) (emphasis supplied) (citations omitted).

the record *conclusively revealed* some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a *weak issue* of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted* independent evidence that no discrimination had occurred.²²

The rule *Reeves* seems to set forth is less of a "pretext-maybe" approach, and more of a "pretext-minus" rule. The lower courts must permit plaintiffs to proceed by proving pretext by a preponderance of the evidence, but the presence of "conclusively revealed" alternative explanations or "abundant and uncontroverted" evidence will be subtracted from the weight of that proof to result in a verdict for defendant. As if this unusual evidentiary standard were not mysterious enough for litigants and the lower courts, Justice O'Connor further muddies the waters in the next paragraph:

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. These include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. For purposes of this case, we need not—and could not—resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law.²³

The Court reiterates that "[t]he ultimate question in every employment discrimination case is whether the plaintiff was the victim of intentional discrimination."²⁴

Anyone who has examined the evolution of the pretext issue over time can anticipate the confusion likely to be caused by the Court's waffling on this issue. But only Justice Ginsburg, the well-known scholar in employment discrimination law, calls attention to the dangers implicit in the Court's ambiguity. In her concurrence, she notes that "it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law."²⁵ Describing such situations as likely to be "uncommon" and "atypical," Justice Ginsburg explains that once pretext is proven, "the inference [of discrimination] remains—unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, that discrimination could not have been the defendant's true motivation."²⁶

22. *Id.* at 148, 120 S. Ct. at 2109 (emphasis supplied).

23. *Id.*

24. *Id.* at 153, 120 S. Ct. at 2111.

25. *Id.* at 154, 120 S. Ct. at 2112 (Ginsburg, J., concurring).

26. *Id.*

The long history of pretext litigation shows that courts will exploit any loopholes provided by the Supreme Court to dismiss what they consider to be unmeritorious discrimination suits. Not only does such judicial practice undermine the purpose of the antidiscrimination laws, but it produces substantial injustice when the standard of proof of claims under a federal statute varies so widely from jurisdiction to jurisdiction. Will the Supreme Court have to confront the pretext issue again, or has the "pretext-minus" rule provided sufficient guidance to the lower courts to bring an end to a generation of uncertainty?

The preliminary results from the lower courts are not encouraging. As one might predict, courts that remain uncomfortable with the concept of circumstantial proof of employment discrimination are gravitating to Justice O'Connor's "pretext-minus" language. Michael Zimmer has shown that the lower courts thus far have not appreciably changed their basic approach to employment discrimination cases.²⁷ The Fifth Circuit proved remarkably unrepentant, at least initially, after a unanimous reversal by the Supreme Court.²⁸ In addition, other courts are trying to reinstate a new version of the pretext-plus rule by imposing more stringent requirements for proving that the reason is pretext.²⁹ In short, it is business as usual in the lower courts.³⁰ One may confidently predict that some time in the next five years or so, we scholars will be called upon again to dissect yet another attempt by the Supreme Court to address the issue of pretext.

IV. PUTTING THE RULE BACK INTO "RULE OF LAW"—THE "PRETEXT-ALWAYS" RULE

Why has this debate over pretext persisted so stubbornly? The antipathy of the lower courts to circumstantial proof of disparate treatment claims may be explained by many factors, including the ideological disposition of many lower court judges, the societal changes in perception of the prevalence of discrimination, and a desire to control the burgeoning dockets of the federal courts.³¹ But logically one would have expected these very factors to influence the Supreme Court, with its deeply conservative majority, to limit sharply the plaintiff's ability to win pretext cases. Instead, as I have shown, the Court has steadfastly asserted for the last twenty years that a plaintiff may prove a disparate treatment case by proving a prima facie case and that the employer's reason was a pretext for discrimination. So why has this deceptively simple rule proven to be so unworkable?

The simple answer is that this rule is not a rule. Neither the "pretext-maybe" formulation in *Hicks* nor the "pretext-minus" articulation in *Reeves* qualifies as a

27. See Zimmer, *supra* note 19, at 582.

28. *Id.* at Section II (discussing *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000); *Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000); and *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000)).

29. See Zimmer, *supra* note 19, at Section II.

30. *Id.*

31. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 La. L. Rev. 555 (2001); Zimmer, *supra* note 19; Lanctot, *The Defendant Lies*, *supra* note 5, at 141.

rule, as one commonly would understand the meaning of the term. A “rule,” the dictionary tells us, is “[a]n authoritative, prescribed direction for conduct, especially one of the regulations governing procedure in a legislative body or a regulation observed by the players in a game, sport, or contest.”³² The “pretext-plus” formulation, for all its many defects, would at least qualify as a rule, in that the litigants know that if the plaintiff cannot generate some additional evidence of discrimination, the case will be lost. But neither *Hicks* nor *Reeves* establishes a rule at all. Sometimes a plaintiff may win with pretext alone, and sometimes she may lose, says the Court. It depends on the circumstances. This is hardly an “authoritative, prescribed direction for conduct.” It more closely resembles an alternative definition for “rule,” which is “[a] generalized statement that describes what is true in most or all cases.”³³ The lower courts have been permitted to exercise virtually standardless discretion in individual discrimination cases.

Scholars have long debated whether a rules-based jurisprudence is preferable to other regimes, and I will not revisit that question here.³⁴ Nevertheless, I would suggest that the thirty-year struggle to develop coherent doctrine in garden-variety employment discrimination cases ought to be examined closely by those who advocate more flexibility for decision makers. It is particularly ironic that the liberal preference for case-by-case exercises of discretion by judges has produced a decidedly illiberal body of law in pretext cases. The failure to impose the rule of law in these cases has enabled lower courts to interpose their own views of civil rights for those embodied in federal law.³⁵

The only way to ensure the application of the rule of law in disparate treatment cases is for the Supreme Court to actually impose one. In *Hicks*, the Court rejected the “pretext-only” rule for fear that a defendant might lose a case even though there was some secret nondiscriminatory reason that actually motivated its decision. In *Reeves*, the Court has now unanimously rejected the “pretext-plus” rule. My solution is for the Supreme Court to adopt a rule I will call the “pretext always” rule, which is a modified version of the “pretext only” rule that the Court rejected in *Hicks*. My rule would provide as follows:

A plaintiff in an individual disparate treatment case is entitled to judgment, as a matter of law, if that plaintiff, by a preponderance of the evidence:

1. Proves all the elements of the prima facie case, as set forth in *McDonnell Douglas* and its progeny; and
2. Proves that the reason offered by the defendant was not the real reason for the employment action; and

32. American Heritage Dictionary of the English Language 1577 (3d ed. 1992).

33. *Id.* at definition 4.

34. See, e.g., Scalia, *supra* note 17; Cass Sunstein, *Problems With Rules*, 83 Cal. L. Rev. 953 (1995).

35. See Susan Grover, *The Business Necessity Defense in Disparate Treatment Cases*, 30 Ga. L. Rev. 387, 421-24 (1996) (need to apply rules in disparate treatment cases to limit judicial bias).

3. Proves that any other reason that reasonably may be inferred from the evidence was not the real reason for the employment action.

Prior to the Court's ruling in *Hicks*, I argued for a pure pretext-only rule—that is, once the plaintiff rebuts the defendant's articulated reason by a preponderance of the evidence, such a showing mandates judgment for the plaintiff because the only reason remaining in the case was the discriminatory one.³⁶ I continue to believe that this rule is the most fair to both plaintiffs and defendants in that it precludes unwarranted speculation about "secret" nondiscriminatory reasons that the employer did not articulate.³⁷ Nevertheless, in light of the persistent concern about such reasons expressed in *Hicks*, *Reeves*, and their progeny, I advance a rule that responds to that issue.

The advantages of the pretext-always rule are many. First, as a matter of substantive law, the rule crystallizes the teachings of the Court since *McDonnell Douglas*, while closing down the principal loopholes that have emerged since *Burdine*. Parts 1 and 2 of my rule simply reiterate the "pretext-maybe" language of *Hicks* and *Reeves*, codifying existing case law. This should be unobjectionable, except to those who reject the entire body of law developed since *McDonnell Douglas*. My proposal admittedly assumes the continuing vitality of the *McDonnell Douglas* prima facie case. In my view, that model is too firmly entrenched in employment law, as well as other areas of law, to be dismantled at this late date, and no better alternative has yet been offered that would adequately protect the interests of plaintiffs.³⁸

Part 3 of my rule removes the "maybe" from the *Hicks* formulation. It is designed to address the situation that seems to haunt so many federal judges—the specter of an undeserving plaintiff prevailing in an employment discrimination case by showing pretext when the real reason being concealed by the employer was not

36. See Lanctot, *The Defendant Lies*, *supra* note 5, at 132-33.

37. See Catherine J. Lanctot, *Can the Plaintiff Win If the Defendant Lies After Hicks?: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases*, in 1994 Wiley Employment Law Update 106 (H. Perritt, ed.).

38. A full-blown defense of the prima facie case requirement established by *McDonnell Douglas* is beyond the scope of this piece. I acknowledge that the *McDonnell Douglas* formulation of the prima facie case has come under increasing attack in recent years. See, e.g., Malamud, *The Last Minuet*, *supra* note 12. Nevertheless, it merits reiteration that this methodology not only pervades employment discrimination law, but also has been imported into other areas, such as jury selection, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). The reason for the widespread adoption of *McDonnell Douglas* is that it provides a relatively straightforward rule for courts to apply in determining whether a plaintiff has raised an inference of impermissible action by the defendant, by eliminating the most common legitimate reasons for the adverse action. See generally Corbett, *supra* note 12. Unless we are willing to take the draconian position that only plaintiffs with so-called "direct" evidence may pursue discrimination claims, we will have to devise a way for such claims to be raised and proven circumstantially. If *McDonnell Douglas* were to be scrapped by the Court tomorrow, or if Congress were to amend the civil rights statutes to eliminate that methodology, the issue of proving cases without direct evidence would still be with us. The elements of proof set forth in the *McDonnell Douglas* prima facie case may be imperfect, but it is difficult to see how it would be preferable to leave plaintiffs to the mercy of trial courts and their individualized notions of what constitutes "discrimination."

discrimination, but something else. I have argued previously that this solicitude for employers who do not tell the truth in civil litigation is unwarranted,³⁹ a position also advanced by Justice Souter for the four dissenters in *Hicks*.⁴⁰ Nevertheless, the possibility that such an injustice might occur is so troubling to many courts that it must be taken seriously if we ever hope to succeed in establishing the rule of law in individual disparate treatment cases. Thus, my rule takes this concern into account by imposing an additional burden on the pretext plaintiff. The plaintiff must not only prove that the employer's articulated reason is untrue, but must also be sure to rebut, by a preponderance of the evidence, any other reason presented by the evidence that might serve as an alternative explanation for the adverse employment action.⁴¹ If the plaintiff meets this additional burden, however, the plaintiff has eliminated all reasons other than the discriminatory one, and is therefore entitled to judgment as a matter of law.

A. Closing the Loopholes in *Reeves*.

This formulation is justifiable on several counts. Although it seems on its surface to add an additional step to the traditional pretext formulation, it is not a significant leap when we recall that the concern about the alternative nondiscriminatory reason is already part of many judges' analyses of disparate treatment cases. Requiring the plaintiff to rebut a reason that the employer did not bother to rely upon may seem unfair, but both *Hicks* and *Reeves* permit courts to enter judgment for defendants when the plaintiff does not eliminate this possibility. Limiting the plaintiff's obligation to rebutting reasons that have some evidentiary basis is fair to both parties by eliminating the risk of speculation by the factfinder, and facilitates review for sufficiency of the evidence on both pretrial and posttrial motions.⁴²

How would a "pretext-always" rule address Justice O'Connor's loophole in *Reeves*? It eliminates the "instances where, although the plaintiff has established

39. Lanctot, *The Defendant Lies*, *supra* note 5, at 133-36.

40. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 527, 113 S. Ct. 2742, 2757 (1993) (Souter, J., dissenting).

41. It should be noted that I do not characterize this requirement as a "legitimate" nondiscriminatory reason. For reasons that I have explained in more detail elsewhere, I believe that the term "legitimate" should more accurately be stated as "genuine." A so-called illegitimate reason may be an unseemly reason (like nepotism) or even an unlawful reason (like retaliating against a whistleblower), but it is nevertheless not, absent unusual circumstances, a discriminatory reason under federal law. See Lanctot, *The Defendant Lies*, *supra* note 5, at 136-40.

42. Common sense dictates that an employer does not offer a pretextual reason to conceal a neutral or benign reason for its action. See Lanctot, *The Defendant Lies*, *supra* note 5, at 133. The often-expressed notion that employers offer untrue justifications for their hiring decisions to spare the feelings of employees by not pointing out their shortcomings simply does not hold up under scrutiny. The economic consequences of an adverse ruling in an employment discrimination action alone would stiffen the resolve of even the most tenderhearted employer. The notion seems particularly inconsistent with the model of rational economic activity that animates so many conservative judges in other areas of the law.

a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory."⁴³ My rule responds directly to the hypothetical situation she advances of a record that "*conclusively revealed* some other, nondiscriminatory reason for the employer's decision." Such a situation could not arise under my rule, because the plaintiff is required to prove, by a preponderance of the evidence, that no such reason exists. Similarly, my rule addresses the other hypothetical situation she posits, when "the plaintiff created only a *weak issue* of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted* independent evidence that no discrimination had occurred."⁴⁴ The evidence would no longer be "uncontroverted" under my formulation.⁴⁵

My rule not only harmonizes existing inconsistencies in disparate treatment law, but it provides certainty in an area where the exercise of virtually unfettered judicial discretion has been especially unsettling. Despite the frequent cautionary statements that employment discrimination law is to be treated like any other body of law, it is difficult to imagine any other substantive area in which standardless review of the evidence would be tolerated the way it is in pretext cases.

The "pretext-always" rule would also serve to clarify the blurring of questions of fact and law that seems to underlie recent pretext cases. Justice O'Connor's opinion in *Reeves* typifies the conflation of issues of law (whether proof of pretext creates an inference of discrimination) with issues of the sufficiency of the evidence (whether the evidence itself suffices to prove the substantive element at issue) and issues of fact. Consider again the loophole created by the majority in *Reeves* for pretext cases in which "the record *conclusively revealed* some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a *weak issue* of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted* independent evidence that no discrimination had occurred."⁴⁶ This language can hardly be characterized as creating a limited exception to a substantive rule of law. Rather, the language seems to speak to the sufficiency of the evidence of pretext. Thus, this language is not inconsistent with the "pretext-always" rule that I advocate.

Indeed, the loophole language in *Reeves* seems to be inconsistent with traditional evidentiary burdens in civil cases. A plaintiff who proves that the employer's reason is pretextual must by definition have proven that element by a preponderance of the evidence—that is, that it is more likely than not that the reason offered is untrue. It is difficult to see how that finding can coexist with a record that

43. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109 (2000).

44. *Id.* at 148, 120 S. Ct. at 2109.

45. There are analytical weaknesses in the hypothetical examples pressed by the *Reeves* majority, in that they seem to combine concerns about sufficiency of the evidence with concerns about the substantive rule. It is difficult to understand how a plaintiff who has proven pretext by a preponderance of the evidence has made a "weak showing," or how in such a circumstance there would be "abundant and uncontroverted" evidence to the contrary. Taking the opinion at face value, however, the "pretext always" rule eliminates these concerns.

46. *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109.

“conclusively reveal[s]” some other nondiscriminatory reason. Presumably the factfinder weighed the evidence and the credibility of witnesses and concluded, in light of all factors, that the plaintiff’s version of events was more likely than not the real explanation for the adverse action. Similar difficulties arise with the concept of “weak issue of fact.” How lower courts are to apply this standard on summary judgment, as well as in post trial motions, remains a mystery.⁴⁷

In contrast, a “pretext-always” standard both responds to the *Reeves* concerns while protecting the interests of defendants. Under my proposal, a plaintiff would be required to disprove any nondiscriminatory reasons presented in the evidence in order to prevail. This eliminates the possibility that the record will “conclusively reveal” such reasons with “abundant and uncontroverted independent evidence.” If such reasons are so presented, they must be disproven by a preponderance of the evidence. Once the plaintiff has done so, there are no other reasons fairly presented by the evidence other than the discriminatory reason, and it is fair to enter judgment for the plaintiff.

B. Secrets and Lies: Eliminating the Secret Nondiscriminatory Reason.

As a matter of logic, the “pretext-always” rule rejects the concept of the employer who lies to conceal a “secret nondiscriminatory reason.” The mythology of the secret reason, neither raised by the employer nor reasonably inferred by the evidence, has at times been advocated as an alternative source for entering judgment for defendant.⁴⁸ *Reeves* seems to foreclose that possibility, and for good reason. It is one thing to concede that an employer may prevail even if its proffered reason is untrue, if there is sufficient evidence in the record for the factfinder to infer that an alternative reason motivated the adverse action, and that evidence was not successfully rebutted by the plaintiff. It is quite another to conclude that entry of judgment for an employer would be permissible in the absence of any record evidence of an alternative explanation, simply based on speculation by the factfinder.

For example, suppose the plaintiff in *Reeves* successfully showed, as he did, that the employer’s proffered reason for firing him (lateness and poor management) was untrue. It would be unwarranted for the court to enter judgment for the

47. In particular, it is difficult to see how summary judgment could be entered for defendant when the record reveals a genuine factual dispute over the veracity of the employer’s proffered explanation, on the basis that the record “conclusively demonstrates” an alternative explanation. Under this scenario, there are at least three possible explanations for the adverse employment action, all of which presumably have record support: the plaintiff’s explanation (illegal discrimination), the employer’s explanation (the legitimate nondiscriminatory reason), and the alternative nondiscriminatory explanation. This is a genuine factual dispute to be resolved by a jury, and the fact that there is strong record evidence that the employer’s proffered explanation is untrue would seem to bolster the plaintiff’s case, not the defendant’s. What would constitute “conclusive” evidence on summary judgment, such that it would not be subject to traditional concerns about credibility and cross-examination, is equally unclear. The “pretext-always” rule would respond directly to this scenario by requiring the plaintiff to create a genuine issue of fact with respect to other reasons lurking in the record.

48. See Lanctot, *The Defendant Lies*, *supra* note 5, at 132-35.

defendant on the ground that the plaintiff might have had an undisclosed physical altercation with his boss that caused the firing, if there was no evidence in the record of such an event. Permitting that kind of speculation would result in the evisceration of any rule of law in disparate treatment cases, and would render it impossible to scrutinize a verdict for sufficiency of the evidence.⁴⁹

Some may criticize my pretext-always rule because it is theoretically possible that an undeserving plaintiff could win. A plaintiff could prevail by disproving the employer's reasons and all other reasons, even though another nondiscriminatory reason truly motivated the employer.⁵⁰ We must remember that the risk of error is present in all trials. Society tolerates such risk for a host of other matters, particularly in civil trials where the evidentiary standard is preponderance of the evidence, and even more particularly when proof is made by circumstantial evidence.

The fact that critics of circumstantial proof in these cases are so obsessed with the remote possibility of an occasional erroneous result is further evidence of a societal reluctance to acknowledge the persistent problem of discrimination. As the Supreme Court is fond of reminding us, employment discrimination cases are just like other civil cases. The factfinder is dealing in probabilities. The theoretical possibility that the occasional unmeritorious plaintiff might succeed against a blameless employer has been driving the substantive debate for far too long. Once all other reasonable probabilities raised by the circumstantial evidence have been rebutted, the entry of judgment in plaintiff's favor is warranted.⁵¹

V. CONCLUSION

The pretext-always rule confronts the central meaning of the term "pretext"—"something that is put forward to conceal a true purpose or object."⁵² Once a plaintiff has eliminated all other reasons in the record to explain the adverse action, judgment should be entered on his or her behalf. Simply articulating this simple rule would provide certainty in an area of law that desperately needs such certainty. The framework under which litigants have labored for decades has not produced consistent, fair results for either plaintiffs or defendants. It has left too

49. Moreover, it is inconsistent with the modern understanding that civil trials are no longer "trial by ambush." See Leland Ware, *Advocating Equality: Judge Theodore McMillan's Civil Rights Jurisprudence and St. Mary's Honor Center v. Hicks*, 43 St. Louis L.J. 1309, 1317-18 (1999).

50. This was the thrust of Justice Scalia's hypothetical in *Hicks* of the employer whose only method of producing its legitimate reason would be through a disgruntled former employee and would therefore lose the case unjustly.

51. As the Court said more than 20 years ago in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2950 (1978), "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race."

52. Edwin Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications In The Supreme Court's Fourth Amendment Pretext Doctrine*, 79 Ky. L. J. 1, 19 (1990).

much leeway for subjectivity and ideological predilection, and has not provided adequate support for the salutary purposes of the federal antidiscrimination laws.

At a time when the entire structure of disparate treatment claims is under attack from both the Left and the Right, it may seem foolish to press for a rule that not only recodifies traditional pretext analysis but also appears to limit the discretion of federal judges in employment discrimination cases. Indeed, the embrace of rules has often been a hallmark of conservative jurisprudence. I admit that mine may be a quixotic quest, but I believe that imposing the rule of law in employment discrimination cases would achieve a progressive result. The civil rights laws are just that—laws, not suggestions. My rule is designed to limit judicial discretion, in an effort to establish the rule of law in disparate treatment cases, in a way that is fair to both parties, and logically consistent with thirty years of individual disparate treatment jurisprudence.

