A CROSS-CIRCUIT COMPARISON OF THE BURDEN-SHIFTING ANALYSIS IN DISPARATE TREATMENT CASES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 AS AMENDED

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I. INTRODUCTION

Prior to the enactment of the Age Discrimination in Employment Act of 1967 (ADEA),[1] both Congress and the Executive Branch of the United States government began to realize that during the 1960s, the number of unemployed Americans age forty-five and older had risen to an alarming number despite an overall low rate of unemployment in the nation.[2] Following this realization, members of Congress and the Executive Branch pledged to open employment opportunities to older Americans who were the victims of discrimination in the

1. Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988).

2. Lyndon B. Johnson's Special Message to Congress Proposing Programs for Older Americans, 1 PUB. PAPERS 32-39 (1967) [hereinafter *Johnson's Special Message*].

workplace.[3] This pledge to end arbitrary age limits on hiring became a reality in 1967 with the enactment of the ADEA.[4] The Executive Branch brought national recognition to the problem of age discrimination,[5] Congress passed legislation,[6] and the United States Supreme Court faced the challenge of developing a standard of proof to apply to age discrimination cases to effectuate the goals of the Executive Branch and Congress. In 1973 the Supreme Court established a test articulating the allocation of burdens and standards of proof for Title VII discrimination claims in *McDonnell Douglas v. Green*.[7] Subsequently, the Court refined the respective burdens on the employee and the employer in *Texas Department of Community Affairs v. Burdine*.[8] Following these decisions, it seemed the lower courts would have a clearcut standard for future age discrimination claims under the ADEA.

The Court has subsequently stated the *McDonnell Douglas* test is "not intended to be rigid, mechanized, or ritualistic."[9] Unfortunately, circuit courts have construed this test with some variation, specifically concerning the burden of proof and the evidence offered to either prove or refute the discrimination charges.[10] Because of the confusion surrounding this standard of proof and the slew of litigation arising under the ADEA, employers need a guide outlining the circuits' various approaches to the burden-shifting analysis for ADEA claims and some clues about how to comply with the ADEA.

This Note provides the necessary guide to the variations in the standards of proof among the eleven judicial circuits. It first examines the legislative history of the ADEA, followed by an analysis of the genesis of judicial application of the ADEA in the Supreme Court. After tracing the development of the Supreme Court standards and examining the confusion that accompanies these standards, this Note compares and contrasts the standards of proof the circuits have used and attempts to draw conclusions about which circuits are most advantageous to employees filing ADEA claims and which circuits are most beneficial to employers attempting to refute ADEA claims.

II. BRIEF LEGISLATIVE HISTORY

A. *Intentions of the Act*

The ADEA was an outgrowth of the civil rights legislation of the 1960s; however, initial efforts to include age as a protected class within those classes

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3. JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 1 (1986) (citing 113 CONG. REC. 34743-44 (1967)).

4. *Id.* at 2.

5. 113 CONG. REC. 34743-44 (1967).

6. LAWRENCE M. FRIEDMAN, YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT 15 (1984).

7. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

8. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981).

9. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

10. KALET, *supra* note 3, at 66-67.

protected under Title VII of the Civil Rights Act of 1964[11] were largely unsuccessful because of the mistaken perception that there was insufficient information available to evaluate the nature of age discrimination.[12] Despite this initial doubt regarding the availability of information about age discrimination, the Secretary of Labor conducted a report and found: (1) arbitrary age limits substantially affected the employment of older employees; (2) although age discrimination was not based on the sort of animus motivating alternative types of discrimination—such as discrimination based on race, gender, or religion—age discrimination was based on stereotypes that older people are unable to contribute as significantly to the work force as younger people; (3) arbitrary age limits were generally unfounded, and overall, the performance of older workers was not inferior to that of younger workers; and (4) arbitrary age discrimination was profoundly harmful not only because it inflicted economic and psychological injury to those unemployed as a result of age discrimination, but also because it deprived the national economy of the productive labor of millions of individuals and imposed substantially elevated costs on the United States Treasury in unemployment insurance and social security benefits.[13] This report laid the foundation for the development of the ADEA.[14]

Although the original intent of the drafters of the ADEA was to include age within the protected classes under Title VII,[15] the drafters eventually determined that age should be a different classification, because unlike race or gender, all workers would eventually be within the protected class.[16] As a result of this differentiation between age and other protected classes under Title VII, the drafters of the ADEA opted to use the Title VII enforcement scheme and proof considerations[17] as well as the remedial scheme detailed in the Fair Labor Standards Act of 1938.[18]

B. *Coverage by the Act*

As originally enacted in 1967, the ADEA defined its protected class of employees as "individuals within the protected age group of 40 to 65 years, inclusive, for private sector employees."[19] The ADEA was amended however, in 1974 to extend its protected class to include federal and state government employees.[20] Subsequent amendments to the ADEA have raised the upper age

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11. 42 U.S.C. § 2000e (1988 & Supp. V. 1993).
12. KALET, *supra* note 3, at 1; *see* 110 CONG. REC. 2596-97 (statement of Rep. Celler), 13490-92 (statement of Sen. Smathers and Sen. Case) (1964).
13. KALET, *supra* note 3, at 2; *see* REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965).
14. KALET, *supra* note 3, at 2; *see* FRIEDMAN, *supra* note 6, at 15.
15. 113 CONG. REC. 34743-44 (1967).
16. KALET, *supra* note 3, at 2.
17. *Id.*
18. *Id.* at 3; Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988).
19. *See* KALET, *supra* note 3, at 3.
20. *Id.*

limit to 70 for private sector employees and removed the upper age limit for federal employees.[21]

An "employer" under section 11(b) of the ADEA is defined as "a person engaged in an industry affecting commerce with twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year."[22] This definition includes private employers, corporations, labor organizations, employment agencies, state and local governments, and the federal government.[23]

III. THE STANDARD OF PROOF: UNITED STATES SUPREME COURT APPLICATION OF THE ADEA

Once the Legislature agreed on the composition and scope of the ADEA, the United States Supreme Court faced the task of establishing a standard of proof for age discrimination claims. To prove discrimination, the Court articulated two theories on which to base a claim: (1) disparate treatment and (2) adverse impact.[24] Because most cases brought under the ADEA are disparate treatment cases,[25] this Note addresses only the disparate treatment theory. According to the Court, disparate treatment occurs when an individual receives "less favorable treatment because of an individual-protected characteristic such as age."[26] A disparate treatment claim under the ADEA requires proof of discriminatory intent, but in certain situations, this intent can be inferred from differences in the treatment of employees in the workplace.[27]

A. McDonnell Douglas v. Green[28]

The primary case establishing the order, allocation of burdens, and standards of proof in disparate treatment cases is *McDonnell Douglas v. Green.* Although *McDonnell Douglas* involved a Title VII claim based on race discrimination,[29] it served as the foundation for a workable age discrimination test, just as Title VII served as a pattern for the drafters of the ADEA.[30]

In *McDonnell Douglas*, the Court held the employee must carry the initial burden of establishing a prima facie case of racial discrimination to withstand an

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21. *Id.*
22. 29 U.S.C. § 630(b) (1986).
23. KALET, *supra* note 3, at 18.
24. *Id.* at 59.
25. *Id.* Most ADEA cases are based on the disparate treatment theory rather than on an adverse impact theory. *Id.* In adverse impact cases, employment practices are facially neutral in their treatment of different groups, but impact more severely on one group than another. *Id.* Because seniority systems are typically arranged to favor the older worker, one can discern that age discrimination would occur largely on an individualized basis. *Id.*
26. *Id.* (citing Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).
27. *Id.*
28. McDonnell Douglas v. Green, 411 U.S. 792 (1973).
29. *Id.* at 796.
30. KALET, *supra* note 3, at 2.

employer's motion for dismissal or a motion for summary judgment.[31] An employee can establish a prima facie case by showing: (1) the employee is within the protected age group; (2) the employee applied and was qualified for the position for which the employer was seeking applicants; (3) despite the employee's qualifications, the employee was rejected; and (4) after the employee's rejection, the position remained open, and the employer continued to seek applicants from persons with the rejected employee's qualifications.[32]

The burden then shifts to the employer to state some legitimate, nondiscriminatory reason for the employee's rejection or dismissal.[33] If the employer fails to articulate a legitimate, nondiscriminatory reason for the employee's discharge, the employer has unlawfully discriminated against the employee on the basis of age.[34] On the other hand, if the employer articulates a reason for the employee's discharge that the court finds both legitimate and nondiscriminatory, the inquiry continues.[35] Subsequently, the burden of proof shifts back to the employee to prove the employer's stated reason for the employee's discharge was a pretext for age discrimination.[36] Because the burden of proof shifts from the employee to the employer and back to the employee, the *McDonnell Douglas* test is known as the burden-shifting analysis, establishing a specific order and allocation of the burdens of proof in an age discrimination case.[37]

B. Texas Department of Community Affairs v. Burdine[38]

In *Texas Department of Community Affairs v. Burdine,* the Supreme Court refined the burden-shifting analysis established in *McDonnell Douglas*.[39] The Court in *Burdine* emphasized the burden that shifted to the employer after the employee established a prima facie case was a burden of producing evidence in support of a legitimate, nondiscriminatory reason for discharge.[40] The employer is not required to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for discharging the employee, or that the employer was motivated by the proffered reasons.[41] It is sufficient if the employer's evidence raises a genuine issue of fact regarding whether the employer discriminated against the employee.[42] The Court stated that putting only the burden of production on the employer would not unduly hinder the employee.[43]

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31. McDonnell Douglas v. Green, 411 U.S. at 802.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 804.
36. *Id.*
37. KALET, *supra* note 3, at 59-60.
38. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
39. KALET, *supra* note 3, at 60.
40. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254.
41. *Id.* at 255-56.
42. *Id.* at 259-60.
43. *Id.* at 258.

Thus, based on the Court's refinement of the *McDonnell Douglas* burden-shifting analysis, the employee retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee.[44] In other words, the burden of persuasion never shifts; it is the order of the parties' respective burdens that shifts from the employee to the employer and back again.[45] Thus, the Supreme Court's burden-shifting analysis for ADEA claims requires that when the employer has the burden, it is only a burden of production, as opposed to a burden of persuasion.[46] Arguably, this interpretation makes an employee's case much harder to prove because it appears the employer only has to produce evidence to the court, whereas the employee has to persuade the trier of fact not only that he or she has established a prima facie case, but also that the reason offered by the employer for the employee's discharge is a mere pretext for discrimination.

C. *Straying from the Standard*

Two years after the Supreme Court established the *McDonnell Douglas* burden-shifting analysis for disparate treatment cases, the Court had the opportunity to discuss the scope of its test in *Furnco Construction Corp. v. Waters*.[47] The Court stated that the *McDonnell Douglas* test was not intended to be "rigid, mechanized, or ritualistic."[48] This statement has caused not only the Supreme Court to stray from its own standard, but has also given the eleven judicial circuits more discretion to apply the *McDonnell Douglas* test differently if a particular set of facts requires such a variation.[49] Furthermore, this single statement created various approaches from which an employee's prima facie case may be judged.[50]

The Supreme Court subsequently took advantage of the latitude of its statement in *Waters* by holding that once a plaintiff establishes a prima facie case and the case is fully tried on the merits, whether the plaintiff actually made out a prima facie case is no longer relevant.[51] In *United States Postal Service Board v. Aikens*,[52] the lower federal courts attempted to determine whether the plaintiff met the requirements of his burden of proof, considering his failure to establish that his qualifications were equal to or better than those of the people promoted ahead of him.[53] The Court ruled that an employee seeking to establish a prima facie case under *McDonnell Douglas* need not establish his relative qualifications, but only that he was qualified for the job.[54]

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44. *Id.* at 253.
45. *Id.*
46. *Id.* at 257.
47. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).
48. *Id.* at 577.
49. KALET, *supra* note 3, at 66.
50. *Id.*
51. United States Postal Serv. Bd. v. Aikens, 460 U.S. 711, 715 (1983).
52. United States Postal Serv. Bd. v. Aikens, 460 U.S. 711 (1983).
53. *Id.* at 713.
54. *Id.* at 712-13.

Despite the fact the Court found the plaintiff's evidence sufficient, the Court stated it does not matter if the plaintiff's evidence is sufficient once the defendant has failed to persuade the district court to dismiss the action for lack of a prima facie case.[55] The *McDonnell Douglas* test is not a rigid, mechanical test; rather, it is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."[56] In other words, after the plaintiff meets his or her initial burden, the factual inquiry moves to a new level at which the court "has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff."[57] The *Aikens* case signified the lower courts' confusion surrounding the burden-shifting analysis, and the Court attempted to clarify the *McDonnell Douglas* test by holding that once the employee has met the initial burden of proof, it was unnecessary, absent a finding of reversible error,[58] to force the employee to further prove the same initial prima facie case at a higher level in the burden-shifting analysis.[59]

The Supreme Court has the discretion to clarify or change its own standard, but the Court in *Aikens* explicitly extended its latitude regarding the *McDonnell Douglas* test by further diluting the test to an "orderly way" of analyzing an age discrimination claim.[60] Consequently, the lower courts eagerly used this caveat to fashion their own variations on the *McDonnell Douglas* test,[61] creating inconsistency in the application of the burden-shifting analysis throughout the circuits.

D. *An Alternative Test—Mixed Motives*

In 1989, the Supreme Court added an alternative test to the already confusing standard for interpreting age discrimination cases under the ADEA. *Price Waterhouse v. Hopkins*[62] departed from the *McDonnell Douglas* type of discrimination case to one involving "mixed motives" on the part of an employer.[63] Although this new standard originated in the context of a sex discrimination suit, this standard has since been applied to age discrimination cases.[64] In *Price Waterhouse*, the Supreme Court held that when an employee proves an impermissible reason played a part in an employment decision, the employer may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision if it had not taken the employee's improper

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55. *Id.* at 714.
56. *Id.* at 715 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).
57. *Id.* (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).
58. *Id.* at 714 n.2.
59. *Id.* at 714-15.
60. *Id.* at 715.
61. KALET, *supra* note 3, at 68.
62. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
63. *Id.* at 232.
64. *See* Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 450 (8th Cir. 1993); Glover v. McDonnell Douglas Corp., 981 F.2d 388, 394 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 1647 (1994); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1186 (2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992); Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991).

classification into account.[65] Thus, the fact finder may consider all of the reasons contributing to the employment decision, both legitimate and illegitimate, in reaching a conclusion in a mixed motives case.[66]

There are distinct differences between the standard articulated in *McDonnell Douglas* and the *Price Waterhouse* analysis. In a mixed motives case, as opposed to a *McDonnell Douglas* pretext case, the employer must shoulder a burden of proof, rather than the mere burden of production required in a pretext case under the *McDonnell Douglas/Burdine* analysis.[67] In addition, the mixed motives test differs from the *McDonnell Douglas* test because the latter is based on the employee's proof that the employer's legitimate, nondiscriminatory reason for the employee's discharge was actually a pretext for unlawful age discrimination.[68] The premise of a pretext case, is "*either* a legitimate *or* an illegitimate set of considerations led to the challenged decision."[69] In contrast, a mixed motives case arises when an employment decision is "the product of a mixture of legitimate and illegitimate motives."[70] Thus, in a mixed motives case, there is not an either-or scenario for the legitimate or illegitimate reason of an employee's discharge as there is in a pretext case.[71] In the mixed motives test, the third prong of the *McDonnell Douglas* test disappears because if the employer proves that the it would have discharged the employee even without taking the illegitimate factor into account, the employer can avoid liability under the ADEA.[72] On the other hand, the employer acquires a burden of proof under the mixed motives analysis; therefore, the employer is faced with an arguably more difficult standard under the *Price Waterhouse* test.[73]

Whether a case is a pretext case or a mixed motives case is a question for the court to determine after the parties present all of the evidence.[74] In *Price Waterhouse*, Justice O'Connor stated, "[i]f the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* . . . ."[75] Thus, under the *Price Waterhouse* standard, an employee will have to establish more than a prima facie case as required in *McDonnell Douglas* to warrant the mixed motives test; otherwise, the employee will have to prove the employer's legitimate, nondiscriminatory reason for the discharge is pretextual under the *McDonnell Douglas* test.[76]

The plaintiff's burden of proving the employer's reason for discharging or failing to hire is pretextual is difficult to meet. The Supreme Court heightened

65. Price Waterhouse v. Hopkins, 490 U.S. at 254.
66. *Id.*
67. 2 HOWARD C. EGLIT, AGE DISCRIMINATION § 7.40 (2d ed. 1994).
68. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).
69. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) (emphasis added).
70. *Id.*
71. *Id.*
72. *Id.*
73. 2 EGLIT, *supra* note 67, § 7.40.
74. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989).
75. *Id.* at 278 (O'Connor, J., concurring).
76. *Id.* (O'Connor, J., concurring).

the plaintiff's burden of proving pretext in *St. Mary's Honor Center v. Hicks.*[77] The plaintiff must affirmatively prove by a preponderance of the evidence that the employer was motivated by discriminatory animus.[78] Thus, it is not sufficient to show that the employer's reason for the adverse employment action was false; an employee must also prove discrimination was the real motivation to show pretext under the *McDonnell Douglas* test.[79]

These are the tests the Supreme Court has established regarding the standard of proof for ADEA claims. The inconsistency in enforcing of the *McDonnell Douglas/Burdine* burden-shifting analysis in the lower courts has been, and still is, a source of much confusion for both the lower courts and the parties.[80] With the addition of the *Price Waterhouse* mixed motives test, the Supreme Court increased the chaos surrounding the application of the ADEA. To determine how this confusion has affected employees who seek to file ADEA claims and employers who wish to refute them, it is necessary to evaluate the lower courts' application of the standard of proof tests in ADEA cases.

IV. APPLYING THE SUPREME COURT'S TEST THROUGH THE EYES OF THE CIRCUIT COURTS

A. *The Traditional Test*

Although the lower courts have used the chaos surrounding the standard of proof tests to create varied applications of the ADEA, some circuits have adhered to the traditional test.[81] These circuits have adopted the traditional burden-shifting analysis developed in *McDonnell Douglas.*[82] Under this test, the employee appears to have a more difficult burden to meet in asserting an age discrimination claim under the ADEA, as opposed to the mixed motives test.[83]

The First Circuit exemplifies those circuits that have not substantially modified the original standard of proof analysis for ADEA claims. Under First Circuit case law, the employee carries the initial burden of establishing a prima facie case of age discrimination to withstand the employer's motion for dismissal or motion for summary judgment.[84] The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[85] "The presumption of unlawful age discrimination generated by the

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77. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).
78. *Id.* at 2752.
79. *Id.*
80. KALET, *supra* note 3, at 66.
81. *Id.*
82. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).
83. 2 EGLIT, *supra* note 67, § 7.40.
84. Goldman v. First Nat'l Bank, 985 F.2d 1113, 1117 (1st Cir. 1993); Lawrence v. Northrop Corp., 980 F.2d 66, 69 (1st Cir. 1992); Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).
85. Goldman v. First Nat'l Bank, 985 F.2d at 1117; Lawrence v. Northrop Corp., 980 F.2d at 69.

plaintiff-employee's prima facie showing disappears, however, provided the employer carries its burden of production; the plaintiff-employee must then demonstrate that the proffered reason for the adverse employment action was simply a pretext for age discrimination."[86] The employee must produce only minimally sufficient evidence of pretext and discriminatory animus in order to meet the ADEA test.[87] A showing that the employer's justification was not the actual motive may be sufficient if the facts and circumstances raise a reasonable inference of age discrimination.[88] Nevertheless, the employee cannot avoid summary judgment if the record is devoid of direct and circumstantial evidence of discriminatory animus on the part of the employer.[89]

Likewise, in assessing pretext, the court's focus is on the perception of the decisionmaker, or more specifically, on whether the employer believed its stated reason was credible.[90] In *Goldman v. First National Bank,*[91] the employer's proffered justification for Goldman's dismissal was that economic considerations necessitated a reduction in work force, and Goldman was the least qualified employee in the work unit.[92] Goldman had to produce evidence to rebut this justification, not merely by showing his work performance was satisfactory, but by showing he was not the least qualified employee in the work unit.[93] The First Circuit does not require the employee to have "smoking gun" evidence of age animus, but the totality of the circumstances must permit a reasonable inference that the employer's justification amounted to a pretext for age discrimination.[94]

Some circuits give statistical evidence considerable weight at both the prima facie case stage and at other junctures during the course of an ADEA suit.[95] The First Circuit, for example, considers statistical evidence—showing older employees were terminated at a disproportionate rate—particularly strong

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86. Goldman v. First Nat'l Bank, 985 F.2d at 1117; *see also* Lawrence v. Northrop Corp., 980 F.2d at 69 (holding that plaintiff needs to do more than merely cast doubt on the employer's justification, rather she needs to show the existence of at least one material factual dispute which could infer a discriminator motive); Connell v. Bank of Boston, 924 F.2d 1169, 1172 (1st Cir.), *cert. denied,* 501 U.S. 1218 (1991).

87. Goldman v. First Nat'l Bank, 985 F.2d at 1117; Lawrence v. Northrop Corp., 980 F.2d at 69-70 n.1; Mesnick v. General Elec. Co., 950 F.2d at 825.

88. Goldman v. First Nat'l Bank, 985 F.2d at 1118; Connell v. Bank of Boston, 924 F.2d at 1175.

89. Goldman v. First Nat'l Bank, 985 F.2d 1113, 1118 (1st Cir. 1993).

90. *Id.*; Mesnick v. General Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991) (citing Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 256 (1st Cir. 1986)), *cert. denied,* 504 U.S. 985 (1992).

91. Goldman v. First Nat'l Bank, 985 F.2d 1113 (1st Cir. 1993).

92. *Id.* at 1118.

93. *Id.*

94. *Id.* at 1119; Connell v. Bank of Boston, 924 F.2d 1169, 1175 (1st Cir.), *cert. denied,* 501 U.S. 1218 (1991).

95. 2 EGLIT, *supra* note 67, § 7.24 (citing Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991)); Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525, 1529 (11th Cir. 1985).

evidence of age discrimination.[96] The First Circuit gives strong consideration to other forms of circumstantial evidence, such as "comments by decision makers which denigrate those over forty, the incidence of differential treatment in the workplace, and the deployment of younger replacements."[97] Above all, the First Circuit considers evidence of age discrimination as an aggregate compilation of proof offered by the employee.[98]

Thus, the First Circuit considers the whole package of proof that an employee offers, but still gives circumstantial evidence considerable weight toward showing the employer's proffered justification for the employee's dismissal was pretextual.[99] To prevail in the First Circuit, an employee must present strong evidence of age discrimination, preferably through statistics, direct comments, or favorable treatment to younger workers to paint a convincing picture of age discrimination in the workplace.[100] To prevail at the summary judgment stage in a case involving a claim of work force reduction, an employer should make certain its decision to dismiss the employee is age neutral or that it has not retained a younger person in the same position of the dismissed employee because of age.[101]

The Third and Fourth Circuits apply the same *McDonnell Douglas* burden-shifting analysis as the First Circuit, but variations exist in the types of circumstantial evidence the employee may produce to successfully resist summary judgment.[102] For example, in the Third Circuit, as a standard to assess whether an employer's decision is pretextual, the employee must cast legally sufficient doubt on the employer's articulated legitimate business reasons and raise a question for the jury about whether objective evidence of performance problems was pretextual.[103] In the Third Circuit, it appears more difficult for an employee to establish pretext because more weight is given to the employer's business judg-

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96 Goldman v. First Nat'l Bank, 985 F.2d 1113, 1119 n.5 (1st Cir. 1993); *see* Mesnick v. General Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991), *cert. denied*,, 504 U.S. 985 (1992); Connell v. Bank of Boston, 924 F.2d at 1177.

97 Mesnick v. General Elec. Co., 950 F.2d at 824.

98. *Id.*

99. *Id.*

100. *Id.*

101. Goldman v. First Nat'l Bank, 985 F.2d 1113, 1117 (1st Cir. 1993); Lawrence v. Northrop Corp., 980 F.2d 66, 69 (1st Cir. 1992); Connell v. Bank of Boston, 924 F.2d 1169, 1173 n.5 (1st Cir.), *cert. denied,* 501 U.S. 1218 (1991); Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1111 (1st Cir. 1989).

102. *See* Stiles v. General Elec. Co., No. 92-1886, 1993 WL 46889, at *4 (4th Cir. Feb. 12, 1993); Tuck v. Henkel Corp., 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993); Billet v. Cigna Corp., 940 F.2d 812, 825-30 (3d Cir. 1991); Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1422-23 (3d Cir.), *cert. denied*, 502 U.S. 941 (1991); Hamilton v. 1st Source Bank, 895 F.2d 159, 162 (4th Cir. 1990); Siegel v. Alpha Wire Corp., 894 F.2d 50, 53-55 (3d Cir. 1990); Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1117-18 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

103. Billet v. Cigna Corp., 940 F.2d at 828.

ment.[104] In *Billet v. Cigna Corp.*,[105] the employee presented his long history of successful employment with the Cigna Corporation as evidence that his dismissal for poor work performance was a pretext for discrimination.[106] The court did not view the employer's justification and the employee's evidence of employment history as inconsistent.[107] Even though the employee had a long history of success with the Cigna Corporation, his employer stated the decision for dismissal arose from the employer's concern with the employee's performance, qualifications, and recent poor performance.[108] The court gave the employer the benefit of the doubt by considering the evidence of the employee's recent poor performance and giving credence to the employer's right to make decisions for the good of the corporation.[109]

This is not to say, however, the Third Circuit unconditionally applies a business judgment rule for the employer and automatically considers the employee's evidence as inferior and incredible.[110] The Third Circuit determined the following circumstantial evidence establishes a pretext for age discrimination: (1) retaliatory conduct, such as a poor evaluation or additional responsibilities, following an employee's refusal to retire or perform a task outside the scope of his employment; (2) affidavits from an employee's co-workers, if the affidavits raise a genuine issue of material fact about the reason for the employee's dismissal; (3) reports from personnel experts, as long as they are not merely speculative;[111] and (4) "inconsistencies in performance evaluations prior and subsequent to employee's termination."[112]

Likewise, the Fourth Circuit admits the employer's burden of producing a legitimate, nondiscriminatory reason for the employee's dismissal is a "relatively modest" burden compared to that of the employee under the *McDonnell Douglas* test.[113] Nevertheless, the Fourth Circuit gives consideration to the same circumstantial evidence as the Third Circuit when determining whether an employee meets his burden.[114] The Fourth Circuit's analysis includes evidence of an employer's deviation from standard employment procedures if it raises a genuine dispute over whether the employer's stated reasons for the employee's dismissal

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104. *See id.*

105. Billet v. Cigna Corp., 940 F.2d 812 (3d Cir. 1991).

106. *Id.* at 826.

107. *Id.* at 829.

108. *Id.* at 828-29.

109. *Id.* at 829.

110. *See* Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1422-23 (3d Cir.), *cert. denied*, 502 U.S. 941 (1991).

111. *Id.* at 1422.

112. Siegel v. Alpha Wire Corp., 894 F.2d 50, 55 (3d Cir. 1990) (citing Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1117 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989)).

113. Stiles v. General Elec. Co., No. 92-1886, 1993 WL 46889, at *3 (4th Cir. Feb. 12, 1993); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 244 (4th Cir. 1982);

114. Tuck v. Henkel Corp., 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993).

were pretextual.[115] In *Tuck v. Henkel Corp.*,[116] the court also considered strong anecdotal evidence, which the employee could develop into statistical evidence sufficient to avoid summary judgment.[117] This case illustrates that some circuits, such as the Third and Fourth, are willing to ease the employee's burden of showing the employer's reasons for dismissal are pretextual and give employees the opportunity to submit their claims of age discrimination to a jury.[118]

In addition, the Tenth Circuit has stated that the ADEA is not a vehicle for reviewing the propriety of business decisions,[119] and courts will not second guess employers' business decisions in the absence of some evidence of impermissible motive.[120] For example, if a business needed to reduce its work force for economic reasons and chose to keep only those employees with the broadest range of skills, the Tenth Circuit would arguably not interfere with this business decision absent strong circumstantial evidence showing the employer's justifications for reducing the work force are pretextual.[121]

The Tenth Circuit requires the same strong circumstantial evidence as the other circuits, including evidence showing the employer's rules in the workplace were not uniformly enforced.[122] This circuit also considers statistical evidence to be strong circumstantial evidence, provided it "show[s] a significant disparity and eliminate[s] nondiscriminatory explanations for the disparity."[123]

A comparison of the First, Third, Fourth, and Tenth Circuits indicates a uniform adherence to the traditional *McDonnell Douglas* burden-shifting analysis, which admittedly provides an easier burden of production for employers than the employee's burden of proof in showing the employer's justifications for dismissal are pretextual.[124] These circuits attempt to counter this discrepancy by acknowledging the credibility of various types of circumstantial evidence offered by employees, thereby enabling employees to avoid summary judgment and

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115. Stiles v. General Elec. Co., No. 92-1886, 1993 WL 46889, at *4; Hamilton v. 1st Source Bank, 895 F.2d 159, 162 (4th Cir. 1990).

116. Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993).

117. *Id.* at 376.

118. *See* Stiles v. General Elec. Co., No. 92-1886, 1993 WL 46889, at *4 (4th Cir. Feb. 12, 1993); Tuck v. Henkel Corp., 973 F.2d at 376; Billet v. Cigna Corp., 940 F.2d 812, 825-30 (3d Cir. 1991); Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1422-23 (3d Cir.), *cert. denied*, 502 U.S. 941 (1991); Hamilton v. 1st Source Bank, 895 F.2d at 162; Siegel v. Alpha Wire Corp., 894 F.2d 50, 53-55 (3d Cir. 1990); Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1117-18 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

119. Lucas v. Dover Corp., 857 F.2d 1397, 1404 (10th Cir. 1988).

120. *Id.* at 1403-04; *see* Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988).

121. Lucas v. Dover Corp., 857 F.2d at 1403-04.

122. Spulak v. K-Mart Corp., 894 F.2d 1150, 1155 (10th Cir. 1990).

123. Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991).

124. Stiles v. General Elec. Co., No. 92-1886, 1993 WL 46889, at *3 (4th Cir. Feb. 12, 1993); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 244 (4th Cir. 1982).

submit their case to the jury.[125] This results in a more flexible arena for employees attempting to attack their employers' business decisions under the *McDonnell Douglas* test of the ADEA.

B. *The Eleventh Circuit: Reticent to Reweigh Plaintiff's Evidence*

Although the Eleventh Circuit follows the same *McDonnell Douglas* burden-shifting analysis as the First, Third, Fourth, and Tenth Circuits, the Eleventh Circuit takes a firm position on refusing to "reweigh the evidence and substitute [its] judgments for that of the jury."[126] The courts in the Eleventh Circuit clearly emphasize weighing the evidence and making credibility determinations are the jury's function.[127] Even if some of the testimony and evidence at the trial conflict, neither the district courts nor the appellate courts may usurp the jury's power, if the evidence justified the jury's findings that (1) the employer's explanation for the employee's termination was pretextual, and (2) the employer discharged the employee on account of age.[128] Thus, in the Eleventh Circuit and in other circuits which adamantly refuse to second-guess juries and overturn verdicts, an employer will experience difficulty in appealing a jury decision for the employee unless the weight of the evidence clearly did not support the verdict.

C. *Changing the Fourth Prong of the* McDonnell Douglas *Test*

Other circuits have altered the traditional *McDonnell Douglas* burden-shifting analysis by changing the fourth prong of the test in work force reduction cases. The fourth prong of the original test required the employee to show that after the employee's dismissal, the employment position remained open, and the employer continued to seek younger applicants from persons with the employee's qualifications.[129] The Ninth, Second, and Fifth Circuits altered the fourth prong of this test in a manner which eases the employee's burden of proof in establishing a prima facie case under the ADEA.

In the Ninth Circuit, the fourth prong of the *McDonnell Douglas* test requires the employee to show he was not hired for a position or dismissed from a position which was given to a substantially younger person with equal or infer-

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125. *See* Stiles v. General Elec. Co., No. 92-1886, 1993 WL 46889, at *4; Tuck v. Henkel Corp., 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993); Billet v. Cigna Corp., 940 F.2d 812, 825-30 (3d Cir. 1991); Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1422-23 (3d Cir.), *cert. denied*, 502 U.S. 941 (1991); Hamilton v. 1st Source Bank, 895 F.2d 159, 162 (4th Cir. 1990); Siegel v. Alpha Wire Corp., 894 F.2d 50, 53-55 (3d Cir. 1990); Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1117-18 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

126. Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1559 (11th Cir. 1988); Michigan Abrasive Co. v. Poole, 805 F.2d 1001, 1005 (11th Cir. 1986).

127. Castle v. Sangamo Weston, Inc., 837 F.2d at 1559.

128. *Id.*; *see* Walls v. Button Gwinnett Bancorp, Inc., 1 F.3d 1198, 1220 (11th Cir. 1993).

129. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

ior qualifications.[130] In other words, an employee must show his replacement was *substantially* younger, not just one or two years younger.[131] Arguably, this makes an employee's burden more difficult, but more importantly, it protects employers from frivolous lawsuits not based on age discrimination.

On the other hand, the Ninth Circuit has held the fourth prong of the *McDonnell Douglas* test need not necessarily be shown if the dismissal results from a general reduction in the work force due to business conditions.[132] Thus, employees are not required to show their replacements were substantially younger to establish a prima facie case of age discrimination under the ADEA.[133] This standard established enables employees to establish a prima facie case and meet their initial burden of proof, avoiding a motion to dismiss by the employer on this ground.

The Second and Fifth Circuits have likewise changed the fourth prong of the *McDonnell Douglas* test in work force reduction cases. In the Second Circuit, under the fourth prong of the *McDonnell Douglas* test, the employee must show the discharge resulted from circumstances leading to an inference of discrimination.[134] This is often the primary contention of employees in establishing a prima facie case.[135] Whether an examination of the evidence proffered by the employee gives rise to an inference of discrimination depends primarily upon the vantage from which the case is viewed and the strength of the evidence proffered.[136] In *Maresco v. Evans Chemetics*,[137] the court held an employer who was forced to reduce his work force could allocate employment positions in accordance with its business judgment, but could not allocate the positions strictly on account of the employee's age.[138] Such a consideration creates the inference of discrimination necessary to complete the fourth prong of the *McDonnell Douglas* test. It also helps the employee establish a prima facie case and proceed to trial, provided the employee can produce enough circumstantial evidence to demonstrate the employer's justification for dismissal was pretextual.[139]

In addition, the Fifth Circuit found the fourth prong of the *McDonnell Douglas* test untenable in work force reduction cases.[140] The Fifth Circuit pro-

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130. Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981).

131. *See* Douglas v. Anderson, 656 F.2d at 533.

132. Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990); Haydon v. Rand Corp., 605 F.2d 453, 454 n.1 (9th Cir. 1979)(per curiam).

133. Rose v. Wells Fargo & Co., 902 F.2d at 1421.

134. DiCola v. Swissre Holding, Inc., 996 F.2d 30, 32 (2d Cir. 1993); Stetson v. Nynex Serv. Co., 995 F.2d 355, 359 (2d Cir. 1993); Maresco v. Evans Chemetics, 964 F.2d 106, 110 (2d Cir. 1992); Rosen v. Thornburgh, 928 F.2d 528, 532 (2d Cir. 1991).

135. Maresco v. Evans Chemetics, 964 F.2d at 111.

136. *Id.*

137. Maresco v. Evans Chemetics, 964 F.2d 106 (2d Cir. 1992).

138. *Id.* at 112.

139. *Id.* at 113.

140. McCann v. Texas City Ref., Inc., 984 F.2d 667, 670 n.4 (5th Cir. 1993) (providing "that the plaintiff was replaced by a younger employee . . . is impossible in a typical work force

posed an alternative test to satisfy the fourth prong of the *McDonnell Douglas* test.[141] The employee must show he was qualified to assume another position at the employer's corporation at the time of discharge.[142] The employee must also produce either circumstantial or direct evidence to enable a factfinder to reasonably conclude the employer intended to discriminate in reaching the employment decision.[143] This addition to the *McDonnell Douglas* test, like the alterations of the test by the Ninth and Second Circuits, further aids the employee in meeting the initial burden of proving a prima facie case of age discrimination and gives the employee a better chance to establish an initial claim of age discrimination.[144]

D. *Adding Options to the Plaintiff's Burden of Persuasion*

The Seventh Circuit provides employees with some hope of defeating motions for summary judgment by employers. In *Metz v. Transit Mix, Inc.*,[145] the court of appeals reversed a judgment for employer Transit Mix and found the employer's justification for Metz's dismissal pretextual. The employer discriminated based on Metz's age making the termination impermissible.[146] It appears, however, the court of appeals allowed Metz to go to court without showing discriminatory intent, which is a necessary element of an age discrimination claim under the disparate treatment model.[147] The court found Metz established a prima facie case of age discrimination under the *McDonnell Douglas* test,[148] and inferred discriminatory intent on the part of Transit Mix to find that the employer's justification for Metz's dismissal was pretextual.[149] The court did not find that Transit Mix treated Metz adversely because of his age.[150] Instead, the court inferred discriminatory intent from Transit Mix's cost-cutting layoffs of higher salaried employees, some of whom, like Metz, were over the age of forty.[151] In effect, the court found Transit Mix considered high salaries, something that is

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reduction case since the plaintiff's position has been eliminated"); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 642 (5th Cir. 1985) (holding work force reduction cases are outside the reach of the *McDonnell Douglas* test because employees in these cases were laid off and therefore incapable of proving actual replacement by a younger employee).

141. *See* Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 118 (5th Cir. 1993); McCann v. Texas City Ref., Inc., 984 F.2d at 670 n.1; Uffelman v. Lone Star Steel Co., 863 F.2d 404, 407 (5th Cir.), *cert. denied*, 490 U.S. 1098 (1989); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d at 642.

142. Molnar v. Ebasco Constructors, Inc., 986 F.2d at 118; Uffelman v. Lone Star Steel Co., 863 F.2d at 407; Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d at 642.

143. Molnar v. Ebasco Constructors, Inc., 986 F.2d at 118; Uffelman v. Lone Star Steel Co., 863 F.2d at 407; Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d at 642.

144. *See* McCann v. Texas City Ref., Inc., 984 F.2d at 670 n.1; Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d at 642.

145. Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987).

146. *Id.* at 1211.

147. *Id.* at 1215 (Easterbrook, J., dissenting).

148. *Id.* at 1204-05.

149. *Id.* at 1207 n.8.

150. *Id.* at 1208-09.

151. *Id.*

correlated with age, when deciding whom to dismiss.[152] Thus, the court inferred discriminatory intent to allow the employee to have his day in court.[153] This Seventh Circuit decision gives employees a greater opportunity to try their claims of age discrimination because they can simply set forth a prima facie case and then allow the court to fill in the blanks to infer intent on the part of the employer.[154] As a result, the employees have an easier burden to prove their ADEA claims because the Seventh Circuit removed the intent requirement from the employees' burden of showing pretext under the *McDonnell Douglas* test.

Likewise, employees have an easier burden to prove age discrimination in the Sixth Circuit. Under Sixth Circuit case law, the employee can show an employer's justification is a pretext for age discrimination by proving (1) the stated reason is not grounded in fact; (2) the proffered reason was not the actual reason; and (3) the reason was insufficient to justify the employer's action.[155] If the employee proves pretext in any of these ways, the employee's burden of showing pretext merges with the burden of persuading the court that the employee has been the victim of intentional discrimination.[156] Thus, in the Sixth Circuit, the employee does not have to prove the employer intentionally discriminated against the employee; the discriminatory intent is merged with pretext, and once the employee proves pretext, the requirements of the *McDonnell Douglas* test are met and a claim is generated under the ADEA.[157] Thus, in the Sixth and Seventh Circuits, the employee's burden of proof under the *McDonnell Douglas* test appears to be easier than in the other circuits.

E. *Hope for Employers: The* Price Waterhouse *Mixed Motive Variation on the Burden-Shifting Analysis in the Eighth Circuit*

In 1989, the Supreme Court added an alternative test which lower courts could apply to age discrimination cases under the ADEA: the "mixed motives" test as described in *Price Waterhouse v. Hopkins*.[158] The Eighth Circuit has

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152. *Id.* at 1210.

153. *Id.* at 1211.

154. *Metz* is not the only Seventh Circuit case to infer discriminatory intent from cost-cutting layoffs of higher salaried employees, many of whom are over the age of forty. *See* Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 851 (7th Cir. 1992) (noting "wage discrimination can be a proxy for age discrimination, so that lopping off high salaried workers can violate the ADEA—although the circumstances under which this holds true remain to be determined"); Visser v. Packer Eng'g Assoc., 924 F.2d 655, 658 (7th Cir. 1991) (en banc) (applying a "mixed motives" test). For additional discussion, see 2 EGLIT, *supra* note 66, § 7.27.

155. Gibb v. Kemp, No. 92-6004, 1993 WL 265161, at *2 (6th Cir. July 15, 1993) (per curiam); Wheeler v. McKinley Enter., 937 F.2d 1158, 1162 (6th Cir. 1991).

156. Gibb v. Kemp, No. 92-6004, 1993 WL 265161, at *2 (per curiam) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

157. *See id.*

158. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

applied this test in several cases.[159] Under this "mixed motives" test, the employee bears the "initial burden of proving that an illegitimate factor was a motivating factor in an employment decision adverse to the plaintiff."[160] Once the employee meets this initial burden, the burden shifts to the employer to prove that it would have made the same decision even if it had not considered the illegitimate factor.[161] Whether a case involves a mixed motives analysis or a pretext analysis is a question for the court once all the evidence has been heard: "[i]f the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* . . . ."[162]

The Eighth Circuit adopted this test and applied it to age discrimination cases in which the employment decision of the employer was "the product of a mixture of legitimate and illegitimate motives."[163] An employee's establishment of a prima facie case of age discrimination is not sufficient to support a claim under the mixed motives test.[164] Rather, the employee must present "evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to infer that attitude was more likely than not a motivating factor in the employer's decision."[165] If the employee cannot establish more than a prima facie case of age discrimination, he will have to pursue his claim under the *McDonnell Douglas* burden-shifting analysis.[166] He will not only bear the burden to show a prima facie case, but also assume the burden of showing the employer's justification for dismissal was a pretext for age discrimination.[167]

Furthermore, in *Glover v. McDonnell Douglas*,[168] the Eighth Circuit stated it expected "all successfully prosecuted age discrimination cases involving a reduction in force would involve mixed motives because the plaintiff would be alleging the employer had both a legitimate reason–the economic need to reduce the workforce–and an illegitimate reason–to terminate an employee based on his or her age."[169]

The Second Circuit is another example of a circuit that also used the mixed motives test in a work force reduction case.[170] If this test is adopted in all work

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159. *See* Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 450 (8th Cir. 1993); Glover v. McDonnell Douglas Corp., 981 F.2d 388, 394 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 1647 (1994); Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991).

160. Radabaugh v. Zip Feed Mills, Inc., 997 F.2d at 448.

161. *Id.*

162. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. at 278).

163. *Id.*

164. *Id.* at 449.

165. *Id.* (quoting Ostrowski v. Atlantic Mutual Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992)).

166. *Id.* at 448.

167. *Id.*

168. Glover v. McDonnell Douglas Corp., 981 F.2d 388 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 1647 (1994).

169. *Id.* at 394.

170. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1186 (2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992).

force reduction cases throughout the circuits, employers will have a more rigorous burden in age discrimination cases under the *Price Waterhouse* mixed motives test than under the *McDonnell Douglas* burden-shifting analysis, and consequently, fewer employers will succeed in motions for summary judgment.[171]

V. SUMMING UP FOR DEFENDANT-EMPLOYERS

Considering the different variations on the standards of proof applied by the several circuits, employers may wonder which circuits favor the employer's interest in age discrimination claims. Arguably, the most favorable circuits are those that apply the *Price Waterhouse* mixed motives test, as illustrated by the cases in the Eighth Circuit.[172] In these circuits, employers have a more rigorous burden of proof, but the employers' employment decisions may be based on a mixture of legitimate and illegitimate motives.[173] Of the circuits applying the *McDonnell Douglas* burden-shifting analysis, the Tenth Circuit takes a particularly strong position on refraining from second-guessing the employer's business decisions unless an employee presents a very strong case.[174]

The Third and Fourth Circuits have noted, in various decisions, that the employer's business judgment should not be disturbed. These circuits have, however, admitted a variety of circumstantial evidence, including anecdotal evidence as opposed to statistical evidence, to aid the employee in his attempt to put forth enough evidence to survive a motion for summary judgment.[175] Despite this attempt to ease the employee's burden, the Third, Fourth, Tenth, and Eighth Circuits that apply the mixed motives test appear to favor employers confronted with age discrimination suits.

Other circuits appear, however, to take a stricter approach toward employers in their applications of the *McDonnell Douglas* burden-shifting analysis under the ADEA. While the Ninth Circuit requires employees to show their

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171. *See* Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448 (8th Cir. 1993).

172. *See* Radabaugh v. Zip Feed Mills, Inc., 997 F.2d at 450; Glover v. McDonnell Douglas Corp., 981 F.2d at 394; Tyler v. Bethlehem Steel Corp., 958 F.2d at 1186; EEOC v. Alton Packaging Corp., 901 F.2d 920, 925 (11th Cir. 1990).

173. Radabaugh v. Zip Feed Mills, Inc., 997 F.2d at 448.

174. *See* Faulkner v. Super Valu Stores, Inc., No. 91-1273, 1993 WL 330042 (10th Cir. Sept. 1, 1993); Fallis v. Kerr-McGee Corp., 944 F.2d 743, 747 (10th Cir. 1991); Lucas v. Dover Corp., 857 F.2d 1397, 1403-04 (10th Cir. 1988); Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988).

175. *See* Stiles v. General Elec. Co., No. 92-1886, 1993 WL 46889, at *4 (4th Cir. Feb. 12, 1993); Miller v. Beneficial Management Corp., 977 F.2d 834, 846-47 (3d Cir. 1992); Tuck v. Henkel Corp., 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993); Billet v. Cigna Corp., 940 F.2d 812, 825-30 (3d Cir. 1991); Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1422-23 (3d Cir.), *cert. denied*, 502 U.S. 941 (1991); Hamilton v. 1st Source Bank, 895 F.2d 159, 162 (4th Cir. 1990); Siegel v. Alpha Wire Corp., 894 F.2d 50, 53-55 (3d Cir. 1990); Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1117-18 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

replacements were substantially younger to establish a prima facie case,[176] the Ninth, Second, and Fifth Circuits have altered the fourth prong of the *McDonnell Douglas* test in many work force reduction cases, thereby easing the employee's burden in establishing a prima facie case.[177] Similarly, the Sixth and Seventh Circuits infer employers' discriminatory intent to lighten the burden of establishing that the employers' justification for dismissal is a pretext for age discrimination.[178]

Although the First Circuit applies the traditional *McDonnell Douglas* test without alteration, it considers a variety of circumstantial evidence in determining whether the employee established a prima facie case and proved the employer's justification was a pretext for age discrimination. This approach results in more employees surviving employers' motions for summary judgment.[179] Despite the fact employees must bear the burden of proof twice under the *McDonnell Douglas* burden-shifting analysis, the decisions of the First, Second, Fifth, Sixth, Seventh, and Ninth Circuit appear less favorable for employers in discrimination suits under the ADEA.[180]

VI. CONCLUSION

In 1973, the Supreme Court established the *McDonnell Douglas* burden-shifting analysis to apply to claims arising under the ADEA.[181] Since its inception, the burden-shifting analysis has been applied with numerous variations and

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176. Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981).

177. DiCola v. Swissre Holding, Inc., 996 F.2d 30, 32 (2d Cir. 1993); Stetson v. Nynex Serv. Co., 995 F.2d 355, 359 (2d Cir. 1993); Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 118 (5th Cir. 1993); McCann v. Texas City Ref., Inc., 984 F.2d 667, 670 n.1 (5th Cir. 1993); Maresco v. Evans Chemetics, 964 F.2d 106, 110 (2d Cir. 1992); Rosen v. Thornburgh, 928 F.2d 528, 532 (2d Cir. 1991); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990); Uffelman v. Lone Star Steel Co., 863 F.2d 404, 407 (5th Cir.), *cert. denied*, 490 U.S. 1098 (1989); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 642 (5th Cir. 1985); Haydon v. Rand Corp., 605 F.2d 453, 454 n.1 (9th Cir. 1979).

178. *See* Gibb v. Kemp, No. 92-6004, 1993 WL 265161, at *2 (6th Cir. July 15, 1993); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1211 (7th Cir. 1987).

179. *See* Goldman v. First Nat'l Bank, 985 F.2d 1113, 1119 n.5 (1st Cir. 1993); Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992); Connell v. Bank of Boston, 924 F.2d 1169, 1177 (1st Cir.), *cert. denied*, 111 S. Ct. 2828 (1991).

180. *See* McCann v. Texas City Ref., Inc., 984 F.2d 667, 670 n.1 (5th Cir. 1993); Gibb v. Kemp, No. 92-6004, 1993 WL 265161, at *2 (6th Cir. July 15, 1993); Maresco v. Evans Chemetics, 964 F.2d 106, 113 (2d Cir. 1992); Mesnick v. General Elec. Co., 950 F.2d at 824, *cert. denied*, 504 U.S. 985 (1992); Wheeler v. McKinley Enter., 937 F.2d 1158, 1162 (6th Cir. 1991); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1211 (7th Cir. 1987); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 642 (5th Cir. 1985); Haydon v. Rand Corp., 605 F.2d 453, 454 n.1 (9th Cir. 1979).

181. KALET, *supra* note 3, at 2 (explaining the *McDonnell Douglas* test, which initially applied in a race discrimination case, has served as the foundation for an age discrimination test of ADEA claims).

alterations in the various circuits.[182] Amid the confusion surrounding the application of the *McDonnell Douglas* test, the Supreme Court further complicated matters by establishing a mixed motives test to apply in discrimination cases.[183] Consequently, some circuits have applied this test to age discrimination claims, and at least one circuit predicted that this mixed motives test will eventually be applied in all work force reduction cases.[184]

In addition to both the numerous types of evidence employees can offer to establish their age discrimination claims, and the availability of two tests establishing the standards of proof, it is difficult for employers to understand how to avoid potential claims under the ADEA and to predict the likelihood of success of an employee's subsequent lawsuit. Although this Note illustrates the different tests applied by the circuits, variation arises in the application of these tests. Furthermore, more circuits may attempt to apply the *Price Waterhouse* mixed motives test. If the test fails to apply to cases at bar, the courts may instead apply the *McDonnell Douglas* burden-shifting analysis.

Age discrimination litigation has become an active area of the law. In an era plagued with increased and continuing unemployment, employers must take great care to avoid not only liability under the ADEA, but also the cost associated with defending an age discrimination claim. Thus, perhaps the best advice for employers is to ensure age is not a factor in decisions dismissing employees or retaining younger persons in the same positions of dismissed employees. Under this approach, employers can guarantee compliance with the confusing tests applied in disparate treatment claims under the ADEA.

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182. *Id.* at 66.

183. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

184. Glover v. McDonnell Douglas, 981 F.2d 388, 394 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 1647 (1994).