TITLE VII MIXED-MOTIVE CASES: THE EIGHTH CIRCUIT ADDS A SECOND TRACK OF LIABILITY AND REMEDY

I. INTRODUCTION

The definition of a mixed-motive case under Title VII is not difficult to grasp. Consider the following hiring sequence which presents a hypothetical mixed-motive situation. Heartland, Inc., assigned three of its top managers to a committee which was given the task of selecting a new person to head up the company's sales department. The vacancy has been advertised both in-house as well as in newspapers with statewide circulations. The final five candidates who were selected on the basis of a paper review of their educational and experiential credentials included four men and a woman named Sarah. After conducting an individual interview with each of the finalists, the committee offered the position to one of the male candidates who readily accepted it. Prior to the interviews, the committee had not met to establish any objective criteria by which the successful candidate would be chosen. After the last finalist had been interviewed, however, the committee members — all of whom were male — did meet together and discovered that they had independently selected the same candidate as being clearly superior to all of the others. Heartland, Inc. was, therefore, somewhat surprised when Sarah filed a Title VII suit against the company alleging discrimination on the basis of sex.[1]

At trial, Sarah was able to present persuasive evidence that she had been treated differently than the other finalists during the interview process. One of the committee members, Archie, had asked her a number of questions which focused on her roles as wife and mother rather than on her qualifications for a management position. For example, he had asked her in the interview whether she had made arrangements for someone to care for her children while she was at work and whether she planned to have any more

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1. 42 U.S.C. § 2000e-2 (1982) provides:

(a) It shall be an unlawful employment practice for an employer —

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

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

Id.

children.[2] He also asked her whether her husband would object to her having to be away from home overnight on not infrequent business trips. Archie had questioned her as to whether she felt that the jealousy and suspicion of the wives of the male employees who would be along with her on such business trips might pose a threat to company morale and, if so, how she planned to deal with it. He had expressed some concern over whether her family obligations would allow her to be flexible in terms of being able to work on special projects late into the evening often on short notice.[3] The court also heard evidence to the effect that Archie had privately told another supervisor at the plant before any of the interviews had taken place that he could not imagine any woman being able to effectively direct the sales department and that he would never vote for a woman to fill that position.

Heartland's defense was entirely predicated on a persuasive showing that the male applicant finally selected was clearly more qualified for the administrative position than was Sarah. Heartland also introduced statistical data which showed that its employee population was fairly well inte-

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2. It is perhaps worthy of mention that questions such as these are illegal on their face in most situations. King v. Trans World Airlines, Inc., 738 F.2d 255, 258 n.2 (8th Cir. 1984) ("[Q]uestions about pregnancy and childbearing would be unlawful per se in the absence of a bona fide occupational qualification."). The EEOC Sex Discrimination Guidelines also prohibit questions of this type: "Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification." 29 C.F.R. § 1604.7 (1986).

3. Legal apocrypha would suggest that the sexual stereotyping inherent in this line of questioning may even have wormed its way into the very chambers of the Supreme Court at least on one occasion:

> Later that term, in a sex discrimination case . . . . Burger wanted to rule in favor of a company that refused to hire women with preschool-age children. He strongly supported the company's policy. "I will never hire a woman clerk," Burger told his clerks. A woman would have to leave work at 6 p.m. to go home and cook dinner for her husband. His first clerk back in 1956 at the Court of Appeals had been a woman, he told them. It had not worked out well at all. As far as he was concerned, an employer could fire whomever he wanted and for whatever reason. That was the boss's prerogative.
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> When it was suggested that his position amounted to a declaration that part of the Civil Rights Act was unconstitutional, Burger angrily shut off the discussion. He didn't want to argue legal niceties. His experience showed him that women with young children just didn't work out as well as men in the same jobs. The employer was within his rights.
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> At conference, however, the majority voted the other way. Burger returned to his chambers and announced that he wanted a per curiam (unsigned opinion) drafted, ruling that unless the company could show that conflicting family obligations were somehow more relevant to job performance for women than for men, the company would have to lose. "It was the best I could do," Burger told his amazed clerks. The decision became another liberal opinion for the Burger Court.

S. ARMSTRONG & B. WOODWARD, THE BRETHREN 123 (1979).

grated from a gender-based perspective.

Reflecting on the foregoing scenario, the reader has probably already correctly deduced that a mixed-motive case under Title VII involves an employment decision or action based on one or more legitimate considerations but which, at the same time, is tainted in some way with a bias or an animus made unlawful by that federal statute. On further reflection, the reader will also realize that such cases present a number of complex issues to the courts relating to the finding of liability and the assessing of remedies. On the question of liability, for example, does Sarah have to show that there was a causal connection between Archie's apparent bias and her not being hired in order to secure a judgment? Does Heartland's bottom line defense that the person selected was head and shoulders more qualified than Sarah insulate that company from any liability which might arise as a result of the hiring process? If not, what remedies would be appropriate under either law or equity? Injunctive relief? Lawyer's fees? Retroactive appointment? Backpay? Other make-whole relief? In their simplest forms, the questions which need to be answered are "who wins", "on what basis do they win", and "what do they win."

This Note will focus on those questions in terms of the unique equitable problems raised by mixed-motive cases. From a classification standpoint, such cases are a subset of the disparate treatment group of cases which arise under Title VII.[4] To date, the Supreme Court has not granted certiorari to any mixed-motive case arising under Title VII, and each circuit, therefore, has had to fashion its own resolutions to the problems presented by them.[5] This Note concentrates almost exclusively on the caselaw in the Eighth Circuit which has recently established new rules and standards to be followed by courts in analyzing mixed-motive cases arising within its jurisdiction.[6]

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4. The classic formulation of the disparate treatment case was set forth in International Bd. of Teamsters v. United States, 431 U.S. 324 (1977):

> Disparate treatment such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id. at 335 n.15 (citations omitted). The Court went on to note how such disparate treatment cases differed from disparate impact cases:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory. Either theory may, of course, be applied to a particular set of facts.

Id. (citations omitted).

5. Bibbs v. Block, 778 F.2d 1318, 1322 (8th Cir. 1985) ("The Supreme Court has not expressly addressed the mixed-motives problem in a Title VII case . . . .").

6. *See id. See also* King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984).

Discussion will be divided into four conceptually distinct considerations which are, in reality, quite integrated and operate in tandem in the actual analysis of the facts of a specific case. The divisions are: 1) the order and allocation of the burden of proof; 2) plaintiff's burden of proof; 3) defendant's burden of proof; and 4) remedies.

It is the contention of this Note that the most recent cases in the Eighth Circuit have shifted the burden-pendulum somewhat in favor of the plaintiff by adding what I have chosen to refer to as a second track of liability and remedy to the analytical model traditionally followed in disparate treatment cases arising under Title VII. It is the purpose of this Note to alert both plaintiffs' and defendants' attorneys to the circuit's new model which has profound implications for the trial strategies of both parties in future cases. The new doctrine will also predictably affect how the respective parties might perceive the attractiveness of reaching a pre-trial settlement.

II. The Order and Allocation of Proof

A. *The Prima Facie Case: The Historical Formulation*

While the Supreme Court has never granted certiorari in a mixed-motive case,[7] the Court did establish in *McDonnell Douglas Corp. v. Green*,[8] a 1973 ruling, a three-tiered analytical structure to be generally followed by courts in reviewing disparate treatment cases brought under Title VII.[9] In *McDonnell*, the Court held that the initial burden of proof was to be carried by the plaintiff: "The complainant in a [T]itle VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."[10] Once the plaintiff has met that initial requirement, "[t]he

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7. *See supra* note 5.

8. 411 U.S. 792 (1973).

9. *Id.* at 800 ("The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination."). The plaintiff in *McDonnell*, who had earlier been laid off by the defendant-employer, alleged that the company had refused to hire him back because of his race and because of the civil rights activities he had carried out when he was formerly an employee there. *Id.* at 794. The employer contended that its refusal to rehire the plaintiff was due to his having taken part in illegal work stoppages following his being laid off. *Id.* at 796. The Supreme Court ultimately remanded the case in order that the plaintiff might have an opportunity to try to establish that the employer's reason for refusing to rehire him was "pretext[ual]." *Id.* at 804. The Court directed that, absent such a rebuttal, the defendant-company was entitled to refuse to hire the plaintiff for his "unlawful [conduct] against it." *Id.*

10. *Id.* at 802. In *McDonnell*, the Court detailed one method by which a plaintiff might present a prima facie case:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from per-

burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for [its contested action].[11] Should the defendant-employer be able to "articulate" such a reason, the analytical inquiry does not end and the plaintiff "must . . . [then] be afforded a fair opportunity to show that petitioner's stated reason . . . was in fact pretext."[12]

While the *McDonnell* formulation clearly provided that once the plaintiff had established a prima facie case, "the burden then must shift to the employer,"[13] the decision did not clarify whether it was the Court's intention that it was only the burden of going forward with the evidence (production) that was shifted to the defendant or whether the burden of persuasion was shifted as well. Following *McDonnell*, the caselaw in the Eighth Circuit generally developed along the theory that both the burdens of production and persuasion shifted to the defendant: "The shifting burden of proof concept is often employed in cases brought pursuant to [T]itle VII of the Civil Rights Act of 1964, 42 U.S.C. [section] 2000 et seq."[14]

Caselaw in other circuits developed along similar lines. In *Burdine v.*

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sons of complainant's qualifications.

Id. at 802. In a footnote to this model, the Court recognized that the question of whether a specifc plaintiff met his or her initial burden was a fact-driven one: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* n.13.

The Court, in later Title VII decisions, explained that the function of the plaintiff's prima facie burden was to raise the inference of discrimination: the plaintiff could meet this burden by establishing a prima facie case sufficient to raise an inference of "discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978).

In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court clarified that "the phrase 'prima facie case' [denoted] the establishment of a legally mandatory, rebuttable presumption." *Id.* at 254 n.7. The Court went on in *Burdine* to note that the

> evidentiary relationship created by a prima facie case and the consequential burden of production placed on defendant is a traditional feature of the common law.
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> Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progresaively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Id. n.8.

11. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

12. *Id.* at 804. The Court's decision in *McDonnell* was arguably a pro-plaintiff one inasmuch as it clearly established the right of the plaintiff to attempt to rebut the "legitimate, nondiscriminatory reason" articulated by the employer in defense of its action: "We do . . . insist that [complainant] under section 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality [discriminatorially] premised." *Id.* at 805 n.18.

13. *Id.* at 802.

14. Clark v. Mann, 562 F.2d 1104, 1117 n.11 (1977).

Texas Department of Community Affairs,[15] the Fifth Circuit, for example, held that once the plaintiff had met his or her initial burden of proof, the defendant had "to prove nondiscriminatory reasons by a preponderance of the evidence."[16] The Supreme Court, however, soundly rejected such an interpretation of the *McDonnell* model in *Texas Department of Community Affairs v. Burdine*:[17] "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[18] The defendant's response was

> sufficient if [it] raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.[19]

If *McDonnell* can be considered to be a pro-plaintiff decision,[20] *Burdine* clearly swung the pendulum in favor of the defendant. The Court indicated in *Burdine* that plaintiff's "burden of establishing a prima facie case of disparate treatment is not onerous"[21] and went on to state that the burden which was shifted to the defendant was no more so. While the defendant's case had to involve "the introduction of admissible evidence"[22] and be "legally sufficient,"[23] the employer did not have the burden of persuading the court that it had been "actually motivated by the proffered reasons."[24] Any procedural or presumptive advantage which the plaintiff might have formerly gained with the establishment of his prima facie case evaporated with the *Burdine* decision.[25] Since the employer would always be able to "articu-

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15. 608 F.2d 563 (5th Cir. 1979).

16. *Id.* at 567. Citing earlier decisions, the circuit court went on to state that such a holding "simply states the obvious: 'articulating' a legitimate reason involves more than merely stating fictitious reasons; *legally sufficient* proof is needed before the trier of fact can find plaintiff's proof rebutted." *Id.* (citations omitted). Not all circuits agreed. *See, e.g.*, Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980); Jackson v. U.S. Steel Corp., 624 F.2d 436 (3rd Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). *But see* Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655 (8th Cir. 1980).

17. 450 U.S. 248 (1981).

18. *Id.* at 253.

19. *Id.* at 254-55.

20. *See supra* note 12.

21. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253.

22. *Id.* at 255.

23. *Id.*

24. *Id.* at 254.

25. It is arguable that the *Burdine* decision tolled the death-knell in terms of the usefulness of the prima facie model of analysis because it is highly improbable that any defendant-

late" a legitimate basis for its decision, the ruling in *Burdine* meant that the plaintiff had, from beginning to end, the burden of persuading the trier of fact that he or she had been the victim of intentional discrimination.[26] According to *Burdine* such a burden could be met in one of two ways. "[The plaintiff] 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."[27] Unless the plaintiff, however, is able to find a "smoking gun" during discovery or is able to make a statistical showing so strong that it is sufficient to create a persuasive inference that the alleged discriminatory action taken against him or her is a part of the defendant-employer's general practice, the burden of persuasion in a disparate treatment case is now a formidable one.[28]

B. *The Prima Facie Model: A Procrustean Bed For Mixed-Motive Cases*

The *McDonnell-Burdine* analytical model becomes something of a Procrustean Bed when applied to mixed-motive cases. The model typically proceeds on the assumption that only one reason was involved in the employer's act or decision which is at issue.[29] In the typical case, the plaintiff who is proceeding on a disparate treatment theory of discrimination alleges that one reason (*e.g.*, gender prejudice) was operative in the employer's action, that this reason is illegally discriminatory under Title VII, and that it directly resulted in his or her not receiving an employment-related benefit.[30] In the same typical case, the defendant, in response, contends that its action was based on another single reason (*e.g.*, merit) which was legitimate and

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employer would ever appear in court without being able to articulate a lawful basis for its action or decision. In effect, the three-tier analytical model of *McDonnell* was reduced by *Burdine* to a single movement in which the plaintiff is responsible for establishing by a preponderance of the evidence that he or she was the victim of discrimination.

26. *Id.* at 256.

27. *Id.*

28. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 321 (1982) [hereinafter Brodin].

> Despite the fact that the *Mt. Healthy* standard places the burden of establishing the "harmless" nature of the discrimination on the employer, the plaintiff in many meritorious cases is likely to face the very difficult task of refuting the defendant's showing. It has been observed that "plausible justification [for adverse personnel action] can frequently be advanced whether or not it actually played any part in the formulation of the decision under contest," and that employers "who receive adequate legal advice and know how to create a personnel file . . . will find rare the occasions on which they are found liable."

Id.

29. Bibbs v. Block, 778 F.2d at 1320.

30. *Id.*

nondiscriminatory.[31] At trial, "the trier of fact will find one reason or the other (but not a combination) to be the true one."[32] In typical, single-motive cases, "the issues of motivation and causation are not distinctly separated nor do they need to be."[33] If the trier of fact finds the plaintiff was persuasive in showing that the employer's proffered articulation of a legitimate basis for its action was pretextual, liability will be found and the appropriate remedies attached.[34] If on the other hand, the plaintiff is not able to successfully carry its burden of persuasion in terms of establishing pretext, the employer will be completely exonerated in terms of liability and no remedies will be attached.[35]

Given the court's interpretations of the circumstances surrounding Heartland's hypothetical hiring process, it is unlikely that Sarah would or could prevail under the pure *Burdine* model: she was not as qualified as the person selected. She could, therefore, not show that the discriminatory animus evident in Archie's behavior toward her was the cause of her not being hired. Viewed from this perspective, the *McDonnell-Burdine* model is rather like an old-fashioned light switch in that it presents the court a choice of only two alternative positions: the bulb is either on or off — either the plaintiff wins all or wins nothing — there are no gradations in between.

An analytical model fashioned on winner-take-all principles in regard to the issues of liability and remedy arguably yields less than entirely equitable results when applied to Sarah's fact situation. On one hand, Heartland, Inc. did select the most qualified candidate to head up its sales department. But there is somewhat of a public policy issue involved in whether an employer should be allowed to conduct its hiring processes in any manner it wishes and yet remain entirely insulated from any liability under the law as long as that decisional process reaches the correct bottom line. Is it equitable that no liability should ever attach to such an employer in such a situation? Is it equitable that no injunctive or monetary relief should ever be afforded to the affected party? Suppose, for example, Archie had indulged in a more distasteful form of sexual discrimination and offered to vote for Sarah's appointment in exchange for sexual favors from her? Under the *McDonnell-Burdine* rule, it would appear that Sarah, even in the latter hypothetical, would be entitled to no relief.[36]

This is not to say that there are no equitable arguments to be made on Heartland's behalf. A finding of liability in a case in which the employer did

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31. *Id.*
32. *Id.* at 1321.
33. *Id.*
34. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256.
35. *See id.*
36. McDonnell Douglas Corp. v. Green, 411 U.S. at 807 ("If the [d]istrict [j]udge so finds [that the plaintiff is able to show defendant's articulation was pretextual], he must order a prompt and appropriate remedy. In the absence of such a finding, [the employer's] refusal to hire must stand.").

select the best candidate could be overly intrusive into that employer's practices. The granting of any remedy to a less qualified candidate might represent a windfall for her; she would not have been hired even without the presence of the discriminatory element.

Title VII does not directly address the problems presented by mixed-motive cases.[37] Congressional intent in this area, therefore, has to be inferred from the language of the law itself and from the legislative history.[38] As might be expected, both parties are able to find statutory grist for their respective mills. Plaintiffs such as Sarah emphasize the seemingly clear meaning set out in the liability section of Title VII:

> It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's* race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely affect his status as an employee, because of such individual's* race, color, religion, sex, or national origin.[39]

Sarah's argument in court is that the apparent gender prejudice displayed by Archie tended to place her at a disadvantage in the hiring process and that, therefore, Heartland must be found liable under Title VII.

Heartland, Inc.'s statutory point of emphasis, on the other hand, would be placed on an entirely different provision of Title VII: on Section 706(g) which addresses the remedies available to plaintiffs under the law. In particular, it would emphasize that section's closing sentence which states:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the *hiring, reinstatement, or promotion* of an individual as an employee, or the payment to him of any *back pay*, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged *for any reason other than discrimination* on account of race, color, religion, sex, or national origin . . . .[40]

Heartland, Inc. would argue that the clear meaning of this section is to prevent a plaintiff from becoming eligible to receive the full continuum of make-whole remedies (at least "hiring, reinstatement, or promotion" or

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37. Brodin, *supra* note 28, at 295.

38. *Id.* ("The task is thus to sift through the legislative history to determine whether Congress anticipated the definitional problem in the mixed-motive context and, if so, what resolution was intended."). Brodin's article contains a review of the legislative background related to mixed-motive cases. *See generally id.* at 294-99.

39. 42 U.S.C. § 2000e-2(a) (1982) (emphasis added).

40. 42 U.S.C. § 2000e-5(g) (1982).

"backpay") upon an employer's showing that the correct bottom line decision was made regardless of whether there was a degree of taint in the employment process. It would go on to argue that this section places, in fact, a heavy burden on plaintiffs to show that there was a direct and causal connection between the discriminatory component(s) alleged to have been a part of the hiring process and the adverse effect they allegedly suffered in terms of some employment benefit.

In summary, the statutory language of Title VII would seem to offer nothing conclusive in Sarah's case. Much of what it seems to be giving in the liability section, Title VII appears to be taking back in the remedies section. The law offers ammunition for the weaponry of both parties. There would appear to be, therefore, a statutory standoff in terms of how liability is to be attached, the burdens of proof associated with that process, and what remedies can be assessed in a mixed-motive situation.

C. *The Bibbs Doctrine: The Second Track*

The Eighth Circuit Court of Appeals, as noted earlier, had tended to construe Title VII's language broadly in light of its remedial nature prior to the *Burdine* ruling.[41] Given this earlier tendency, it is perhaps logical that the court would be philosophically uncomfortable with the concept of automatically extending the winner-take-all rule of law of *Burdine* to mixed-motive cases and thereby entirely insulate the discriminatory practices of an employer like Heartland, Inc. from both a finding of any liability and the attachment of any remedies.

In its most recent mixed-motive cases, the Eighth Circuit has resolved the tensions resulting from applying the *McDonnell-Burdine* analytical model, which was fashioned out of single-motive cases, to mixed-motive situations.[42] It has accomplished this conceptually by separating the consideration of the appropriate remedies from a determination of liability.[43] While this separation will be analyzed more closely in the sections which follow, it may be well at this point to state that what the Eighth Circuit has done, in essence, is to add a second track of liability and remedy to the *McDonnell-Burdine* model when applying it to mixed-motive Title VII cases. Under such an analysis, the first or primary track consists of the traditional, *McDonnell-Burdine* prima facie model which focuses on whether or not the

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41. *See* Vaughn v. Westinghouse Elec. Co., 620 F.2d 655 (8th Cir. 1980). The Eighth Circuit held in that case that once the plaintiff had presented a prima facie case, the "employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually." *Id.* at 659 (citation omitted). Certiorari was granted and the judgment vacated in this case following the *Burdine* decision and it was "remanded for further consideration in light of . . . *Burdine*." Westinghouse Elec. Corp. v. Vaughn, 450 U.S. 972 (1981).

42. *See generally* Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985); King v. Trans World Airlines, 738 F.2d 255 (8th Cir. 1984).

43. Bibbs v. Block, 778 F.2d at 1321.

plaintiff would have, but for the alleged discrimination, realized an employment opportunity or benefit which was denied to him or her. The first track concentrates on the results or consequences of the alleged discrimination. As stated earlier, Sarah is not likely to prevail in any way in her suit against Heartland, Inc. on the first or primary track of liability.

In contrast, the focus of the second track of liability is less global in nature: it concentrates not on the bottom line but on the decisional process itself. In terms of Sarah's suit against Heartland, the second-track liability issue is whether she can demonstrate persuasively that there were elements in the hiring process which were related to her gender and which unfairly and illegally lessened her chances of success.[44] What evidentiary burdens Sarah bears in this second track, what defenses Heartland might have available, and what second track remedies might be appropriate are discussed in that order in the following sections.

III. Plaintiff's Evidentiary Burden on the Second Track of Liability

Under the *McDonnell* model,[45] Sarah would seem to be able to establish a prima facie case against Heartland, Inc.: (i) because she is a woman, she is a member of a protected class; (ii) she was qualified and applied for a job which was vacant; (iii) in spite of her qualifications,[46] she was not offered the job; and (iv) the job was offered to a person who was not a member of a protected class.[47] In a single-motive case, the analysis of plaintiff's initial

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44. *See* 42 U.S.C. § 2000e-2(a)(2) (1982) ("would deprive or tend to deprive . . . .").

45. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

46. The Supreme Court has never directly decided the issue as to whether a plaintiff must show, in presenting a prima facie case, that he or she was as qualified or more qualified than the person actually selected. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Green's qualifications were not an issue since he had, prior to his being laid off, worked for the employer in the same type of position for which he was now applying. *Id.* at 802. In *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), the Supreme Court did not reach a district court ruling which had held that a plaintiff had to show "he was 'as qualified or more qualified' than the people who were [selected] as a part of his prima facie showing. *Id.* at 713. The Court did not reach this issue in *Aikens* because it found that the defendant-employer "has done everything that would be required of him if the plaintiff had properly made out a prima facie case, [and therefore] whether the plaintiff really did so [was qualified] is no longer relevant." *Id.* at 715.

47. *See* McDonnell Douglas Corp. v. Green, 411 U.S. at 802. In Green's case the fourth element actually stated "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802. In that case, the Court went on to state: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.* n.13. In another case, the Court noted that the prima facie case method established in *McDonnell* was "never intended to be rigid, mechanized, or ritualistic. 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." Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978).

burden of proof would end at this point. But in a mixed-motive case, the question that now needs to be addressed is whether, in addition to this primary track of liability, Sarah has any additional evidentiary burden in terms of establishing that Heartland is also potentially vulnerable along the second track or theory of liability: that there was discriminatory taint in Heartland, Inc.'s hiring process.

In this case, Sarah's prima facie burden is closely related to her allegation that she was not selected because of the discriminatory animus toward her which could be inferred from the manner in which she was treated during the interview process. Since, by definition, the second track of liability focuses on the process rather than on the result or consequences of the decision, Sarah will probably not need to introduce any additional substantive evidence in this regard although undoubtedly second-track liability will be carved out of the factual situation and emphasized as a distinct theory of liability by her attorney both in the opening and closing statements as well as in any proposed jury instructions.

A. *Plaintiff's Burden of Showing A Causal Connection: An Historical Perspective*

Although the trier of fact in Sarah's case did determine that she had been treated differently in her interview and that discriminatory animus was present there, there has been — and still may be — something of an open question as to whether her persuasive showing that Archie did ask those discriminatory questions is, in and of itself, enough to carry her burden on the second track of liability. The question is whether Sarah must not only demonstrate the fact of Archie's discriminatory intent behind his questions but also persuasively show that there was a causal connection between those questions and her not being offered the department head position. The question, moreover, begs a continuum of possible causal connections any one of which a court might elect to lay on a plaintiff's shoulders. Is a showing, for example, that Archie's remarks were "a factor" enough to carry her burden? Or does Sarah have to show that they were "a contributing factor?" Perhaps "a motivating factor?" A "but-for factor?" A "sole factor?"[48]

The Eighth Circuit Court of Appeals has come almost full circle on this question. As was true in a number of the other circuits, the earliest decisions in mixed-motive cases heard in the Eighth Circuit tended to construe the remedial language of Title VII broadly and to hold that a plaintiff's demonstration of the existence of a discriminatory element ("a factor") in the em-

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48. *See generally* Brodin, *supra* note 28. Brodin also suggests that a congressional proposal which would have made the plaintiff show that the "prohibited discrimination was the *sole* ground for the personnel action" was given an "unambiguous rejection" by both houses. *Id.* at 297.

ployer's decisional process was enough to fix liability.[49] A showing of a substantial linkage between that element and the decision itself or its results was not required.[50] These early decisions, by implication, rejected any concept of a balancing test being employed by the court in analyzing a mixed-motive case. The Eighth Circuit held, in effect, that it was not enough if the employer's final decision was objectively defensible: an employer's motivations and procedures had to be lily-white. A finding of flecks of taint at any stage of the process was enough to bring about a decision for the plaintiff.[51]

As noted earlier, the Supreme Court "has not expressly addressed the mixed-motives [sic] problem in a Title VII case."[52] The Court has, however, addressed mixed-motive cases which have arisen in constitutional contexts.[53] The language used by the Supreme Court in these cases caused lower courts to rethink their earlier positions relative to the necessity of assigning the burden of establishing a causal connection to the plaintiff in such cases.[54] The two most influential equal protection cases in this regard, whose rulings had in fact been heralded in the previous year by the single-motive case of *McDonald v. Santa Fe Trail Transportation Co.*,[55] were *Arlington Heights v. Metropolitan Housing Development*[56] and *Mt. Healthy City School District Board of Education v. Doyle*.[57]

The primary issue in *McDonald* was whether Title VII also afforded protection to majoritarian white males who had been discharged from their employment while a black employee, who had been charged with the same

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49. *Id.* at 308 ("The [lower] courts that were the first to face the question of the degree of discrimination necessary to make out a violation of Title VII generally applied [a] . . . test of causation [a]pparently influenced by the broad language of the statute's prohibitions, as well as the liberal interpretation initially afforded the Act by the Supreme Court . . . .") (footnotes omitted).

50. *See id.*

51. Although analyzed as an equal protection case under the fourteenth amendment, *Langford v. City of Texarkana*, 478 F.2d 262 (8th Cir. 1973), is illustrative of the circuit's early philosophy in a mixed-motive case. The plaintiffs in that case were two city employees, a black man and a white woman, who alleged that the fact they had been seeing each other socially was a factor in their respective firings. *Id.* at 264. The city-defendant argued that the plaintiffs had been fired for work-related reasons. *Id.* Remanding the case, the circuit court directed the lower court to determine if the plaintiffs' interracial "associations were a factor in the discharge of either or both. If it finds that the associations were *a factor*, it must reinstate the person discriminated against to the position formerly held by that person or to a position that is comparable . . . ." *Id.* at 268 (emphasis added). *See also* Williams v. Anderson, 562 F.2d 1081, 1094 (1977) ("It is sufficient if it is demonstrated that race was a factor in the employment decision.").

52. Bibbs v. Block, 778 F.2d at 1322.

53. *Id.*

54. Brodin, *supra* note 28, at 309.

55. 427 U.S. 273 (1976).

56. 429 U.S. 252 (1977).

57. 429 U.S. 274 (1977).

offense, was not dismissed.[58] Applying the *McDonnell-Burdine* model, the Court analyzed plaintiff's burden at the point after the employer has rebutted a prima facie showing by articulating a facially legitimate and job-related motivation for its action:

> The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies, . . . no more is required to be shown than that race was a "but for" cause.[59]

While this standard appears as dicta in *McDonald*, the implication was clear that the Court would probably hold a plaintiff in a mixed-motive case to a much more rigorous burden of proof in terms of causation than a number of the circuits were doing.[60]

Such an interpretation of the ruling in *McDonald* was to be reinforced in two equal protection cases decided the following year: *Arlington Heights v. Metropolitan Housing Development Corp.*[61] and *Mt. Healthy City School District Board of Education v. Doyle.*[62] In *Arlington Heights*, suit had been filed by a development corporation which alleged that the city's refusal to make a zoning change allowing for the building of multiple-family houses on a particular parcel of land was racially motivated and in violation of the fourteenth amendment.[63] In remanding the case, the Court noted that plaintiffs "simply failed to carry their burden of proving that discriminatory purpose was *a motivating factor* in the Village's decision."[64]

The requirement that plaintiff's initial burden in an equal protection case was more than a mere showing of the existence of a discriminatory element in the decisional process was reiterated in *Mt. Healthy City School District Board of Education v. Doyle.*[65] In *Mt. Healthy*, the plaintiff brought an equal protection suit against his former employer in an attempt to regain his teaching position by alleging that his discharge had been based on activity protected by the fourteenth amendment.[66] The Court stated that the plaintiff's initial burden was "to show that his conduct was constitutionally protected, and that this conduct was a *'substantial factor'* — or, to put it in other words, that it was a *'motivating factor'* in the Board's decision not to rehire him."[67] Earlier in the decision, the Court noted its rationale for

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58. McDonald v. Santa Fe Transp. Co., 427 U.S. at 275-76.
59. *Id.* at 282.
60. *See supra* note 49.
61. 429 U.S. 252 (1977).
62. 429 U.S. 274 (1977).
63. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 254.
64. *Id.* at 270 (emphasis added).
65. 429 U.S. 274 (1977).
66. *Id.* at 283.
67. *Id.* at 287 (emphasis added) (footnote omitted).

making such a requirement:

> a rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[68]

While *Arlington Heights* and *Mt. Healthy* were constitutional, rather than Title VII cases, lower courts began to apply these rulings of the Court to mixed-motive employment cases as well.[69] The Eighth Circuit was no exception to this general rule, and a good number of its decisions in mixed-motive cases following 1977 were made on the basis of a "determining factor" standard: "In cases challenging adverse employment actions as racially discriminatory under section 703(a), 42 U.S.C. section 2000e-2(a), we have held the court must look for the 'motivating factor', when the evidence suggests mixed motives."[70]

But while the lion's share of its mixed-motive caselaw held plaintiffs to a higher burden of proof, there were also indications that the Eighth Circuit Court of Appeals was not completely comfortable with doing so and that its decisions, therefore, were not always predictable. For example, in *Satz v. ITT Financial Corp.*,[71] the court held that "*a factor*" showing by the plaintiff was sufficient in terms of carrying its burden.[72] At the heart of the court's continuing discomfort with Title VII mixed-motive cases might well have been its underlying belief that a broad construction should be afforded the remedial statute whose very language made "unlawful" any "employment practice" which not only "would deprive . . . any individual of employment opportunities" but which "would . . . tend to deprive" an individual of equal treatment due to that person's "race, color, religion, sex, or national origin."[73] Yet under the *McDonnell-Burdine* model, no liability would be attached to a transgressing employer whose sins of discrimination

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68. *Id.* at 285.

69. Brodin, *supra* note 28, at 309.

70. Womack v. Munson, 619 F.2d 1292, 1297 n.7 (8th Cir. 1980). *See, e.g.*, Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979); Clark v. Mann, 562 F.2d 1104, 1116 (8th Cir. 1977) (42 U.S.C. § 1983 action) ("Proof that race or protected speech was a motivating factor in the decision is sufficient."); Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982) (Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 action) ("[T]he ultimate burden shouldered by the plaintiff is that age was a determining factor in his or her discharge." (citations omitted)). *But see* Coleman v. Missouri Pac. R.R., 622 F.2d 408, 410 (8th Cir. 1980) ("[A]ppellant correctly points out that an impermissible discrimination exists even if bias is merely a *contributing factor* rather than the sole factor in the employer's decision." (citations omitted) (emphasis added)).

71. 619 F.2d 738 (8th Cir. 1980).

72. *Id.* at 746 (citation omitted). "An issue raised by appellant is whether sex was a factor in this process." *Id.*

73. 42 U.S.C. § 2000e-2(a)(2) (1982).

were only venial nor would any relief be given to a plaintiff who could not establish the necessary causal linkage between those sins and her alleged loss. It seemed as though those courts which were sympathetic to the pro-plaintiff resonances of Title VII were caught in a dilemma.

B. *The Bibbs Resolution: The Second Track (The Case)*

The seemingly irreconcilable tension between a broad interpretation of a remedial law and narrow holdings in analogous Supreme Court caselaw has been resolved, at least for a time, by the Eighth Circuit in its ruling in *Bibbs v. Block.*[74] The plaintiff Bibbs, a black man, alleged that Title VII was violated when he was passed over in favor of a white man for a promotion to a supervisory position in the print shop of the Agricultural Stabilization and Conservation Service (ASCS), a division of the Department of Agriculture.[75] ASCS defended its action on the grounds that it had selected the most qualified candidate for the vacancy.[76] The district court determined that "race was a factor in the 'selection process' " after finding that the key member of the three-person selection committee who had interviewed each of the final candidates had made racist remarks regarding the plaintiff.[77] The district court also found that, on the whole, the testimony of all the selection committee members was "not particularly credible, either in demeanor or in the substance of the testimony."[78] The district court, however, dismissed the case against ASCS holding that Bibbs had not been able to show that his race was "a 'determining factor' or a 'but for' factor, meaning a factor that ultimately made a difference in the decision, and that liability was therefore not established."[79] Referring to the literal and straightforward language of section 703(a) of Title VII, the Eighth Circuit Court of Appeals, in an *en banc* decision, rejected the lower court's analysis and held that Title VII is violated and liability attaches at the very moment a discriminatory element creeps into the employment process regardless of whether the party towards whom the discrimination was directed is appointed to the position.[80] On the issue of liability, therefore, the court concluded "Bibbs has proved race was *a discernible factor* in the decision not to promote him. We hold such proof is sufficient in a mixed-motive context to establish intentional discrimination and liability under Title VII."[81]

The finding of liability did not, however, automatically trigger the

74. 778 F.2d 1318 (8th Cir. 1985).
75. *Id.* at 1319.
76. *Id.*
77. *Id.* at 1319-20.
78. *Id.* at 1320.
79. *Id.*
80. *Id.* at 1321-22.
81. *Id.* at 1324 (emphasis added).

whole range of make-whole remedies including those of retroactive appointment or back pay.[82] The case was remanded to the lower court to make further findings relative to the issue of remedies.[83] The court stated in remanding the case that the remedies issue turned on the question of whether ASCS could show that "Bibbs would not have received the promotion even if race had not been considered."[84]

Regardless of what the lower court might find on remand, the significance of *Bibbs* lies in the fact that even if the plaintiff does not prevail on the primary track of liability under the *McDonnell-Burdine* model, he may receive some relief along the second track of liability by clearly showing that there was discriminatory taint in the decisional process. The remedies aspect of mixed-motive cases in light of the *Bibbs* doctrine will be fully explored in a following section, but it is important to emphasize at this point that the overall effect of the *Bibbs* decision is to allow a plaintiff who is able to show a single rotten apple in the barrel to obtain some relief at the expense of the offending employer.

C. *Bibbs: A Rejection of the Necessity of Plaintiff's Showing Causal Linkage*

Whether the Eighth Circuit Court would ever not find liability in a case where a plaintiff persuasively demonstrated that a discriminatory animus was "a factor" is not, unfortunately, made absolutely clear in the *Bibbs* decision. The use of the word "discernible"[85] in the majority's opinion — certainly a conscious choice by Judge Arnold who wrote the *en banc* decision which vacated an earlier panel decision — literally appears to demand little more than that the discriminatory factor be of sufficient magnitude or nature to be somehow apparent to the trier of fact. The word "discernible" does not necessarily entail any element of causation.[86]

It is on this precise point that three of the appellate judges dissented.[87] In their view, the plaintiff must show "some" causal relationship between the alleged discriminatory element and the employment decision at issue.[88] As statutory support they point to sections 703(a)(1) & (2) of Title VII which declare certain employer actions unlawful when they are undertaken "*because of* such individual's race, color, religion, sex, or national origin."[89] The dissenting judges, moreover, argue that a doctrine which holds plaintiffs only to a "discernible factor" test "dilutes the requirement that every Title

82. *See id.* at 1324.
83. *Id.*
84. *Id.* at 1325.
85. *Id.* at 1324.
86. *Id.* at 1331 (Ross, J., dissenting).
87. *Id.* at 1330 (Ross, J., dissenting).
88. *Id.* at 1331 (Ross, J., dissenting).
89. *Id.* at 1330 (Ross, J., dissenting) (emphasis added).

VII plaintiff must prove intentional discrimination"[90] and flies in the face of the burden of proof standard established for plaintiffs in *Burdine*: that plaintiffs bear the burden of persuading "the court that a discriminatory reason more likely motivated the employer . . . ."[91]

Chief Judge Lay, who wrote the earlier panel decision[92] which was vacated by the *en banc* decision, wrote a concurring opinion in *Bibbs* in which he stated that "the dissent misreads [the majority's] . . . opinion" in that "the majority opinion does not substitute the phrase 'discernible factor' as a test to replace causation."[93] In support of his contention, the Chief Judge quoted a portion of the majority opinion which stated that to establish "a violation of [Title VII]", the plaintiff had to prove "an unlawful motive played some part in the employment decision or decisional process."[94]

Because Chief Judge Lay's interpretation appears only in his concurring opinion and not in that of the majority, his statements do not conclusively make causation an element of plaintiff's burden in proving up an employer's culpability on the second track of liability in a mixed-motive case. In fact, there are implications that causation is not an element of plaintiff's burden under the *Bibbs* doctrine. Such a conclusion is supported by the majority's very selection of the word "discernible" in a decision which itself cited a number of earlier cases, any one of which might have furnished a more exact term if it were the majority's intention to preserve the causation element.[95] Indeed, the fact that the dissent focused on the causation issue also implies a conclusion opposite to the one reached by Chief Judge Lay inasmuch as it would seem logical that, especially in an *en banc* decision, a misunderstand-

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90. *Id.* at 1331 (Ross, J., dissenting).

91. *Id.* at 1331 (Ross, J., dissenting) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256).

92. Bibbs v. Block, 749 F.2d 508 (8th Cir.), *vacated*, 778 F.2d 1318 (8th Cir. 1985). For a commentary on this earlier panel decision, see Note, *An Evaluation of the Popular Standard of Causation in the Dual Motive Title VII Context: A Rejection of the "Same Decision" Standard*, 35 DRAKE L. REV. 209 (1985).

93. Bibbs v. Block, 778 F.2d at 1325.

94. *Id.*

95. *See* Bibbs v. Block, 49 F.2d 508, 512 (8th Cir. 1985). In his earlier decision, Chief Justice Lay had strongly implied that for a discriminatory factor "to exist" that factor had "to cause":

> We find it inherently inconsistent to say that race was a discernible factor in the decision, but the same decision would have been made absent racial considerations. Thus, we think that once race is shown to be a causative factor in the employment decision, it is clearly erroneous to find that racial considerations did not affect the outcome of the decision. The analysis could be reversed to say that once it is shown that the same decision would have been made absent racial considerations, then it is clearly erroneous to find that race was a causative factor in the employment decision.

Id. at 512. It is possible to argue that the majority in the en banc decision silently intended this same definitional construct to attach and that a causal factor is, therefore, still a required element in plaintiff's burden, but, as discussed in the text above the circumstances around the *Bibbs* decision point in the other direction.

ing over the meaning of a key word in a proposed decision which would have been circulated among the judges could have been easily and quickly rectified by the majority's either selecting a different word which would be more indicative of an intended causal connection or by the addition of a clear statement in the majority's opinion which would indicate that a causal connection was to be implied in the word "discernible." The fact that the majority elected to do neither suggests that a majority of the judges currently sitting on the Eighth Circuit Bench are willing to find liability in a mixed-motive case in which a plaintiff is able to prove the presence of a discriminatory element in the decisional process but is not able to persuasively demonstrate a firm causal nexus between that element and the decision itself.

While subsequent case law will no doubt clarify the issue, defendants' counsel should be on notice that a persuasive showing by the plaintiff that any element in the employment process was tainted by a discriminatory factor prohibited by Title VII might well result in a finding of liability against an employer. The thin facts of the *Bibbs* case, moreover, further support such a postulate in that ASCS's discriminatory sins against Bibbs as found by the court — some two or three racial remarks including one made outside the interview process and one made about a black man other than the plaintiff — were more venial, perhaps, than mortal and yet were still enough to support a finding of liability.[96] What precisely the employer might be liable for is the subject of the later "remedies" section. But before addressing that question, some consideration needs to be given to what the defendant's burdens and defenses might be along the second track of liability.

IV. Defendant's Evidentiary Burden on the Second Track of Liability

McDonnell Douglas Corp. v. Green[97] set out what defendant's burdens were in a single-motive Title VII case where the issues are focused solely on the end result of an employer's decision or action: the primary or first track of liability. According to the *McDonnell* analytical model, once the Title VII plaintiff has presented a prima facie case, the employer-defendant then has the burden of "articulating some legitimate, non-discriminatory reason [for its contested action]."[98] Since the ruling in *McDonnell* did not elaborate on the burden which shifted to the defendant once the plaintiff had established a prima facie case, there was some inconsistency among the circuits for a time as to precisely what that burden was.[99] As noted earlier, the *Burdine*

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96. Bibbs v. Block, 778 F.2d at 1320. The only information presented in the case provides as to the racist remarks is as follows: "One witness testified Tresnak [a committee member] had characterized Bibbs as a 'black militant,' while another testified Tresnak referred to another print-shop employee who was black as 'boy' and 'nigger.' " *Id.*

97. 411 U.S. 792 (1973).

98. *Id.* at 802.

99. *See, e.g.*, Marshall v. Roberts Dairy Co., 572 F.2d 1271, 1273, (8th Cir. 1978) ("[Plain-

decision clarified that the defendant's burden at that point was not one of persuasion but of production only: "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[100]

Assuming that at trial the respondent will neither confess to being solely or primarily motivated by a discriminatory element nor "compose fictitious, but legitimate, reasons for his actions,"[101] the employer has two generic defenses available: 1) to contend that plaintiff's basic facts and/or the implications which plaintiff has drawn from them are erroneous; or 2) to contend that its primary motivation was legitimate even if the decisional process was tainted with one or more discriminatory factors: that it would have reached the same conclusion even if those factors had not been present.[102] In either case, "[t]he defendant need not persuade the court that it

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tiff contends that defendant's] evidence falls short of meeting the standard of proof required to rebut a prima facie case of age discrimination.").

100. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. at 577 ("[t]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."); Board of Trustees v. Sweeny, 439 U.S. 24, 25 (1978) (employer is not responsible for proving absence of discriminatory motive).

101. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 258.

102. While this second defensive strategy substantially resembles the "same decision" test utilized in constitutional cases alleging violations of the first and fourteenth amendments, the constitutional cases are to be distinguished in that, once the plaintiff has shown that a violation has taken place, the burden of proof shifts to the defendant who must show "by a preponderance of the evidence that it would have reached the same decision as to [respondent] even in the absence of the protected conduct." Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977). *See also* Givhan v. West Line Consol. School Dist., 439 U.S. 410, 417 (1979); Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 270 n.21 (1977).

In certain of its rulings on school desegregation cases brought under the mantle of equal protection, the Eighth Circuit has held that not only did the burden of persuasion shift to the defendant but it then had to:

> show by 'clear and convincing' proof that the dismissal of black teachers was not unlawfully discriminatory if the district has a long history of segregation, if there is a decrease in the number of black teachers, if the proportion of the black faculty to white faculty is significantly less than the proportion of black to white students, and if only black teachers are dismissed.

Moore v. Board of Educ., 448 F.2d 709, 711 (8th Cir. 1971) (citations omitted) (suit was brought under 42 U.S.C. §§ 1981 and 1983 and under the due process and equal protection clauses of the fourteenth amendment). *See also* Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977) ("In some section 1983 cases, however, involving allegations that teacher discharges were racially motivated, we have employed a shifting burden of proof concept whereby once a plaintiff establishes a prima facie case the burden shifts to the defendants to prove an absence of discrimination." (citation omitted)).

The Eighth Circuit has applied the equal protection, burden shifting, "same decision" analysis in at least one Title VII case where the plaintiff alleged his discharge was in retaliation for activities protected by the first amendment: "Access to the EEOC and federal courts by filing charges is clearly conduct protected from employer retaliation by section 704(a)." Womack v. Munson, 619 F.2d 1292, 1297 (8th Cir. 1980) (citations omitted).

was actually motivated by the proffered reasons."[103] If the plaintiff is not able to rebut by a preponderance of evidence that the employer's proffered reasons were, in fact, pretextual, judgment has to be entered for the defendant according to the *McDonnell-Burdine* model.[104]

The traditional *McDonnell-Burdine* model which sets out the analytical process for the primary track of liability needs to be carefully distinguished from the model for analyzing the second track of liability which has been fashioned by the Eighth Circuit in its recent mixed-motive cases. One of the earliest of these cases was *King v. Trans World Airlines*.[105] The facts in *King* are somewhat similar to the hypothetical situation involving Sarah and her case against Heartland, Inc. Ernestine King, the mother of four children, applied for a kitchen-helper position with TWA's dining and commissary department.[106] Ernestine had worked for a few months in that same capacity approximately one year earlier but had been laid off in her probationary period during a general reduction in force.[107] The position for which she had applied was "basically an entry-level position that required little or no training or experience."[108] During her interview with the manager of the department, she was asked, among other things, about "her marital status . . . the number of children she had and whether they were illegitimate, her child care arrangements, and her future childbearing plans."[109] When she was not selected for any of the "ten or eleven" vacancies TWA filled in the following two months, Ernestine brought a Title VII action against the company alleging both sex and race discrimination.[110] TWA countered her prima facie showing by articulating a number of nondiscriminatory reasons for not appointing her including the fact that she had had two absences from work during her earlier probationary period with the company, that she had "a close relationship with another TWA employee," and had received "an unfavorable recommendation from another supervisor."[111] The district court found for the defendant-employer holding that Ernestine had "failed to prove by a preponderance of the evidence that TWA's articulated reasons were pretextual . . . ."[112]

In reversing the lower court's decision on appeal, the circuit court focused on the plaintiff's allegations that the employer had asked questions during her interview not asked of other applicants and had "used the infor-

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103. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254.
104. *See id.* at 259-60.
105. 738 F.2d 255 (1984).
106. *Id.* at 256.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 257.
112. *Id.*

mation in deciding not to hire her."[113] The court of appeals carefully explained the point at which it departed from the lower court's holding: "But for the fact that appellant alleged that TWA treated her differently in the hiring process, we would have no reason to fault the district court's analysis of the employer's articulated reasons for its refusal to hire."[114] In language which clearly envisioned a second layer or track of liability in addition to the one delineated in the *McDonnell-Burdine* model, the court went on to note that while TWA's articulated reasons might explain why Ernestine was not hired, those reasons did "not explain why the appellant was treated differently during the interview."[115] Distinguishing the "hiring process" from the "hiring decision," the court observed that "[o]rdinarily, the plaintiff does not challenge the hiring process itself but argues that the hiring *decision* was the product of unlawful discrimination. Thus concentration on the reasons for the plaintiff's 'rejection' may be misleading in cases like the present one."[116]

In *King*, the defendant-employer did not dispute either the allegation that the plaintiff had been asked questions relating to "pregnancy, childbearing and childcare" or the allegation that, according to TWA's own policy, these questions were not to be asked during the interviews of either male or female job applicants.[117] The court held, therefore, that even though the employer might be able to show that the applicant would not have been hired in any event for legitimate reasons, that proof went only to the issue of "limit[ing] the job applicant's *relief*" not to the issue of the defendant-employer's liability.[118] The case was remanded to the lower court with instructions to fashion the appropriate remedy.[119] The lower court was to determine whether TWA would have hired appellant absent the unlawful discrimination.[120] If the lower court were to conclude that she would have been

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113. *Id.*

114. *Id.*

115. *Id.* (citations omitted).

116. *Id.* n.1.

117. *Id.* at 258. The court stated: "Because TWA offered no reason to explain why appellant's interview was different, TWA in effect remained 'silent in the face of the presumption [of unlawful discrimination].'" *Id.* at 259. Although the court did not comment directly on the point, it would be logical to suppose that in a case where the employer did contest plaintiff's allegations of facts, the presumption would be nullified and the plaintiff would then bear the burden of proving with a preponderance of evidence that her allegations should prevail.

118. *Id.* at 257-58. The court held the defendant in *King* to a "clear and convincing" evidentiary standard once the plaintifff had "proved unlawful discrimination in the hiring process." *Id.* at 257.

119. *Id.* at 259.

120. *Id.* As will be discussed in more detail in the section in the text focusing on remedies, the circuit court held that Ernestine King was entitled to at least injunctive relief as well as attorney's fees with a showing that she had been potentially victimized by a discriminatory factor in the hiring process regardless of whether the employer could show it would have made the same decision absent the discriminatory element. *Id.*

hired, then Ernestine would be entitled to complete, make-whole relief "in the form of an order directing TWA to offer to hire appellant and to back pay."[121] In making this determination, the Eighth Circuit Court of Appeals emphasized that the lower court was to consider that "[u]nlawful discrimination having been proven . . . the burden . . . is on [the employer] to prove by clear and convincing evidence[122] that [appellant] would not have been . . . hired in the absence of discrimination."[123] In explaining the rationale for the shifting of the burden of persuasion to the defendant once discrimination has been proven, the court stated: "The burden of showing that proven discrimination did not cause a plaintiff's rejection is properly placed on the defendant-employer because its unlawful acts have made it difficult to determine what would have transpired if all parties had acted properly."[124]

It must be emphasized that the shifting of the burden of persuasion in *King* occurs only in the determination of the appropriate remedy not in the determination of liability: the same-decision test is to be applied "in order

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121. *Id.*

122. The court's holding of a defendant-employer to a "clear and convincing" standard has been reduced to one of "a preponderance of evidence" in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985). *See supra* note 118.

123. King v. Trans World Airlines, 738 F.2d at 259 (citations omitted). In *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977), the Supreme Court stated this same principle in terms of an affirmative right of the defendant-employer: "Even assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event." *Id.* at 403 n.9 (citations omitted).

124. King v. Trans World Airlines, 738 F.2d at 259. (citations omitted). The D.C. Circuit has applied this same rationale for burden shifting to cases of sex harassment arising within its jurisdiction. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). Citing its earlier decision in *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976) for precedent, that court wrote:

> [W]e held that, since the employer had already been proved a discriminator, the plaintiff's prima facie case . . . had in effect already been made out, and that the burden should immediately shift to the employer to prove that [the plaintiff's] qualifications were such that he would not have been promoted even if he had not been the victim of discrimination . . . . *Id.* Moreover, in this special circumstance we held that the burden of persuasion, not just the burden of going forward with the evidence, shifted to the employer. And we held that the employer must meet his burden by clear and convincing evidence, rather than simply by a preponderance of the evidence . . . . *Id. See* Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 444-45 (5th Cir.), *cert. denied*, 419 U.S. 1083 (1974) (once employer is proved to have discriminated against plaintiff class, he bears burden of presenting clear and convincing evidence on issue of discrimination against individual plaintiffs). We stressed in *Day* that since the employer's own proved discriminatory actions were largely responsible for the plaintiff's typical dilemma of having to prove the motive underlying the employer's past action, "any resulting uncertainty [should] be resolved against the party whose action gave rise to the problem."

Id. at 952 (citations omitted).

to limit the job applicant's *relief*."[125] Because the shift takes place only after liability has already attached to the employer, neither the letter nor the spirit of the holding in *Burdine* that "the plaintiff retains the burden of persuasion" is violated.[126] In effect, the Eighth Circuit has developed an analytical model which consciously splits the issues relating to liability and those relating to remedy: "In [a mixed-motive case], we believe analysis is aided best by separating the issues of liability and remedy."[127] The same analytical framework of *King* was subsequently overlaid on the facts presented by *Bibbs*: "This same-decision test will apply only to determine the appropriate remedy and only after plaintiff proves he or she was a victim of unlawful discrimination in some respect."[128] By the time of its *Bibbs* decision however, the court had reduced the proof requirement which shifts to the defendant-employer from a "clear and convincing" level to one of a preponderance of evidence.[129] In *Craik v. Minnesota*,[130] a Title VII pattern and practice suit alleging sex discrimination, the Eighth Circuit stated: "The normal standard of proof in civil litigation is that of a preponderance of the evidence, and we do not believe that the public and private interests involved require altering that distribution of the risk of error between the litigants."[131] In *Bibbs*, that same court affirmed that reduction in burden: "We adhere to that view now."[132]

The developing case law in the Eighth Circuit holds profound implications for Heartland's attorneys as they prepare to defend their client against Sarah's allegations of sex discrimination. Prior to the rulings in *King* and

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125. King v. Trans World Airlines, 738 F.2d at 258 (citations omitted).

126. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256.

127. Bibbs v. Block, 778 F.2d at 1321. The *Bibbs* court went on to note: "The [d]istrict [c]ourt itself, citing Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982), suggested such an approach, but decided, in view of its 'novelty' to leave to us whether to pursue it . . . . We accept the invitation." *Id.*

128. *Id.* at 1324. The Eighth Circuit Court went on to cite with approval *Tony v. Block*, 705 F.2d 1364, 1370 (D.C. Cir. 1983) (Tamm, J., concurring) ("[The same-decision test] has no relevance to the liability phase of a Title VII suit."). In his concurring opinion in *Bibbs*, Chief Judge Lay noted his disagreement with the majority's application of the same-decision test to mixed-motive cases: "[Once the plaintiff has established] invidious discrimination which *in any way* influences or motivates an employment decision . . . [the fact that] the employer has other nondiscriminatory reasons which enter into the decision is irrelevant." *Id.* at 1326.

129. *Id.* at 1324 ("The defendant may avoid an award of reinstatement or promotion and back pay if it can prove *by a preponderance of the evidence* that the plaintiff would not have been hired or promoted even in the absence of the proven discrimination." (emphasis added)).

130. 731 F.2d 465 (8th Cir. 1984).

131. *Id.* at 470 n.8.

132. Bibbs v. Block, 778 F.2d at 1324 n.5. In his concurring opinion, Circuit Judge McMillian wrote: "[I] do not agree with the preponderance of the evidence standard of proof and would instead require the employer to prove by clear and convincing evidence that appellant would not have been promoted in the absence of discrimination. *See, e.g.*, King v. Trans World Airlines, Inc., 738 F.2d 255, 259 (8th Cir. 1984)." *Id.* at 1329 (McMillian, J., concurring).

Bibbs, Heartland might well have based its entire defense on a showing that the male candidate selected was, from a credentials point of view, head and shoulders above Sarah. It might well have, with impunity, elected not to even attempt to counter Sarah's allegations related to any improprieties which might have taken place during her interview. That strategy will probably still be successful even in a post-*Bibbs* adjudication along the primary line of liability. That scenario would proceed as follows: Sarah will satisfy her prima facie burden either by applying the familiar *McDonnell* model[133] or by showing gender "was a 'discernible factor' at the time of the decision."[134] Heartland, Inc., in response, will articulate a legitimate basis for its decision (better qualified candidate); and given the facts of the hypothetical situation, Sarah will find it impossible to prove with a preponderance of the evidence that Heartland's response was pretextual.[135]

But no longer does the bottom line winner necessarily take all. Under the doctrine applied in *King* and elucidated in *Bibbs*, if Sarah is able to establish the presence of sex discrimination in her interview (which, of course, is quite likely to be a finding of fact if Heartland does not contest it) then she becomes a winner, some liability attaches to the employer, and some relief flows to her: "Once plaintiff has established a violation of Title VII by proving that an unlawful motive played some part in the employment decision or decisional process, the plaintiff is entitled to some relief."[136] The nature of the relief to which Sarah might be entitled will be discussed in the next section.

Recognizing this, counsel for Heartland will either have to put on evidence refuting Sarah's allegations regarding her illegal interview or defend it under one of the exceptions contained in Title VII.[137] Not to do so may result in the court's finding of employer liability and the awarding of some remedies to the plaintiff. Such a defense tactic will be especially risky in a case in which the plaintiff's past work credentials are very similar in kind and weight to those of the person selected. Remember that the burden of persuasion shifts to the defendant in the second track of liability when remedies are being determined.[138] Had Sarah's been such a case, Heartland would have had the burden of proving by a preponderance of the evidence that it would have made the same decision,[139] a burden which will be almost

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133. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

134. Bibbs v. Block, 778 F.2d at 1320.

135. *See* McDonnell Douglas Corp. v. Green, 411 U.S. at 804.

136. Bibbs v. Block, 778 F.2d at 1323-24.

137. For example, in different fact situations, section 703(h) would allow an employer to defend an otherwise unlawful employment practice on the grounds of a "bona fide seniority or merit system" or a "professionally developed ability test." 42 U.S.C. § 2000e-2(h) (1982). Section 703(e) would allow exceptions for a "bona fide occupational qualification." 42 U.S.C. § 2000e-2(e) (1982).

138. Bibbs v. Block, 778 F.2d at 1324.

139. *Id.* ("The defendant may avoid an award of reinstatement or promotion and back

as difficult for it to carry as it would be for Sarah if the candidates' credentials are evenly balanced. In this regard it would appear to be theoretically possible that, in a close hiring or firing case in which plaintiff could not prevail under her initial burden of persuasion with a preponderance of the evidence on the primary track of liability, she might win both back pay and retroactive appointment under the second track if: 1) she can establish that the process was colored by discrimination; and 2) the employer-defendant is also unable to show under a now-shifted burden of persuasion in the remedies determination that it would have made the same decision "even in absence of the proven discrimination."[140] In the light of *King* and *Bibbs*, defendants clearly have compelling reason to attempt to prevent a plaintiff from establishing any taint in "the employment decision or decisional process."[141] To lose that battle may, in a close case, mean — with the shifting of the burden of persuasion — the loss of the war as well.

V. The Second Track of Remedies

In *Albemarle Paper Co. v. Moody*,[142] the Supreme Court stated that the primary objective of Title VII was prophylactic in nature: "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[143] The Court went on to state a second objective:

> It is also the purpose of [T]itle VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice."[144]

In a sense, the Eighth Circuit's adoption of a bifurcated review process for mixed-motive cases which "separate[s] the issues of liability and remedy" places those twin objectives in a sequential rather than concurrent analytical construct.[145] The Eighth Circuit found textual support for its bifur-

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pay if it can prove by a preponderance of the evidence that the plaintiff would not have been hired or promoted even in the absence of the proven discrimination." (footnote omitted)).

140. *Id.* at 1324. While such a situation would seem to be theoretically possible, the court would in all likelihood find that the plaintiff prevailed on the primary track of liability and award the remedies accordingly at that level of inquiry.

141. *Id.* at 1323-24.

142. 422 U.S. 405 (1975).

143. *Id.* at 417 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)). It is perhaps noteworthy that the Court stated in a decision written two years later that the deterrent purpose and the compensation purpose in Title VII were "equally important." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 364 (1977).

144. Albemarle Paper Co. v. Moody, 422 U.S. at 418 (quoting Brown v. Swann, 35 U.S. (10 Pet.) 497 (1836)).

145. Bibbs v. Block, 778 F.2d at 1321. In *Easley v. Anheuser-Busch Inc.*, 758 F.2d 251, 262 (8th Cir. 1985), the court drew a parallel between the bifurcation in *Bibbs* and the normal

cated approach in the remedies section of Title VII which provides:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement, or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . .[146]

A close reading of the statutory language, the Eighth Circuit Court argues, suggests that the whole of the remedies section is controlled by its opening conditional phrase: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint . . . ."[147] From such a finding flows two remedy tracks which are to be aligned with the two tracks of liability discussed above. Remedies associated with the primary track of liability which relates to the bottom line result (*e.g.*, discharge, failure to hire, promote, reinstate, etc.) obviously include considerations such as retroactive appointment and back pay. This primary track of remedy was carefully circumscribed by Congress in the closing sentence of section 706(g) of Title VII which denies such remedies to plaintiffs in cases where the employer is able to show the decision or action at issue was made or taken "for any reason other than discrimination."[148]

But even if the plaintiff does not prevail on the issues and remedies associated with the primary track, section 706(g) clearly provides that some

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process in a class action: "In class actions, which are usually bifurcated into a liability phase and a remedial phase, the employer carries the burden of demonstrating at the remedial phase that an individual applicant would not have been hired even absent unlawful discrimination." *Id.* (citation omitted).

146. 42 U.S.C. § 2000e-5(g) (1982).

147. *Id.*

148. *Id.* Note the statutory language does not specifically address the question of who has the burden of proof during the determination of remedies. *See id.* As noted earlier, the Eighth Circuit affirmed in *Bibbs* its earlier ruling in *King* that the defendant had the burden of persuasion at the remedy stage of the analysis to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." Bibbs v. Block, 778 F.2d at 1323. *See also* King v. Trans World Airlines, 738 F.2d at 259. But in any case, such a showing on the part of the defendant-employer "does not extinguish liability[; i]t simply excludes the remedy of retroactive promotion or reinstatement." Bibbs v. Block, 778 F.2d at 1323.

relief might be forthcoming along the second track of remedy: "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate."[149] According to the doctrine set down for mixed-motive cases by the Eighth Circuit in *Bibbs*, the granting of injunctive relief to a plaintiff who "proves he or she was a victim of unlawful discrimination in some respect"[150] appears to be fairly automatic:

> In the instant case, Bibbs has proved race was a discernible factor in the decision not to promote him. We hold such proof is sufficient in a mixed-motive context to establish intentional discrimination and liability under Title VII. We therefore . . . remand for the entry of a declaratory judgment in favor of Bibbs and an injunction prohibiting the ASCS from future or continued discrimination against Bibbs on the basis of race.[151]

Perhaps more importantly, the *Bibbs* decision goes on to award attorney's fees once such a showing has been made: "In addition, the District Court should consider Bibbs a prevailing party for the purpose of an award of attorney's fees."[152] By way of rationale, the court noted that in proving unlawful discrimination, plaintiff had prevailed on a significant question of issue "and thereby vindicated a major purpose of Title VII, the rooting out and deterrence of job discrimination."[153] In addition the court might order any additional "affirmative action . . . or any other equitable relief as the

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149. 42 U.S.C. § 2000e-5(g) (1982).

150. Bibbs v. Block, 778 F.2d at 1324.

151. *Id. See also* Taylor v. Teletype Corp., 648 F.2d 1129, 1135 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981) (once discrimination has been established in a Title VII action, the issuance of an injunction rests in the sound discretion of the district court); King v. Trans World Airlines, Inc., 738 F.2d 255, 259 (8th Cir. 1984) ("The district court on remand is instructed to enter judgment in favor of appellant and to enter an injunction prohibiting TWA from future, or continued, discrimination against appellant on the basis of sex."). The *King* court cited, with approval, *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981):

> When a legitimate candidate for a job has demonstrated that [she] has been the subject of unlawful discrimination in the employment process, [she] is entitled to an injunction against future, or continued, discrimination. The purpose of such an order is to ensure that, at the very least, the applicant will receive full and fair consideration from the employer if [she] seeks similar employment in the future.

Id. at 1333.

152. Bibbs v. Block, 778 F.2d at 1324. *See* 42 U.S.C. § 2000e-5(k) (1982); King v. Trans World Airlines, Inc., 738 F.2d at 259 ("The district court should consider appellant a prevailing party for the purposes of an award of attorney's fees and is instructed to determine a reasonable fee on remand.")

153. Bibbs v. Block, 778 F.2d at 1324. However, *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985), would suggest that a party who prevailed under the second track of remedy would not generally be eligible for an "enhanced award" relative to attorney's fees under criteria adopted by the Eighth Circuit Court: "We conclude that enhancement was not necessary to provide fair and reasonable compensation to plaintiffs' counsel." *Id.* at 265.

court deems appropriate."[154] But a plaintiff may be prevented from receiving either a retroactive appointment or back pay by the employer's showing that the action or decision at issue was taken or made "for any reason other than discrimination."[155] Allowing the defendant an opportunity to make such a showing in terms of determining the appropriate remedy is reasonable in the majority's opinion:

> It does not follow, though, that retroactive promotion is an appropriate remedy. Unless the impermissible racial motivation was a but-for cause of Bibbs losing the promotion, to place him in the job now would award him a windfall. He would be more than made whole. He would get a job that he would never have received whatever his race.[156]

In terms of Sarah's case against Heartland, Inc., it would appear under the teaching of *King* and *Bibbs* that she would be entitled to injunctive relief and attorney's fees by her showing that in the final interview she had been treated differently than the male candidates and that a number of questions she had been asked were discriminatory in nature. Because, however, Heartland, Inc. will be able to establish that the male applicant selected was clearly the superior candidate, it would seem that, even under *Bibbs*, Sarah will not be entitled to either a retroactive appointment or back pay.

There are some who would agree with Chief Judge Lay's wry remark in his concurring opinion that

> [m]any litigants who successfully prove racial discrimination in the employment decision will now find that the spoils do not go to the victim but only to the victim's attorneys. Plaintiffs such as Bibbs will obtain attorneys' fees and perhaps injunctive or declaratory relief, but no award of back pay or reinstatement.[157]

Those in agreement with Judge Lay would argue that such a structuring of remedies puts plaintiffs in the position of the young Oliver Twist in the poorhouse with but one bowl of gruel for his dinner with little or no hope of

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154. 42 U.S.C. § 2000e-5(g) (1982). *See* Cleverly v. Western Elec. Co., 594 F.2d 638 (8th Cir. 1979) (example of equitable relief which a court might fasion in a given case). In this case, which was brought under the ADEA, the plaintiff, who was in his fifties, alleged his being laid off during a time of general company downsizing was at least partially due to "make way for younger engineers in the department." *Id.* at 641. The company argued that its layoff decision was "based soley on [plaintiff's] performance as an engineer and on the company's need to reduce its work force." *Id.* On the facts presented, the lower court found that while "age was a factor in his discharge" the plaintiff "was not entitled to present reinstatement." *Id.* at 640. It did, however, award the plaintiff "retroactive reinstatement from the date of his discharge [for approximately six months] when his pension rights would have vested." *Id.* The circuit court upheld this award. *Id.* at 642.

155. *Id.*

156. Bibbs v. Block, 778 F.2d at 1322.

157. *Id.* at 1326 (Lay, C.J., concurring).

having any more even should they ask. Such critics would argue that such tepid remedies serve neither the prophylactic nor the make-whole purposes of Title VII set out in *Albemarle*.[158] The argument continues that although defendant-employers may be obligated for attorneys' fees, such a penalty may well be perceived by them as being little more than an indulgent slap on the wrist: a gentle admonition that they go forth and sin no more. Such toothless watchdogs are not likely, they would argue, to change tainted employment practices, especially where they are conscious and inculcated. Finally, they argue that even "good-ole-boy" employers who discriminate "just a little bit" deserve some comeupance since, according to the law: "Discriminatory intent is simply not amenable to calibration."[159]

At the same time, there are others who would argue with equal force that a doctrine which gives any remedial relief whatsoever to a plaintiff who would not have been selected even if the discriminatory element were disregarded gives that person an undeserved windfall.[160] Such proponents argue alongside the dissenting judges in *Bibbs* and insist that before any relief can be given to a plaintiff, he or she must show — at the liability stage of the proceedings — that the alleged discriminatory factor was a "motivating" one.[161] No harm, no foul, they argue. Like the dissenting judges, these critics argue that the rule of *Bibbs* "is an open invitation to attorneys to file frivolous or extremely marginal cases so that they can get attorneys' fees for showing that an unlawful factor was 'discernible'."[162]

Because *Bibbs* teaches neither a decidedly pro-plaintiff nor an emphatically pro-defendant doctrine, it is vulnerable to attacks and derision from both flanks. On reflection, however, the analytical model assembled in *Bibbs* has much to recommend it. In fashioning the doctrine which is to be followed for mixed-motive cases in the Eighth Circuit, the court has traced an analytical flowchart which takes into account both of the dual purposes of prevention and make-whole relief which the Court has held drive the Title

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158. Albemarle Paper Co. v. Moody, 422 U.S. at 417-18.

159. Personnel Adm'r v. Feeney, 442 U.S. 256, 277 (1979).

160. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977):

> [A] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

Id. at 285.

161. *See* Bibbs v. Block, 778 F.2d at 1330 (Ross, J., dissenting).

162. *Id.* at 1332 (Ross, J., dissenting). *See supra* notes 93-95 and accompanying text (noting that Chief Justice Lay did not read the majority's use of the word "discernible" as reading out a causal connection). While it may be true that under the *Bibbs* ruling a lawyer may be more likely to take on a close case on a contingent basis than prior to that decision, such a result is arguably in keeping with the overall thrust of Title VII. In creating Title VII, Congress looked to private litigation as a major enforcement machanism. *See* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 (1981).

VII engine.[163]

That same analytical line traces the two remedial tracks clearly set out in section 706(g) of the statute itself.[164] Its reservation of the remedies of backpay and retroactive appointment to plaintiffs only in those cases where the employer-defendant cannot meet its burden of showing it would have made the same decision absent the unlawful conduct limits the full range of "make-whole" relief to those persons who "suffered [injuries] on account of unlawful employment discrimination.[165]

There are, moreover, a number of ripple effects created by the *Bibbs* doctrine which can be anticipated and which will further both purposes of Title VII. While it is true that not all plaintiffs who are successful in establishing that a discernible discriminatory factor was a part of an employer's decision will receive back pay or a position, all plaintiffs will have prevailed on a significant issue and to that extent will *feel* vindicated in their minds and hearts.

The *Bibbs* decision will, in addition, promote the prophylactic purpose identified in Title VII.[166] With its new doctrine of employer vulnerability, *Bibbs* should encourage employers to relook at all of their employment processes with an eye to making each component as uniform, objective, job-related and as taint-free as possible.[167] Selection committee members should be in agreement in advance of the interview as to the criteria they will be using to evaluate the interviewees. Employers will want to give special at-

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163. Albemarle Paper Co. v. Moody, 422 U.S. at 417-18.

164. *See* 42 U.S.C § 2000e-5(g) (1982).

165. Bibbs v. Block, 778 F.2d at 1322 (citation omitted). In a number of cases, the Supreme Court has limited the award of make-whole relief to actual victims of discrimination. *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) ("The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."). Limiting make-whole remedies to actual victims would suggest that the *Bibbs* doctrine of allowing injunctive relief and attorney's fees upon an initial finding of liability to a plaintiff who can prove gender or race "was a discernible factor in the [employer's] decision," would not be automatically extended to plaintiffs who proceeded entirely on a disparate impact theory of discrimination. Bibbs v. Block, 778 F.2d at 1324. The court's language would appear to apply such remedies narrowly to those plaintiffs who can show they were personally affected: "In the instant case, Bibbs has proved race was a discernible factor in the decision not to promote him. We hold such proof is sufficient in a mixed-motive context to establish intentional discrimination and liability under Title VII." *Id.*

166. Albemarle Paper Co. v. Moody, 422 U.S. at 417.

167. *See* Williams v. Anderson, 562 F.2d 1081, 1085 (8th Cir. 1977) ("The defendants were found to have discriminated against [b]lack faculty members by failing to use objective standards . . . for those purposes in accordance with the requirements set forth in *Moore v. Board of Education of Chidester School Dist. No. 59, Ark.*, 448 F.2d 709 (8th Cir. 1971)."). In *Moore*, which was a school desegregation case in a district where there had been a history of discrimination the court wrote: "[W]e now make clear that a board of education is obligated to use objective nondiscriminatory standards in the employment, assignment and dismissal of teachers. A board may also consider established and previously announced nondiscriminatory subjective factors in making such decisions." Moore v. Bd. of Educ., 448 F.2d at 713.

tention to those individuals who not only have raised or are likely to raise areas of questionable legality in interviews but to those supervisors in their tables of organization who have a reputation as being a racist or a sexist. Such managers are "smoking guns" in embryo. No longer is finding and selecting the most qualified candidate a complete defense to a Title VII charge where the plaintiff is able to establish the fact of a tainted element some place in the defendant's decisional process: an element "which would deprive or tend to deprive any individual of employment opportunities."[168] Quite aside from any injunctive relief or any award of attorneys' fees which might be assessed against it, the employer will also have to live with the fact that a declaratory ruling has been made — an adjudication which is a matter of public record — that it has been found guilty of discrimination. The next time, moreover, this same employer goes to court on a suit alleging discrimination, it will go to the plate with one strike already against it. There are additional considerations relating to public relations with the surrounding community which might be affected should an employer be found guilty of discrimination. There are, similarly, morale considerations involving the employee community which need to be taken into account. Insofar as these elements enhance the plaintiff's bargaining position, the *Bibbs* doctrine may well generate some additional impetus for settlement outside of the courtroom rather than adjudication within.

VI. Conclusion

Bibbs is a centerpiece decision that predictably will prompt further discussion in legal circles: discussion which will focus not only on the language of Title VII and its caselaw but on public policy issues as well. The remedial restructuring that becomes doctrinal in *Bibbs* is pro-plaintiff relative to the-best-candidate-take-all burden which plaintiff had carried in the past. Prior to *Bibbs*, unless a plaintiff felt reasonably sure that she could show that she was the best candidate for a given opportunity, there was to be no remedy at all for her — including compensation for her legal expenses — even if she could demonstrate clear discriminatory animus at work in the process. A knowledgeable lawyer would have had to advise her of her slim chances of success accordingly.

In *EEOC v. Associated Dry Goods Corp.*[169] the Supreme Court affirmed that "private lawsuits by aggrieved employees [are] an important part of [Title VII's] means of enforcement."[170] The carefully orchestrated remedial model set forth in *Bibbs* would appear to have restored some balance to an enforcement component of a law which expressly prohibits decisions or actions of an employer which "in any way would deprive or tend to deprive

168. 42 U.S.C. § 2000e-2(a)(2) (1982).
169. 449 U.S. 590 (1981).
170. *Id.* at 595 (citation omitted).

any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[171] From such a perspective, *Bibbs* and its progeny to come should be viewed as a positive step in stilling the "built-in headwinds" that continue to blow in our collective faces.[172]

Max J. Schott

171. 42 U.S.C. § 2000e-2(a)(2) (1982).

172. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("In the implementation of [employment] decisions, it is abundantly clear that Title VII tolerates no discrimination, subtle or otherwise.").