Denver Law Review

Volume 80
Issue 3 *Tenth Circuit Surveys*

Article 4

January 2003

The Critical Effect of a Pretext Jury Instruction

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INTRODUCTION

In June 2002, the Tenth Circuit Court of Appeals decided *Townsend v. Lumbermens Mutual Casualty Co.*,[1] and added the Tenth Circuit to the short list of circuits that require a pretext jury instruction in employment discrimination cases.[2] A pretext instruction is an instruction to the jury explaining that if the plaintiff has met his prima facie burden, and the jury finds an employer's justification for firing the plaintiff unconvincing, or a "pretext," the jury may infer that discrimination was the basis of the termination and find for the plaintiff.[3]

The subject of this survey is the critical effect of a judge giving a pretext instruction to the jury. An examination of circuit cases reveals that where a jury is informed that they are allowed to infer discriminatory animus based on pretext, they consistently find in favor of the plaintiff. Inversely, where they are not informed of the inference, they find for the defendant. This survey contends that if a jury is not informed that they are allowed to make an inference, they will not make it. There is a dispute about allowing a pretext jury instruction: several circuits regularly implement pretext instructions,[4] while many others choose not to alert the jury that it is able to infer discrimination based on pretext.[5] This survey will show which circuits are in favor of a pretext jury instruction, which ones are not, and show that decisions in circuits that don't allow the instruction find for defendants when the decision would not have been for the defendant had there been a pretext jury instruction.

Disparate treatment claims, which encompass every ground on which to base a discrimination claim (race, gender, religion, age, and national origin), can be broken into two categories: direct evidence cases and circumstantial evidence cases.[6] A direct evidence case (also known as a mixed-motive case) is a case where a plaintiff has concrete evidence showing that the employer discriminated against her.[7] In this situation the employer's defense is to say that it had a mixed-motive in firing the

1. 294 F.3d 1232 (10th Cir. 2002).
2. *See Townsend*, 294 F.3d at 1237-39.
3. *See id.* at 1238, 1241.
4. *See id.* at 1237, 1241 (explaining that the Second, Third, and Tenth Circuits are in favor of a pretext jury instruction).
5. *See id.* at 1238-39 (explaining that the First, Seventh, Eighth and Eleventh Circuits are not in favor of a pretext jury instruction).
6. *See* Hill v. Burrell Comm. Group, Inc., 67 F.3d 665, 667 (7th Cir. 1995). *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 252-55 (1989) (describing how courts apply either a clear and convincing standard or a preponderance of the evidence standard when analyzing claims of discrimination).
7. *See generally Price Waterhouse*, 490 U.S. at 246-53 (identifying factors that if proven constitute direct evidence of discrimination).

plaintiff, i.e., there were several reasons for terminating the plaintiff, only one of which was discriminatory.[8] The burden in a direct evidence case is placed on the employer to show that the plaintiff would have received the same treatment even without the discriminatory motive.[9] This survey will not focus on direct evidence cases.

A circumstantial evidence case is a case where a plaintiff was fired for reasons that she suspects are discriminatory, but has no concrete evidence to show discriminatory animus.[10] In this situation, the plaintiff must present a prima facie case as established by *McDonnell Douglas Corp. v. Green*.[11] Once the plaintiff satisfies the prima facie requirements, the burden shifts to the employer to present legitimate, nondiscriminatory reasons for terminating the plaintiff.[12] At this point, the burden shifts back to the plaintiff, who then must show that the employer's proffered reasons are pretextual; or a false cover-up of discriminatory animus.[13] The jury then weighs the credibility of each party's explanation, and disbelief of the employer's reasons can be sufficient to carry a verdict for the plaintiff.[14]

This survey will focus on circumstantial evidence cases where the plaintiff has met her prima facie burden and the employer has proffered some legitimate, nondiscriminatory reason for its action. Further, this survey will focus specifically on *Townsend* and the implications of the Tenth Circuit's holding that, in such situations, a pretext instruction is required.[15]

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8. *See id.* at 245-48.

9. *See id.* at 244-45.

10. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that a plaintiff proved a prima facie case of discrimination under Title VII even though the plaintiff did not have concrete evidence of discrimination).

11. 411 U.S. 792, 802-03.

12. *McDonnell Douglas*, 411 U.S. at 802-03.

13. *Id.* at 804. It is important to note that no label for this distinction is satisfactory. There are situations in a circumstantial or indirect evidence case where the plaintiff does have direct evidence of discrimination. *See Hill*, 67 F.3d at 667. However, that direct evidence may be insufficient, on its own, to carry a verdict for the plaintiff or even to move the case under the more favorable and plaintiff-friendly *Price Waterhouse* framework. *See Price Waterhouse*, 490 U.S. at 266-71 (O'Connor, J., concurring) ("[Under the *Price Waterhouse* framework] I do not think that the employer is entitled to the same presumption of good faith [as under the *McDonnell Douglas* framework] where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII."); 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 43 (Paul W. Cane, Jr. et al. eds., 3d ed. 1996) ("[T]he plaintiff presumably must offer stronger evidence to invoke the mixed-motive framework than that needed to establish a prima facie case under *McDonnell Douglas-Burdine-Hicks*."). Thus, the direct/indirect distinction can be misleading and even incorrect. I chose to use the direct/circumstantial labels because the cases examined in this survey consist of situations where the plaintiff has *some* (albeit a minuscule amount of) direct evidence showing discrimination, and I concede that the label chosen is subject to dispute and possibly confusion.

14. *See Townsend*, 294 F.3d at 1237.

15. *See id.* at 1237, 1239, 1241.

I. BACKGROUND: THE EVOLUTION OF THE INDIRECT EVIDENCE BURDEN SHIFTING FRAMEWORK

A. McDonnell Douglas Corp. v. Green[16]

McDonnell Douglas is the landmark decision regarding disparate treatment claims in employment law cases.[17] In *McDonnell Douglas*, Percy Green worked for the defendant, McDonnell Douglas Corporation, for eight years before he was "laid off in the course of a general reduction in [the defendant's] work force."[18] Green was a member of the Congress on Racial Equality ("CRE") and "protested vigorously that his discharge and the general hiring practices of [the defendant] were racially motivated."[19] Green, along with other members of the CRE, organized a "stall-in,"[20] where numerous vehicles were deliberately stalled on major roads leading to the defendant's factory during the morning rush hour.[21] Weeks later, Green and members of the CRE were involved in a "lock-in,"[22] where a padlock was placed on the factory doors preventing the defendant's employees from leaving.[23]

Three weeks after the lock-in, the defendant sought to hire qualified mechanics, and Green, a qualified mechanic, immediately applied for re-employment.[24] Defendant "turned down [Green], basing its rejection on [Green's] participation in the 'stall-in' and 'lock-in.'"[25] Green then filed a complaint with the Equal Employment Opportunity Commission, "claiming that [the defendant] had refused to re-hire him because of his race and persistent involvement in the civil rights movement."[26]

The district court found that the defendant's "refusal to rehire [Green] was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities."[27] The Eighth Circuit affirmed,[28] and the Supreme Court granted certioriari.[29]

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16. 411 U.S. 792 (1973).
17. William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It is Not Time to Jettison* McDonnell Douglas, 2 EMPLOYEE RTS. & EMP. POL'Y J. 361, 361 (1998).
18. *McDonnell Douglas*, 411 U.S. at 794.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 795.
23. *Id.*
24. *Id.* at 796.
25. *Id.*
26. *Id.*
27. *Id.* at 797.
28. *Id.*
29. *Id.* at 798.

In deciding *McDonnell Douglas*, the Supreme Court announced the framework to be used in deciding Title VII employment discrimination cases:[30]

> The complainant in a Title VII trial must carry the initial burden . . . of establishing a prima facie case of discrimination. 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 persons of complainant's qualifications.[31]

After determining that the Green met his prima facie requirements,[32] the Court moved to its "burden shifting" framework.[33]

After a plaintiff has met his prima facie requirement, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[34] In this case, the defendant contended that its reason for rejecting Green was his involvement in the illegal "stall-in" and "lock-in" protests.[35] The Court found that the defendant's "reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here . . . [the plaintiff] must . . . be afforded a fair opportunity to show that [the defendant's] stated reason for [the plaintiff's] rejection was in fact pretext."[36] Thus, the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[37]

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

To modify the framework enumerated in *McDonnell Douglas*, the Supreme Court granted certiorari in *Burdine*[39] to determine whether, "after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, non-discriminatory reasons for the challenged employment action existed."[40] The Court explained

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30. "Indeed, *McDonnell Douglas* has been so influential that it has spread beyond employment discrimination cases to employment actions brought under other types of federal and state employment laws and to discrimination cases in contexts other than employment law." Corbett, *supra* note 17, at 363-64.

31. *McDonnell Douglas*, 411 U.S. at 802.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.* at 803.

36. *Id.* at 804.

37. *Id.* at 805.

38. 450 U.S. 248 (1981).

39. *Burdine*, 450 U.S. at 252.

40. *Id.* at 250.

that the burden that shifts to the defendant after the plaintiff has met her prima facie burden is a burden of *production*.[41] "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason."[42] The Court further explained that:

> the defendant *need not* persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. . . . 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.[43]

At this point in the opinion, the Court engaged in a technical examination of what happens next under the framework.[44] The Court explained:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered explanation is unworthy of credence.[45]

It is this examination that caused confusion among the lower courts, and that ultimately warranted the Court's 1993 decision in *St. Mary's Honor Center v. Hicks*.[46]

The *McDonnell Douglas-Burdine* burden-shifting framework is as follows. A plaintiff must carry her prima facie burden of showing that the factors requisite for a discrimination case exist.[47] Upon carrying this requirement, the burden shifts to the defendant to show that legitimate, non-discriminatory reasons for its actions exist.[48] This, however, is merely a burden of production.[49] The defendant need not persuade the court that the proffered reasons were its actual motivation; the defendant need only rebut the presumption of discrimination that was created when

41. *See id.* at 255.
42. *Id.* at 254 (emphasis added).
43. *Id.* at 254-55 (emphasis added) (citation omitted).
44. *See id.* at 255-56.
45. *Id.* at 256 (emphasis added).
46. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). *See generally* Corbett, *supra* note 17, at 361 (examining the effect of the *Burdine* decision and the resulting *St. Mary's* decision).
47. *McDonnell Douglas*, 411 U.S. at 802.
48. *St. Mary's*, 509 U.S. at 506-07.
49. *See id.* at 507.

the plaintiff established her prima facie case.[50] Upon meeting the burden of production, the burden shifts back to the plaintiff, who must then either directly show that a discriminatory reason more likely was the true motivation, *or* indirectly show that the reasons presented by the defendant are a mere pretext to cover the defendant's true discriminatory motivations.[51]

This was the framework in employment discrimination cases for over a decade.[52]

C. St. Mary's Honor Center v. Hicks[53]

In this case, Melvin Hicks, a black man, was hired by St. Mary's Honor Center in 1978 and promoted to a supervisory position in 1980.[54] In 1983, St. Mary's conducted an administrative investigation that resulted in extensive personnel shifts, and while Hicks retained his position, two new supervisors were placed above him.[55] "Prior to these personnel changes [Hicks] had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions."[56] Following a suspension, letter of reprimand, and demotion, Hicks was fired for threatening his boss "during an exchange of heated words."[57] Hicks then brought suit alleging that St. Mary's had violated Title VII by "demoting and then discharging him because of his race."[58] The district court found for St. Mary's and the Eighth Circuit reversed.[59]

The Supreme Court used this opportunity to add a caveat to the *McDonnell Douglas-Burdine* framework: "although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"[60] The Supreme Court added the caveat because of the way that the district and circuit court analyzed the case below.[61] The district court "found that the reasons [St. Mary's] gave were not the real reasons for [Hicks'] demotion and discharge."[62] It "nonetheless held that [Hicks] had failed to carry his ultimate burden of proving that *his race* was the

50. *See id.*
51. *See id.* at 507-08.
52. *Burdine* was decided in 1981 and *St. Mary's* was decided in 1993. *Burdine*, 450 U.S. 248; *St. Mary's*, 509 U.S. 502.
53. 509 U.S. 502 (1993).
54. *St. Mary's*, 509 U.S. at 504.
55. *Id.* at 504-05.
56. *Id.* at 505.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 507 (quoting *Burdine*, 450 U.S. at 253).
61. *See id.* at 507-09 (comparing the analyses of the district and circuit court).
62. *Id.* at 508.

determining factor in [St. Mary's] decision to . . . dismiss him."[63] Thus, "although [Hicks] ha[d] proven the existence of a crusade to terminate him, he ha[d] not proven that the crusade was racially rather than personally motivated."[64] The Eighth Circuit reversed, holding that "[o]nce [Hicks] proved all of [St. Mary's] proffered reasons for the adverse employment actions to be pretextual, [Hicks] was entitled to judgment as a matter of law."[65] The Eighth Circuit came to this conclusion by reasoning that:

> [b]ecause all of defendant's proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.[66]

The Supreme Court rejected the Eighth Circuit's analysis with an emphatic, "that is not so."[67] The Court explained that the defendant's burden of production contains no credibility assessment, and that merely producing evidence tending to rebut plaintiff's contentions, regardless of weight, satisfies the burden of production.[68]

At this point, the Court analyzed what it *said* in *Burdine* versus what it *meant*.[69] The Court began by explaining that when it used the term "pretext" it meant "pretext for discrimination,"[70] and that "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."[71] So, at every point in *Burdine* where the Court mentioned "pretext," the reader is to understand it as "pretext for discrimination."[72]

Next, the Court explained what it meant when it said that after a defendant has proffered reasons for its decision, the plaintiff's burden to show that the proffered reasons are untrue "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[73] When the Court said "merges," it did not mean that "the ultimate burden of persuading the court that she has been the victim of intentional discrimination' is *replaced* by the mere burden of 'demonstrat[ing] that the proffered reason was not the true reason for the em-

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 508-09 (quoting Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492 (8th Cir. 1992)).
67. *Id.* at 509.
68. *See id.*
69. See *supra* notes 40-45 and accompanying text, for the disputed language from *Burdine*.
70. *St. Mary's*, 509 U.S. at 515-16.
71. *Id.* at 515.
72. *See id.* at 516.
73. *Id.* (quoting *Burdine*, 450 U.S. at 256).

ployment decision."[74] The Court meant "that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."[75]

Finally, the Court asserted that its statement in *Burdine*, that a plaintiff may prove intentional discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence,"[76] was inadvertent dicta,[77] and that disproof of a defendant's proffered reason is an auxiliary, rather than independent, means of proving unlawful discrimination.[78]

The final result of the *St. Mary's* decision is that a plaintiff must first prove her prima facie case under the framework established by *McDonnell Douglas*.[79] A light burden of production is then placed on the defendant to show evidence of non-discriminatory intent.[80] Regardless of the weight or credibility of this evidence, a plaintiff is entitled to a judgment only if the evidence, taken as true, would not allow the conclusion that there was a non-discriminatory rationale behind the adverse action *and* the plaintiff has proved her prima facie case by a preponderance of the evidence.[81] So, in addition to producing a prima facie case, and on top of showing that the defendant's reasons are mere pretext, a plaintiff must produce evidence that shows that discrimination *actually occurred*, because finding pretext is auxiliary to finding discrimination, not independent.[82]

Following the *St. Mary's* decision, it was unclear whether pretext alone could justify a verdict for the plaintiff because *Burdine* indicated that pretext alone was sufficient[83] and *St. Mary's* indicated that the statement in *Burdine* was "inadvertent dictum."[84]

D. Reeves v. Sanderson Plumbing Products, Inc.[85]

In 2000, the Supreme Court decided *Reeves* to resolve the ambiguities of the *St. Mary's* decision; specifically, the indications that "pretext-plus" was the standard in employment discrimination cases.[86] So, in *Reeves* the Court set out to determine "whether a defendant is entitled to

74. *Id.*
75. *Id.* at 517.
76. *Burdine*, 450 U.S. at 256.
77. *St. Mary's*, 509 U.S. at 518.
78. *Id.*
79. *See id.* at 506; *McDonnell Douglas*, 411 U.S. at 802 (discussing the *McDonnell Douglas* prima facie framework).
80. *St. Mary's*, 509 U.S. at 506-07.
81. *Id.* at 509.
82. *See id.* at 518.
83. *Burdine*, 450 U.S. at 256.
84. *St. Mary's*, 509 U.S. at 518.
85. 530 U.S. 133 (2000).
86. *See Reeves*, 530 U.S. at 137.

judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action."[87]

In 1995, plaintiff Roger Reeves was 57 and had worked for defendant Sanderson Plumbing Products for 40 years.[88] Reeves was responsible for recording the hours the people under his supervision worked and for reviewing weekly reports that listed the hours worked for each employee.[89] In the summer of 1995, Caldwell, Reeves's direct supervisor, informed Sanderson's executive officials that production was down in Reeves's department because employees under Reeves's supervision were often absent and coming in late and leaving early.[90] However, because Reeves's records indicated no problems, Sanderson executives ordered an audit of Reeves's department.[91] The investigation revealed that Reeves and his co-supervisors made "numerous timekeeping errors and misrepresentations."[92] Following the audit, Sanderson executives recommended that the company fire Reeves and one of his co-supervisors.[93]

Reeves filed suit, contending that he had been fired because of his age.[94] At trial, Sanderson argued that it "fired [Reeves] due to his failure to maintain accurate attendance records."[95] Reeves attempted to demonstrate that Sanderson's explanation was pretext for age discrimination by introducing evidence that his records were accurately maintained and, further, that his immediate supervisor had "demonstrated age-based animus" in his dealings with Reeves.[96]

The district court, after twice denying Sanderson's motions for judgment as a matter of law, instructed the jury that "if the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant."[97] The jury "found that [Sanderson's] age discrimination had been 'willfu[l]'" and returned a verdict for Reeves.[98] The district court then entered judgment

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 138 (quoting Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 690 (5th Cir. 1999)).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 138-39.
98. *Id.* at 139 (alteration in original) (quoting *Reeves*, 197 F.3d at 691).

for Reeves in the amount of $70,000, including "$35,000 in liquidated damages based on the jury's finding of willfulness."[99]

The Fifth Circuit reversed, holding that Reeves "had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination."[100] The Fifth Circuit noted that Reeves may have presented sufficient evidence for a finding of pretext, but that pretext alone was not sufficient to resolve the ultimate issue of whether Reeves presented evidence sufficient to show that age was the motivating factor in Sanderson's employment decision.[101]

The Supreme Court reversed the Fifth Circuit, noting that the circuit court "misconceived" the *St. Mary's* decision in reversing the district court.[102] In fact, the Court spent two pages explaining what it meant when it decided *St. Mary's*.[103] The Court started by stating that it "held that the fact-finder's rejection of the employer's legitimate, nondiscriminatory reasons for its action does not *compel* judgment for the plaintiff."[104] The Court continued: "In other words, '[i]t is not enough . . . to *dis*believe the employer, the fact-finder must *believe* the plaintiff's explanation of intentional discrimination.'"[105] To get to "this conclusion, however, [the Court] reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."[106] The Court noted:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[107]

The Court then resolved the *St. Mary's* ambiguity by concluding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[108] Resting on this analysis, the Court held that "because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 146.
103. *See id.* at 146-48.
104. *Id.* at 146.
105. *Id.* at 147 (quoting *St. Mary's*, 509 U.S. at 519).
106. *Id.*
107. *Id.*
108. *Id.* at 148.

premise that a plaintiff must always introduce additional, independent evidence of discrimination."[109]

The ambiguity of the *St. Mary's* decision has been resolved, and a finding that the employer's justification was a pretext, combined with prima facie evidence, is sufficient for a jury to find in favor of a plaintiff.[110] The split that now exists between the circuits is over whether the jury should be informed that a finding of pretext (assuming the plaintiff has met her prima facie burden) is sufficient to find in favor of the plaintiff.[111]

II. THE TENTH CIRCUIT: REQUIRING A JURY INSTRUCTION INDICATING THAT INFERENCE OF DISCRIMINATION BASED ON PRETEXT IS ALLOWED

A. *Tenth Circuit:* Townsend v. Lumbermens Mutual Casualty Co.[112]

Prior to the *Townsend* decision, the Tenth Circuit had not dealt specifically with whether to require a pretext jury instruction in employment discrimination cases.[113] *Townsend* is the focus of this survey because of its holding that a pretext jury instruction is required in employment discrimination cases that involve circumstantial evidence.[114] *Townsend* aligns the Tenth Circuit with the Second and Third Circuit in holding that a pretext jury instruction is *required* in circumstantial evidence employment discrimination cases.[115]

1. Facts

John Townsend began working for defendant Lumberman's Mutual Casualty Company in 1986.[116] Over the course of eleven years, Townsend, a black man, enjoyed numerous merit raises and performance bonuses.[117] Citing Townsend's "poor performance," the defendant began demoting Townsend, and then nine months later fired him.[118] Townsend's supervisor "informed Townsend that he could either resign or be demoted to . . . a non-management position."[119] Townsend accepted the demotion, and a white female, Maureen O'Connor, filled his management position.[120] Eight months later, O'Connor terminated Townsend.[121]

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109. *Id.* at 149.
110. *Id.*
111. *Townsend*, 294 F.3d at 1237-39.
112. 294 F.3d 1232 (10th Cir. 2002).
113. *Townsend*, 294 F.3d at 1237.
114. *See id.* at 1241.
115. *Id.*; Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280-81 (3d Cir. 1998); Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994).
116. *Townsend*, 294 F.3d at 1234.
117. *See id.* at 1232, 1234.
118. *Id.* at 1234.
119. *Id.* at 1235.
120. *Id.*
121. *Id.* at 1236.

Townsend filed an action in which he alleged that "he had been demoted and ultimately fired because of his race . . . and that he had been retaliated against for complaining of race discrimination."[122] He argued that even though he objectively outperformed Chris Gold, a white man who held a similar position, Gold was made eligible for a promotion and Townsend was not.[123] Further, Townsend contended that he was criticized by his supervisor for "giving favorable treatment to black subordinates."[124] The defendant maintained that Townsend was fired because he "failed to increase sales in his territory" and "failed to show up on time for scheduled meetings."[125]

The case went to a jury, which returned a verdict in favor of the defendant.[126] Townsend "filed a motion for a new trial on the grounds that the district court had erred in refusing to instruct the jury on the issue of pretext."[127] The district court denied the motion.[128]

2. Decision

The Tenth Circuit's primary motivation for overruling the district court was the high likelihood that a jury would be unable to correctly apply facts without a jury instruction.[129] The Tenth Circuit noted that even after the Supreme Court resolved the circuit split over "pretext-plus" in *St. Mary's*, federal courts were still not awarding verdicts to plaintiffs in pretext cases.[130] Rather than trust juries to reach the correct conclusion on their own in complex employment discrimination pretext cases, the Tenth Circuit decided to require a pretext jury instruction in circumstantial evidence cases.[131] After examining decisions in other circuit courts, the Tenth Circuit believed that the critical issue was "whether in the absence of any instructions about pretext, 'the jury found for the defendant because it believed the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment decisions.'"[132] Persuaded that juries were being led astray, the Tenth Circuit held that "in cases such as this, a trial court *must in-*

122. *Id.* at 1233.
123. *Id.* at 1234.
124. *Id.*
125. *Id.*
126. *See id.* at 1233.
127. *Id.*
128. *Id.*
129. *See id.* at 1241 ("[T]his is a difficult matter for the courts, and would certainly be difficult for a jury. We consider the danger too great that a jury might make the same assumption that the Fifth Circuit did in *Reeves* [*v. Sanderson Plumbing Prods., Inc.*, 197 F.3d 688 (5th Cir. 1999), that finding that the defendant's explanation was a pretext was not a sufficient basis for a finding in favor of the plaintiff].").
130. *Id.* at 1240-41. "Pretext plus" was a theory that said that "a jury's rejection of an employee's proffered explanation could not, by itself, suffice to show discriminatory motive." *Id.* at 1240.
131. *Id.* at 1241.
132. *Id.* (quoting Brief of Amici Curiae Equal Employment Opportunity Commission at 10, Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002) (No. 00-3055)).

struct jurors that if they disbelieve an employer's proffered explanation they may--but need not--infer that the employer's true motive was discriminatory."[133]

The Tenth Circuit's holding in *Townsend* indicates that if a plaintiff meets her prima facie burden, a jury may infer discrimination if the employer is unable to convince the jury of a legitimate, non-discriminatory rationale.[134] More importantly, the Tenth Circuit now requires that a jury *must be informed* that they are allowed to infer discriminatory animus from the circumstances alone.[135]

B. Other Circuits: No Pretext Jury Instruction Required

1. First Circuit: *Fite v. Digital Equipment Corp.*[136]

a. Facts

Plaintiff David Fite was fired after twenty years of employment with the defendant, Digital Equipment Corporation, because of "substandard" performance.[137] Fite filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that he was discharged because of his age, 53, and disability, a chemical dependence on cocaine.[138]

In the district court a jury found against Fite on his discrimination and retaliation claims.[139] The jury was not given a pretext instruction.[140]

b. Decision

On appeal Fite argued that "the jury should have been told affirmatively that a *prima facie* case, coupled with finding of pretext, would permit the jury to infer discrimination."[141] The First Circuit held that "while permitted, we doubt that such an explanation is compulsory."[142] The First Circuit is thus in *alignment* with *Reeves*: "'[T]he falsity of the employer's explanation' may permit the jury to infer a discriminatory motive but does not compel such a finding."[143] So, despite being aligned with the Supreme Court by allowing inference of discrimination based on pretext, a pretext jury instruction is not mandated in the First Circuit.[144]

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133. *Id.* (emphasis added).
134. *See id.*
135. *See id.*
136. 232 F.3d 3 (1st Cir. 2000).
137. *Fite*, 232 F.3d at 4-5.
138. *Id.*
139. *Id.* at 5.
140. *See id.* at 7.
141. *Id.*
142. *Id.*
143. *Id.* (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)).
144. *See id.*

2. Seventh Circuit: *Gehring v. Case Corp.*[145]

a. Facts

Plaintiff Dale Gehring was discharged in a general lay-off scheme during a downsizing.[146] Gehring contended that his age, 52, was the determinative factor in defendant Case Corporation's decision to fire him.[147] The jury found in favor of the defendant, and Gehring appealed and requested a new trial, arguing that the instructions given to the jury were inadequate.[148]

b. Decision

The Seventh Circuit affirmed the district court's ruling, concluding that the *McDonnell Douglas* burden-shifting framework applies *exclusively* to pretrial proceedings and "not to the jury's evaluation of evidence at trial."[149] The court continued its analysis with the proposition that pretext *itself* is not an element to be examined:

> Once the judge finds that the plaintiff has made the minimum necessary demonstration (the 'prima facie case') and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question--the *only* question the jury need answer--is whether the plaintiff is a victim of intentional discrimination.[150]

Thus, in the Seventh Circuit, not only is a pretext instruction not allowed, but an inquiry into pretext itself is impermissible outside of pretrial motions.[151]

3. Seventh Circuit: *Russell v. Acme-Evans Co.*[152]

a. Facts

Plaintiff John Russell, a 59-year old black man, was hired by the Acme-Evans Company in 1975, and from 1977 to 1990 Russell worked as "mill sweeper," a job that he enjoyed and that was considered light work.[153] By 1990, Russell had worked at the plant longer than anyone else.[154] In 1990, new supervisors, who were white, began giving Russell "warnings for failing to wash his hands and for other infractions of work

145. 43 F.3d 340 (7th Cir. 1994).
146. *Gehring*, 43 F.3d at 342.
147. *Id.*
148. *Id.* at 342-43.
149. *Id.* at 343.
150. *Id.*
151. *See id.* at 344.
152. 51 F.3d 64 (7th Cir. 1995).
153. *Russell*, 51 F.3d at 66.
154. *Id.*

rules."[155] In 1992, when Russell was 59 years old, the management transferred Russell from mill sweeper to "skid wrapper," "a more strenuous and monotonous job."[156] Russell claimed that "he was transferred to make room for a young white man who wanted to be 'downgraded' from assistant miller to mill sweeper."[157] Soon after Russell was transferred, he applied for the vacant assistant miller position, "but was turned down in favor of a young white man."[158] In 1993, Russell applied to work "overtime as a member of the blow-down crew,'" a four person group that cleans the grain elevator.[159] Again, Acme declined Russell's application, "giving the opportunity for overtime work to a younger white man."[160]

Russell contended that the denial of the blow-down opportunity, his transfer to skid wrapper, and the denial of his application for the assistant miller position were motivated by race and age discrimination.[161] Acme offered several nondiscriminatory reasons for its actions.[162] First, Acme contended that Russell was transferred to skid wrapper because, "in light of his disciplinary infractions, he required closer supervision than was feasible for a sweeper."[163] Second, he "had been turned down for the assistant miller job because he was not trained for it and the white man who was given the job 'demonstrated mechanical aptitude' and 'worked well with others.'"[164] Further, Acme noted that they offered the assistant miller job to a black man "before the white man, but [he] had turned it down."[165] Finally, Acme contended that Russell was turned down for the blow-down crew because Russell was already working a substantial amount of overtime and "because at 190 pounds he was too heavy" for one of the crew's critical positions.[166] The district court granted summary judgment in favor of Acme.[167]

b. Decision

In its decision, the Seventh Circuit noted that "the only evidence submitted in opposition to the employer's motion for summary judgment is the plaintiff's own testimony,"[168] and that the evidence "required to contradict the employer's evidence is rarely within the plaintiff's compe-

155. *Id.*
156. *Id.* at 67.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *See id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 68.

tence to give."[169] Russell insisted that his claim should go to a jury, hoping that a jury would infer discriminatory animus from the employer's pretextual reasons for its actions.[170] The Seventh Circuit, however, affirmed the district court, concluding that a jury trial was not necessary because "[i]n the face of Acme-Evans' uncontested grounds for transferring Russell, and with no evidence that Acme-Evans' true motivation was racial, no reasonable jury could infer from doubt . . . that the true motivation was indeed race."[171] The circuit court went on to state: "There is no basis for confidence that the defendant did *not* discriminate against Russell on account of his race and age; it is simply that Russell has not presented enough evidence . . . to withstand the company's motion."[172] Finally, the court stated, "[T]here is nothing in our power to do that would lighten the burden of the employee without depriving the employer of procedural rights."[173]

4. Seventh Circuit: *Hill v. Burrell Communications Group, Inc.*[174]

a. Facts

In this case, the plaintiff, Sandra Hill, was fired from her position as Director of Print Production at Burrell Communications Group.[175] Burrell contended that the reason it fired Hill was "decline in print production volume" and necessary "personnel cutbacks."[176] However, Hill, a white woman, contended that Burrell, an advertising agency with a focus on minority markets and primarily minority employees, fired her based on reverse discrimination.[177] Hill filed suit.[178] To back her contention, Hill introduced evidence at trial that shortly after her departure, Burrell hired Roxanne Hubbard, a black woman, for the position of Print Production Supervisor, with substantially the same responsibilities as Hill, even though Burrell said that it had eliminated her position.[179] Hill also introduced evidence of a conversation in which her supervisor stated to Burrell's personnel administrator, "I believe I found a minority candidate to replace Sandra."[180]

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169. *Id.*
170. *See id.*
171. *Id.* at 70.
172. *Id.* at 70-71.
173. *Id.* at 71.
174. 67 F.3d 665 (7th Cir. 1995).
175. *Hill*, 67 F.3d at 666.
176. *Id.*
177. *See id.*
178. *Id.*
179. *See id.* at 667.
180. *See id.* This is a situation where the plaintiff did introduce some direct evidence (what the supervisor said). However, this case falls under the indirect or circumstantial evidence rubric, and is an example of why the "circumstantial evidence," rather than "indirect evidence" label, is more appropriate and less confusing.

The district court granted Burrell's motion for summary judgment "on the ground that plaintiff's position was eliminated and her employment was terminated because of a steady decline in print production business."[181] "[T]he district Judge stated that Hill had not presented sufficient evidence to demonstrate that Burrell's proffered legitimate reason for firing her was pretextual."[182]

b. Decision

The Seventh Circuit affirmed.[183] The court concluded, first, that the supervisor's ambiguous statement to Burrell's personnel administrator could not lead a reasonable fact-finder to conclude that the statement "reveals a discriminatory intent."[184] Second, the court did not find Burrell's hiring of Roxanne Hubbard convincing because "the evidence shows that Hubbard's duties as supervisor were not identical to Hill's duties as director."[185] Therefore, "Hubbard was not given Hill's position but instead received the lesser title and duties of Print Production Supervisor with a lower salary than Hill."[186] The Seventh Circuit concluded, despite circumstantial evidence to the contrary, that Hill had "presented no evidence to contradict defendant's showing that the desire to reduce costs motivated Hill's termination."[187]

5. Eighth Circuit: *Moore v. Robertson Fire Protection District*[188]

a. Facts

The Robertson Fire District was seeking a fire chief.[189] A total of nineteen individuals submitted applications, and, after reviewing resumes, the fire district selected a few individuals for interviews, one of whom was black.[190] Cornelius Moore, a black man, was not selected for an interview.[191] Moore initiated an action "after discovering that the board had hired David Tilley, a white man who did not meet many of the requirements placed in the ad."[192]

The jury instructions submitted by the district court were as follows: "Your verdict must be for Plaintiff . . . and against Defendant . . . on Plaintiff's claim of race discrimination if all the following elements have been proved by the greater weight of the evidence: [f]irst, Defendant

181. *Id.*
182. *Id.*
183. *Id.* at 670.
184. *Id.* at 669.
185. *Id.*
186. *Id.* at 670.
187. *Id.*
188. 249 F.3d 786 (8th Cir. 2001).
189. *Moore*, 249 F.3d at 787.
190. *Id.*
191. *Id.*
192. *Id.* at 788.

failed to hire plaintiff; and [s]econd, Plaintiff's race was a motivating factor in Defendant's decision."[193] Moore requested that a pretext instruction be added to "motivating factor."[194] His suggested instruction read: "You may find that Plaintiff's race was a motivating factor in defendant's decision not to hire plaintiff, if it has been proved by a greater weight of the evidence that Defendant's stated reasons for its decision are not the true reason, but are a "pretext' [sic] to hide discriminatory motivation."[195] The district court rejected Moore's proposed instructions and he appealed, claiming that the refusal was an error.[196] Moore argued "that the omission of this instruction impermissibly prevented the jury from considering whether the Fire District's reasons for not interviewing and hiring him were a pretext for race discrimination."[197]

b. Decision

The Eighth Circuit affirmed the district court's decision because "[t]he instructions provided by the District Court presented the proper legal standard for the jury's consideration, namely, whether Moore's race was a motivating factor in his non-selection."[198] The Eighth Circuit, however, is not averse to pretext in general.[199] The court noted that "[i]n deciding the 'motivating factor' question, the jury was free to consider Moore's evidence of pretext,"[200] and "although the District Court elected not to submit a pretext instruction, it in no way prevented Moore from presenting his pretext arguments to the jury."[201]

6. Eleventh Circuit: *Palmer v. Board of Regents*[202]

a. Facts

Judy Palmer was a temporary assistant professor at Kennesaw State University.[203] She applied for a permanent position in the foreign language department, but was not selected.[204] Palmer then filed suit, contending that the University did not hire her because she was Jewish.[205] Palmer sought to introduce evidence tending to show that the University's proffered reasons were pretextual; specifically, she wanted a witness to testify that "two members of the search committee had stated that hiring [Palmer] could be problematic because she was Jewish and her

193. *Id.* at 789.
194. *Id.*
195. *Id.*
196. *Id.* at 788-89.
197. *Id.* at 789.
198. *Id.*
199. *Id.* at 791.
200. *Id.* at 789.
201. *Id.* at 791.
202. 208 F.3d 969 (11th Cir. 2000).
203. *Palmer*, 208 F.3d at 971.
204. *Id.* at 971-72.
205. *Id.* at 972.

husband was a lawyer."[206] The district court did not allow this testimony.[207]

At trial, Palmer submitted a jury instruction that "specifically explicated that if the jury found that the reasons offered by the University System to justify its hiring decision were pretextual, it would be authorized to find intentional religious discrimination on the part of the University System."[208] The court declined to give Palmer's instruction, and the jury found in favor of the University.[209]

b. Decision

On appeal, Palmer argued that the jury instructions used by the district court were "not properly balanced because 'the jury was not specifically informed that it was authorized to find for the Plaintiff without any additional evidence of discrimination.'"[210] The Eleventh Circuit did not accept this contention, explaining:

> The argument that the jury may draw a permissible inference of intentional religious discrimination if it disbelieves the University System's stated reason for not hiring Palmer is a logical extension of our prior decisions . . . that the jury is entitled to infer discrimination from pretext.
>
> However, in this case, we cannot say that the trial court erred in its instructions to the jury.[211]

C. Other Circuits: Pretext Jury Instruction Required

1. Second Circuit: *Cabrera v. Jakabovitz*[212]

a. Facts

A landlord, Jakabovitz, was suspected of employing discriminatory practices in evaluating applicants for his apartment complexes.[213] In sum, white people inquiring about housing were given applications and tours, while members of minority groups who inquired about the same apartments were told there were no openings or, alternatively, were steered towards neighborhoods composed primarily of minorities.[214] The jury

206. *Id.*
207. *See id.*
208. *Id.* at 972-73.
209. *Id.* at 973.
210. *Id.*
211. *Id.* at 974-75.
212. 24 F.3d 372 (2d Cir. 1994).
213. *Cabrera*, 24 F.3d at 378.
214. *Id.* at 377-79.

found in favor of the plaintiffs, concluding that Jakabovitz discriminated against two minority applicants in violation of Title VII.[215]

b. Decision

The Second Circuit stated that if a defendant produces evidence to rebut a plaintiff's prima facia case, the members of the jury must be instructed that they are entitled to infer that the plaintiff has met his burden of proving discrimination if they disbelieve the defendant's rebuttal.[216] On appeal, Jakabovitz argued that "the [c]ourt erred in instructing the jury that he bore the burden of establishing that race played no role in his decision not to show an apartment to the African-American or Latino tester."[217] The district court had given the following jury instruction:

> [A] defendant must establish that his decision not to offer an available apartment to plaintiff was based completely on considerations other than race or national origin, that is[,] the defendant must show that race played no role whatsoever in his decision not to afford the plaintiff access to an available apartment.[218]

The Second Circuit concluded that the lower court's instruction was erroneous.[219] The Second Circuit found, however, that "[b]ecause of the [district] [c]ourt's extensive and repeated instructions that the plaintiff bore the burden of proving discrimination . . . the jury could not have been led astray by the [c]ourt's brief comment to the contrary."[220]

2. Second Circuit: *Zimmermann v. Associates First Capital Corp.*[221]

a. Facts

Associates Financial Services Company ("AFSC") hired Deborah Zimmermann in 1996 as a Business Development Director.[222] During her employment, Zimmermann "worked out of her home, faxing weekly progress reports" to her supervisor.[223] In April 1997, ASFC hired Stephen Haslam to be Zimmermann's new supervisor.[224] Haslam expected a different, "more proactive," work product, and Zimmermann's duties became more involved and less independent.[225] Zimmermann worked for Haslam for less than two months, and "[o]n Haslam's fifty-

215. *Id.* at 379.
216. *Id.* at 382.
217. *Id.* at 383.
218. *Id.* (alterations in original).
219. *Id.*
220. *Id.* at 384.
221. 251 F.3d 376 (2d Cir. 2001).
222. *Zimmerman*, 251 F.3d at 378.
223. *Id.*
224. *Id.*
225. *See id.*

first day, he fired Zimmermann."[226] She "testified that when she asked Haslam to explain why she was being fired, he insisted that it 'had nothing to do with [her] performance,' but explained instead that she 'didn't have a good relationship' with . . . one of her supervisors."[227] However, that supervisor "did not speak with Haslam about Zimmermann prior to her firing."[228] Further, Haslam entered "inferior performance" as the reason for Zimmermann's firing on her last payroll entry.[229]

Zimmermann, however, "had exceeded her goals for the second quarter of 1997" by about six percent.[230] Additionally, the first time Zimmermann met Haslam face-to-face was when she was fired, and she "had never received any warnings or criticism of her performance from Haslam or any other supervisors prior to being fired."[231] Further, Zimmermann was 49 when she was fired and she "was replaced by Stephen Mitchell, a slightly younger male."[232] Then, "a week after firing Zimmermann, Haslam recommended the termination of another of the three female Business Development Directors."[233] During that same time period, no male Business Development Directors were fired.[234]

"Zimmermann filed a charge with the EEOC, alleging that she was terminated because of her sex and age."[235] The jury, after receiving a pretext jury instruction, returned a verdict for Zimmermann on her gender discrimination claim, "awarding $165,000 in back pay, $50,000 in compensatory damages, and $1,000,000 in punitive damages."[236] The district court reduced the damages and entered judgment for Zimmermann "in a total amount of $452,979."[237]

b. Decision

The Second Circuit framed the issue this way:

> The evidence in this case plainly permitted the jury to infer that the Defendant's proffered reason for her discharge--deficient work performance--was pretextual. Therefore, the issue as to the sufficiency of the evidence is whether the record as a whole, including whatever reasonable inference the jury could draw from the proffer

226. *Id.* at 379.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 380.
236. *Id.*
237. *Id.* at 383.

> of a false reason for the discharge, permitted the required ultimate finding of discrimination.[238]

The court also noted that "only occasionally will a *prima facie* case plus pretext fall short of the burden a plaintiff carries to reach a jury on the ultimate question of discrimination."[239] In this light, the court affirmed the jury's finding of discrimination based on pretext.[240]

Zimmerman presented evidence that she was fired for reasons that Haslam could not explain.[241] She further showed that Haslam had demonstrated discriminatory animus against other female employees by recommending their termination.[242] There was only circumstantial evidence of discrimination in this case. However, in the Second Circuit, this was deemed sufficient to support a finding of discrimination.[243]

3. Third Circuit: *Smith v. Borough of Wilkinsburg*[244]

a. Facts

Edward Smith alleged that his age, 61, was the dispositive factor in his employer's decision not to renew his employment contract.[245] In 1989, Smith was hired as Borough Manager of Wilkinsburg under a five-year employment contract.[246] At the expiration of that contract, the Borough informed Smith that it would not renew his contract, "but that he was welcome to reapply for the job along with other applicants."[247] Smith informed "several council members that he was interested in retaining his position, [but] he did not formally submit an application."[248] After the Borough hired Thomas Leach, age 37, Smith applied in writing for the Borough Manager position.[249]

When Smith brought suit, the Borough first defended itself by contending that Smith's "performance on the job had been inadequate."[250] However, the Borough changed its position after Smith introduced evidence that the Borough had never previously criticized Smith's job performance and Smith showed that "the fiscal health of the Borough had improved markedly during his tenure."[251] Instead, the Borough explained

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238. *Id.* at 381.
239. *Id.* at 382 (quoting Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir. 2001).
240. *Id.*
241. *See id.* at 379-80.
242. *See id.* at 379.
243. *See id.* at 381-82.
244. 147 F.3d 272 (3d Cir. 1998).
245. *Wilkinsburg*, 147 F.3d at 274.
246. *Id.* at 275.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*

"that it did not renew Smith's contract because Smith had not timely applied for the position."[252]

At trial, Smith "requested that the court instruct the jury that it could infer intentional discrimination if it found the Borough's reasons for not renewing the contract to be false or not credible."[253] The district judge "denied Smith's request . . . stating: '[I]t is error for me to instruct on that . . . for me to give a pretext instruction would be an error, simple as that.'"[254] The jury returned a verdict in favor of the Borough.[255]

b. Decision

On appeal, the Third Circuit engaged in an extensive analysis of the necessity of a pretext jury instruction.[256] The court noted that "a finding of pretext was a permissible basis for a verdict of discrimination."[257] Based on this foundation, the Third Circuit stated:

> [W]e join the Second Circuit in holding that the jurors *must* be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision.[258]

In addition, the Third Circuit explained that under the district court's jury instruction:

> [T]he juror's who found no evidence fitting the examples of circumstantial evidence . . . , but who disbelieved the employer's explanation[,] could reasonably conclude that there was no evidence on which they would be permitted to base a plaintiff's verdict. This conclusion would . . . be incorrect as a matter of law.
>
> . . . .
>
> Without a charge on pretext, the course of the jury's deliberations will depend on whether the jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from the evidence establishing plaintiff's prima facie case and the pretextual nature of the employer's proffered reasons for its action. It does not denigrate the intelligence of our jurors to suggest that they

252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *See id.* at 278-81.
257. *Id.* at 279.
258. *Id.* at 280 (emphasis added).

need some instruction in the permissibility of drawing that inference.[259]

III. ANALYSIS: A JURY WILL NOT INFER DISCRIMINATION FROM PRETEXT IF IT IS NOT INSTRUCTED THAT IT IS ALLOWED TO DO SO

A pretext jury instruction is important for two reasons. First, the importance of the pretext jury instruction lies in the rationale for employment law itself. Employment law is designed, in part, to protect employees from arbitrary and capricious treatment by their employers.[260] A pretext jury instruction furthers this rationale. Discharged employees are generally in a position where they are unable to produce direct evidence of discrimination.[261]The only evidence an employee is likely to have is circumstantial, as when the circumstances of the firing, combined with prior treatment of the employee, indicate that the employer had an improper motive.[262] As such, a pretext instruction to the jury puts a disadvantaged employee on equal footing with the employer—filling in gaps that the employee is simply unable to produce evidence to fill.

Second, only employers are in the position to know the true reasons an employee was fired. Employers generally do not arbitrarily fire their employees.[263] Their motivation to avoid precisely these types of lawsuits is the impetus behind keeping extensive performance records, recording meetings and phone calls, and constantly informing the employee of her status. When a frivolous employment discrimination case arises, employers should have more than the necessary evidence to show legitimate reasons for firing the employee. It is in the cases where the employer cannot produce such evidence that an air of suspicion arises. When an employer is faced with an employment discrimination lawsuit brought by an employee that has little or no direct evidence, and the employer is *unable* to convince a jury of legitimate reasons for firing the employee,

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259. *Id.* at 280-81.

260. Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. § 2000e to e-17 (2000), the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (2000), and the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621-634 (2000), are examples of federal laws that prevent discriminatory practices by employers.

261. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998); Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of discrimination is hard to come by"). In *Wilkinsburg*, the plaintiff's evidence consisted of improved fiscal health of the Borough during his term as Borough Manager, the absence of negative job performance ratings, and the fact that plaintiff's replacement was nearly half plaintiff's age. *Wilkinsburg*, 147 F.3d at 275.

262. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993).

263. An employer should be thoroughly aware of the repercussions of discriminatory activity in their firing of employees. An aggrieved employee can resort to Title VII, ADA, and ADEA if they feel they have been wrongfully discharged. Facing such ammunition, an employer has ample impetus to defend himself against an employment discrimination lawsuit. Therefore, an intelligent employer will keep voluminous records of its dealings with employees to combat any charges of employment discrimination.

the logical inference is that the employer had illegitimate motives. A pretext instruction is an extension of that logical inference.

That logical inference is why pretext instructions have such a critical effect. When a jury is wary of an employer's proffered reasons for firing the plaintiff, it is likely that those proffered reasons are illegitimate. A pretext instruction to the jury is critical because, without it, the members of a jury may be unaware that they are allowed to find for the plaintiff where the plaintiff's evidence is circumstantial, even though the employer's evidence is suspicious or unconvincing. Pretext instructions will help a plaintiff where it is likely that the plaintiff was discriminated against. Conversely, the pretext instruction will have no effect where the employer had a legitimate reason to fire the employee, backed by direct evidence, which is within the employer's competence to give.

The cases in this survey show the critical effect of a pretext jury instruction. When a jury is informed that it is permissible to make an inference of discrimination based on pretext, it finds for the plaintiff.[264] In similar factual situations in other circuits where the jury is not given a pretext instruction, the jury finds for the defendant.[265] The logical inference is that plaintiffs will prevail in circumstantial evidence cases in the Second, Third, or Tenth Circuit where they would not in the First, Seventh, Eighth, or Eleventh Circuit. Thus, whether a pretext jury instruction is given is critical in determining the outcome of circumstantial evidence employment discrimination cases. This is in light of the fact that the burden-shifting framework in employment discrimination cases is uniform throughout the circuits.[266]

The following are two jury instructions used in employment discrimination cases involving circumstantial evidence. The instruction below was used in the Eighth Circuit, which disfavors giving pretext jury instructions:[267]

> Your verdict must be for the plaintiff . . . and against defendant . . . on plaintiff's claim of race discrimination if all of the following elements are proved by the greater weight of the evidence: [f]irst, de-

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264. Townsend v. Lumbermens Mut. Cas., Co., 294 F.3d 1232, 1242-43 (10th Cir. 2002); Zimmermann v. Assocs. First Capital Corp., 251 F.3d 376, 383-84 (2d Cir. 2001); *Wilkinsburg*, 147 F.3d at 281; Cabrera v. Jakabovitz, 24 F.3d 372, 383-84 (2d Cir. 1994).

265. Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789 (8th Cir. 2001); Palmer v. Bd. of Regents of the Univ. Sys., 208 F.3d 969, 975 (11th Cir. 2000); Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995); Hill v. Burrell Comm. Group, Inc., 67 F.3d 665, 670 (7th Cir. 1995); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994).

266. When and how the burden-shifting framework is used is subject to some controversy. The Seventh Circuit relegates the framework exclusively to pretrial proceedings. *Gehring*, 43 F.3d at 343. The majority of the circuits, including the Tenth Circuit, utilize the burden-shifting framework throughout the employment discrimination trial. *See Townsend*, 294 F.3d at 1240. The framework itself, however, is uniform throughout the Circuits because the Supreme Court set forth the framework in *St. Mary's* and *Reeves*.

267. *See Moore*, 249 F.3d at 789.

> fendant failed to hire plaintiff; and [s]econd, Plaintiff's race was a motivating factor in Defendant's decision. If either of the above elements has not been proved by the greater weight of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim.[268]

Compare the above instruction to the following instruction that was given by the Tenth Circuit in *Townsend*, and is a standard pretext instruction:

> You may find that plaintiff's race was a motivating factor in defendant's decision to demote or discharge plaintiff if it has been proved by a preponderance of the evidence that defendant's stated reason(s) for its decision are not the true reasons, but are a "pretext" to hide discriminatory motivation.[269]

Both of these instructions are *legally* correct.[270] They are both adequate representations of the law under *Reeves* and *St. Mary's*. However, for the cases that follow, imagine the result had the opposite instruction been given.[271]

Recall *Russell v. Acme-Evans Co.*, discussed above.[272] In that case, had a jury been allowed to decide whether Russell had been discriminated against, it would have been faced with three different situations where Russell had been transferred or denied a position in favor of a younger white man.[273] The jury would also have considered Acme's proffered reasons for its treatment of Russell in light of the racial trend. Had this case been tried in the Second, Third, or Tenth Circuit, and had the jury been instructed on an allowed inference of pretext, Russell might have prevailed.

The Seventh Circuit held, however, that Russell had not produced sufficient evidence to show discriminatory animus.[274] The court also stated that the evidence *required* to rebut an employer's proffered reasons is not within a plaintiff's competence to give.[275] From this paradox the Seventh Circuit concluded that "there [was] nothing in their power"

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268. *Id.*

269. *Townsend*, 294 F.3d at 1236-37. This was the jury instruction that Townsend proposed, and that was rejected by the District Court, but found sufficient by the Tenth Circuit. *Id.*

270. Under the Supreme Court's holding in *Reeves*, it is permissible for the trier of fact to infer discrimination based on pretext, but such inference is not compulsory. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-47 (2000). Thus, instructing the jury about pretext or refraining from giving the instruction both adhere to the *Reeves* precedent.

271. The jury in *Moore* was given the first example instruction and found for the defendant. *Moore*, 249 F.3d at 789. The Tenth Circuit was convinced that had the jury been given the second instruction in *Townsend* that the jury would have found in favor of the plaintiff. *Townsend*, 294 F.3d at 1236-37.

272. 51 F.3d 64 (7th Cir. 1995).

273. *Russell*, 51 F.3d at 67.

274. *See id.* at 71.

275. *See id.* at 68.

to alleviate this burden on a plaintiff.[276] There is a resolution to this problem: give the case to a jury and let a jury decide whether an employer discriminated against an employee.

Compare *Zimmerman v. Associates First Capital Corp.*,[277] a Second Circuit case, to *Russell*. In *Zimmerman*, the plaintiff, Zimmerman, prevailed using exclusively circumstantial evidence. She showed a pattern of sex discrimination by her employer and ambiguous and contradictory statements made by her immediate supervisor.[278] The evidence Russell presented against Acme was at least as probative as what was presented by Zimmermann. While there are factual differences between the cases, it appears that the determinative factor in the divergent results is whether the jury was given a pretext instruction.[279] Russell probably would have prevailed had he been able to remove his case from the Seventh Circuit to the Second, Third, or Tenth Circuit.

Next, recall *Hill v. Burrell Communications Group, Inc.*,[280] another Seventh Circuit decision. The Seventh Circuit's conclusion in *Hill* is precisely why the issue of pretext must be given to a jury. Hill introduced circumstantial evidence that Burrell's actions were discriminatory. Hill showed that she, a white woman, was fired in a general downsizing scheme, but was replaced by a member of a minority group to do substantially the same job.[281] She next introduced a statement by her supervisor that showed she was to be replaced by a minority candidate.[282] Finally, the type of work Burrell engaged in, advertising in minority markets,[283] provided a motive for firing Hill. Burrell responded by offering a reason why Hill was fired.[284] In the Second, Third, and Tenth Circuit, the jury would have been allowed to judge the credibility of each party's explanation. Further, the jury would have been instructed that if it found that the plaintiff satisfied her prima facie burden, and if it disbelieved Burrell's proffered reasons, it would be allowed to find for the plaintiff. This is why the outcome of the case probably would have been different had it been brought in one of those circuits.

Finally, recall *Palmer v. Board of Regents*.[285] Again, imagine the result had Palmer's claim been brought in the Tenth Circuit. Palmer ap-

276. *Id.* at 71.
277. 251 F.3d 376 (2d Cir. 2001).
278. *Zimmerman*, 251 F.3d at 379.
279. *Compare Russell*, 51 F.3d at 67-8, *with Zimmermann*, 251 F.3d at 379. In Russell's case the district court did not allow the claim to even reach the jury; the court granted summary judgment in favor of the employer. *Russell*, 51 F.3d at 67.
280. 67 F.3d 665 (7th Cir. 1995).
281. *Hill*, 67 F.3d at 667.
282. *Id.*
283. *See id.* at 666.
284. *See id.*
285. 208 F.3d 969 (11th Cir. 2000).

plied for a permanent position at the University, but was denied.[286] Palmer had circumstantial evidence that the University's proffered reasons for its employment decision were pretextual,[287] yet "the jury was not specifically informed that it was authorized to find for the Plaintiff without any additional evidence of discrimination."[288] Because the jury was not specifically informed of the allowed inference, the defendant prevailed.

CONCLUSION

The cases in this survey have shown the critical effect of a pretext jury instruction. In factually similar circumstances, whether the jury was given a pretext instruction determined the outcome. In the Second, Third, and Tenth Circuit, where pretext instructions are given, plaintiffs tend to prevail where they probably would not have in the First, Seventh, Eighth, or Eleventh Circuit. Because *Townsend* is such a recent case, *Townsend*'s implication and impact in the Tenth Circuit has not yet been fully realized. However, because of the effect a pretext instruction has on the outcome of employment discrimination cases, it is likely that a pro-plaintiff trend will soon evolve in the Tenth Circuit in circumstantial evidence employment discrimination cases.

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286. *Palmer*, 208 F.3d at 971-72.
287. *Id.*
288. *Id.* at 973.

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