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THE EVIDENTIARY NATURE OF DEFENDANT'S BURDEN IN TITLE VII DISPARATE TREATMENT CASES

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In *Texas Department of Community Affairs v. Burdine,*[1] the United States Supreme Court indicated that the defendant bears the burden of production in a Title VII disparate treatment case. Although an employer need not prove that legal reasons motivated its decision, it must do more than merely plead the existence of a legitimate reason. The *Burdine* Court left unresolved whether the defendant's burden requires introducing evidence of the existence of the reason, or proving the existence of the reason. Proper analysis suggests that the defendant's burden is to establish that the reason asserted actually exists. It is only by convincing the trier of fact that the reason exists that the defendant meets its burden of going forward on the ultimate issue of motivation. This intermediate burden is consistent with the established principle that the plaintiff bears the ultimate burden of persuasion on the issue of motivation.

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1. 450 U.S. 248 (1981).

I. DISPARATE TREATMENT AND THE *McDonnell Douglas* MODEL

Title VII of the Civil Rights Act of 1964[2] prohibits employers, labor organizations, and employment agencies from discriminating "because" of the race, color, religion, sex, or national origin of the employee or applicant. The term "because" suggests that the defendant's motivation is a substantive element of the statutory scheme. Indeed, in disparate treatment cases—those involving a single decision to discharge, promote, or hire a particular person—illegal motivation is the key issue.[3] Motive, a state of mind, is a subjective fact, and in many cases there is no direct evidence of the fact. Proof of motivation can be drawn, however, from inferences that flow from objective facts. Direct evidence of improper motive is not required.[4]

McDonnell Douglas Corp. v. Green[5] is the seminal case setting forth the model by which the inferences of motivation are created. *McDonnell Douglas* places the initial burden upon the plaintiff to establish six elements: (1) plaintiff belongs to a class protected by Title VII (racial, ethnic minority, or a

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2. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981). The provision relevant to this discussion is found in § 703(a) of the Act:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or 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.
>
> (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.

42 U.S.C. § 2000e-2(a) (1976); *see also id.* §§ 2000e-2(b) to (d) (similar language applicable to labor organizations and employment agencies).

Title VII racial discrimination claims may arise in two ways. "An individual may allege that he has been subjected to 'disparate treatment' . . . or that he has been a victim of a facially neutral practice having a 'disparate impact on his racial group.' " Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-82 (1978) (Marshall, J., dissenting). If an employer utilizes a selection device that has a adverse impact on a protected class and the employer cannot justify that the device has a manifest relationship to job performance, the fact that the employer has no invidious motivation is not determinative. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Griggs v. Duke Power Co., 401 U.S. 424, 430, 432 (1971). When the issue is disparate treatment of a particular employee or a particular employment decision, however, the motivation for that decision is the key element. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576, 580 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977); *see generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1153-58 (1976). This Article addresses disparate treatment cases.

3. While not obligated to prove that the improper grounds were the *sole* cause, the plaintiff must show that the employment action would not have been taken but for the race, sex, religion, or national origin of the plaintiff. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976); B. SCHLEI & P. GROSSMAN, *supra* note 2, at 2253-54.

4. United States Postal Serv. v. Aikens, 103 S. Ct. 1478, 1482 (1982).

5. 411 U.S. 792 (1973).

woman);[6] (2) defendant had a vacancy and was seeking applicants; (3) plaintiff had the qualifications for the position; (4) plaintiff applied; (5) plaintiff was not hired; and (6) the position remained open or was filled by a non-minority person.[7] From this showing flows "an inference of discrimination . . .

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6. White males are protected by Title VII against race discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976). It is doubtful whether a white male could establish a prima facie case of illegally motivated race or sex discrimination using the *McDonnell Douglas* model in the context of an employer dominated by white males. If the employer is minority dominated, a white applicant would be able to invoke the *McDonnell Douglas* approach. *See* Chaline v. KCOH, Inc., 693 F.2d 477, 480 (5th Cir. 1982).

7. 411 U.S. at 802. The Court actually listed only four elements:

> (i) he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualification, 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.

Id. Under element (ii), the Court combined three distinct factors: application, plaintiff's qualification, and vacancy. Each element must be separately established. *See, e.g.*, Johnson v. Armco, Inc., 548 F. Supp. 1109, 1112 (D. Md. 1982) (failure to prove application); Lee v. National Can Co., 699 F.2d 932, 936 (7th Cir. 1983) (failure to prove qualification); Wright v. Stone Container Corp., 524 F.2d 1058, 1063 (8th Cir. 1975) (same); Daves v. Payless Cashways, 661 F.2d 1022, 1025 & n.3 (5th Cir. 1981) (failure to prove vacancy).

The weight of authority indicates that the plaintiff need only show that she possesses the posted job qualifications, or otherwise has been satisfactorily performing the job. *See* Eastland v. Tennessee Valley Auth., 704 F.2d 613, 625 (5th Cir. 1983); EEOC v. Federal Reserve Bank, 698 F.2d 633, 671 (4th Cir. 1983); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981). International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) suggested that the plaintiff must establish "an absolute or relative lack of qualifications" for the person hired. *Id.* at 358 n.44 (dictum). Some courts have followed this statement and required plaintiffs to prove relatively superior qualifications. *E.g.*, Anderson v. City of Bessemer City, 717 F.2d 149, 153 (4th Cir. 1983); Cuthbertson v. Bigger Bros., Inc., 702 F.2d 454, 465 (4th Cir. 1983); Cartogena v. Secretary of Navy, 618 F.2d 130, 133 (1st Cir. 1980); *see also* Mason v. Continental Ill. Nat'l Bank, 704 F.2d 361, 366 (7th Cir. 1983) (dicta) (proof of minimal qualifications required for routine jobs, while non-routine jobs require proof of plaintiff's relative superiority). *But see* Aikens v. United States Postal Serv., 665 F.2d 1057, 1059 (D.C. Cir. 1981) (plaintiff does not need to prove her superior qualifications), *rev'd on other grounds*, 103 S. Ct. 1478 (1983); *cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (hiring a person of comparative superior ability may be a legitimate nondiscriminatory reason).

Similar standards have been applied when the plaintiff is refused a promotion, United States Postal Serv. v. Aikens, 103 S. Ct. 1478, 1480 (1983); Brown v. Tennessee, 693 F.2d 600, 603 (6th Cir. 1982), or denied a transfer. Peters v. Jefferson Chem. Co., 516 F.2d 447, 449 (5th Cir. 1975). The *McDonnell Douglas* formula, with appropriate modifications, has been adapted to discriminatory discharge cases. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981). The plaintiff's prima facie discharge case consists of showing that she was a member of a class traditionally subject to discrimination, performing satisfactory work for defendant, discharged, and that the employer sought to fill the vacancy or utilized non-minority persons to perform the work. EEOC v. Brown & Root, Inc., 688 F.2d 338, 340 (5th Cir. 1982); Johnson v. Bunny Bread Co., 647 F.2d 1250, 1253 (8th Cir. 1981); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977). *But see* Morvay v. Maghielse Tool & Die Co., 708 F.2d 229, 233 (6th Cir. 1983) (prima facie case requires proof that plaintiff was discharged without good cause). *Morvay* improperly forces the plaintiff to prove a negative, and seems contrary to *Burdine*. If the defendant can demonstrate that the vacancy was filled by a person of the same race or gender as the plaintiff, the prima facie case may be rebutted. Freeman v. Lewis, 675 F.2d 398, 402 (D.C. Cir. 1982); Jones v. Western Geographical Co. of Am., 669 F.2d 280, 284 (5th Cir. 1982); DeVolld v. Bailar, 568 F.2d 1162, 1165 (5th Cir. 1978); Brazer v. St. Regis Paper Co., 498 F. Supp. 1092, 1098 (M.D. Fla. 1980); *cf.* Keys v. Lutheran Family & Children's Servs., 668 F.2d 356 (8th Cir. 1981) (allegation that plaintiff was replaced by another minority applicant not sufficient to support summary judgment).

because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[8]

After the plaintiff has established an inference of illegal motivation through this prima facie case, *McDonnell Douglas* states that "the burden must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection."[9] Denial of illegal motivation will not suffice; a "reason" must be "articulated." Failure of the defendant to "articulate" a "reason" that is "legitimate" and "nondiscriminatory" will result in a judgment, as a matter of law, for the plaintiff.[10] When "all legitimate reasons for rejecting an applicant have been eliminated [or none are articulated] . . . it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration."[11]

If the defendant carries its burden of articulating a legitimate nondis-

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The *McDonnell Douglas* prima facie case formulation is not always required. If the plaintiff has direct or circumstantial evidence of improper motivation and the defendant has articulated reasons for its action, the trial court may go directly to the issue of improper motivation without any particular attention to the precise requirements of the *McDonnell Douglas* elements. United States Postal Serv. v. Aikens, 103 U.S. 1478, 1482 (1983); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982). A prima facie showing of improperly motivated discrimination may be made by statistics that indicate a particular employment decision could not have been based on prescribed factors. Gay v. Waiters Local Union, No. 30, 694 F.2d 531, 552 (9th Cir. 1982); Payne v. Travenol Laboratories, 673 F.2d 798, 817 (5th Cir. 1982); Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979). This showing, similar to direct evidence of improper motivation, will shift the burden to the defendant to articulate legitimate, nondiscriminatory reasons for its action. *Id.*

8. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

9. 411 U.S. at 802.

10. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); Paxton v. Union Nat'l Bank, 688 F.2d 552, 569, 572 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1772 (1983). Prior to *Burdine*, there was some question whether the prima facie case merely *allowed* a finding on behalf of the plaintiff, or, in the absence of contradicting evidence, *required* a finding for the plaintiff. *See* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1149-50 (1980); *see also* Olson v. Philco-Ford, 531 F.2d 474, 478 (10th Cir. 1976) (unrefuted prima facie case does not require judgment for plaintiff). *Burdine* clearly held, however, that the inference of discrimination created by a prima facie case is not merely "permissible"; it is more in the nature of a "presumption" that requires a judgment in favor of the party who has the benefit of the presumed fact. *Cf.* 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2494 (J. Chadbourn rev. 1981).

A reason will be "legitimate and nondiscriminatory" even if it is not sufficiently strong as to be considered "necessary." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978). It need not even be directly related to actual or projected job performance. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973). It would seem that to be "legitimate," however, a reason could not otherwise violate the law. *Cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1978) (defendant's burden in a "pattern or practice suit" is to set forth "lawful reasons"). A totally arbitrary reason would not be "legitimate." *See* Brown v. Tennessee, 693 F.2d 600, 605 (6th Cir. 1982); United States v. City of Miami, 614 F.2d 1322, 1345-46 (5th Cir. 1980), *modified*, 644 F.2d 435 (5th Cir. 1982); Green v. Missouri Pac. R.R., 549 F.2d 1158, 1159 (8th Cir. 1977). A reason totally divorced from reasonable employer concerns could not carry a factual inference that it was the articulated reason rather than illegal concerns that motivated the employer's decision.

11. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

criminatory reason, it will be entitled to judgment unless the plaintiff presents additional evidence, direct or circumstantial, of illegal motivation.[12] The burden thus shifts back to the plaintiff to present evidence, beyond the prima facie case, that tends to establish the defendant's improper motivation. *McDonnell Douglas* indicated that evidence of pretext might consist of proof that the "reason" was not uniformly applied, that the defendant has expressed specific prejudice against the plaintiff's class, or that the defendant's general employment practices show a discriminatory pattern, which suggests a subtle discriminatory bias.[13]

McDonnell Douglas did not indicate whether a plaintiff who had

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12. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), held that once the defendant has met its burden, the plaintiff has to make some presentation of evidence or elicit from the defendant on cross examination some evidence that tends to establish improper motivation. *Id.* at 255. Failure of the plaintiff to provide some additional evidence would result in judgment for the defendant. *See, e.g.*, Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983). The Court thus utilized a modified version of Professor Thayer's bursting bubble theory of presumptions, adopted by Federal Rule of Evidence 301. Once the presumption is met by contradictory evidence, it ceases to have any probative value. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 346 (1898). The Court rejected the theory that a presumption flowing from a prima facie case shifted to the defendant a risk of non-persuasion on the fact presumed (motivation). *See* E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 80-81 (1956). But the Court did not hold that the presumption entirely "disappeared," as Thayer suggested. Rather, the Court stated that in evaluating whether plaintiff had persuaded the fact finder of the employer's motivation, the fact finder should "consider evidence previously introduced by plaintiff to establish a prima facie case." 450 U.S. at 255 n.10. *But cf.* United States Postal Serv. v. Aikens, 103 S. Ct. 1478, 1482 (1983) (trial court could resolve the ultimate issue of motive without deciding whether a prima facie case had been established). For a thorough discussion of Title VII presumptions in a pre-*Burdine* context, see Mendez, *supra* note 10, at 1141-61. *See generally* 9 J. WIGMORE, *supra* note 10, § 2493.

13. 411 U.S. at 804-05. "[S]tatistics as to petitioner's employment policy and practice may be helpful in determinating of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 805; *see* Davis v. Califano, 613 F.2d 957, 963 (D.C. Cir. 1979) (relied almost exclusively on statistics to establish improper motivation); *see also* Gay v. Waiters Local Union No. 30, 694 F.2d 531, 550 (9th Cir. 1982); Payne v. Travenol Laboratories, 673 F.2d 798, 820 (5th Cir. 1982). For an example of the lack of uniformity in imposing the rules, see Gerdom v. Continental Airlines, 692 F.2d 602, 604 (9th Cir. 1982) (en banc); Corley v. Jackson Police Dep't, 566 F.2d 994, 996 (5th Cir. 1978). Pretext may be established from a broad pattern of treatment, Lowry v. Whitaker Cable Corp., 348 F. Supp. 202, 215 (W.D. Mo. 1972), *aff'd*, 472 F.2d 210 (8th Cir. 1973), or through direct statements of prejudice, Eastland v. Tennessee Valley Auth., 704 F.2d 613, 626 (5th Cir. 1983). A plaintiff's relatively superior credentials plus extremely subjective articulated reasons also might show pretext. *See* Martinez v. El Paso County, 710 F.2d 1102, 1104-05 (5th Cir. 1983); Paxton v. Union Nat'l Bank, 688 F.2d 552, 569 (8th Cir. 1982). *But see* Anderson v. City of Bessemer City, 717 F.2d 149, 156 (4th Cir. 1983); Verniero v. Air Force School Dist. No. 20, 705 F.2d 388, 392 (10th Cir. 1983). A formalistic "three step minuet" is possible, with the plaintiff making a prima facie case, followed by the defendant's presentation challenging either the prima facie case or "articulating legitimate nondiscriminatory reasons," followed by the plaintiff making a rebuttal demonstration of pretext. The trial court, however, controls the order of proof. FED. R. EVID. 611. Thus, a court, in its discretion, may require the plaintiff to present all of its evidence at one time, reserving for rebuttal only direct refutation of the defendant's evidence. Holden v. Commission Against Discrimination, 671 F.2d 30, 36 (1st Cir. 1982); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Sime v. Trustees of Cal. State Univ., 526 F.2d 1112, 1114 (9th Cir. 1975). Even when a two-step procedure is followed, it is desirable to analyze the evidentiary obligations as having three basic stages: plaintiff's prima facie presentation, defendant's challenge, and plaintiff's additional evidence of actual motivation.

presented additional evidence of illegal motivation had the ultimate burden of persuasion on the issue of motivation, or whether after the plaintiff's burden of presenting additional evidence of motivation was satisfied, it was the defendant who must carry a burden of persuasion by convincing the trier of fact that the plaintiff's rejection was motivated by the articulated reason. The issue was eventually resolved; the plaintiff carries the ultimate burden of persuasion on the existence of illegal motivation.[14] The precise nature of the defendant's evidentiary burden, however, short of a burden of persuasion on motivation, has not been determined.

II. INTRODUCTION TO THE EVIDENTIARY ISSUE

A. *The Two Levels of Factual Inquiry in Disparate Treatment Cases: Intermediate and Ultimate Issues*

The ultimate factual issue in disparate treatment cases is the defendant's motivation. Intermediate factual issues may arise, and they may create inferences that go to the ultimate issue. *McDonnell Douglas* teaches that plaintiffs create a "rebuttable presumption" of illegal motivation by proving the existence of the six elements previously enumerated.[15] In presenting the prima facie case, however, the factual existence of one or more of these elements may become an issue. For example, the plaintiff may assert that she was qualified, and present evidence that she possessed the posted job credentials. Defendant may assert, with supporting evidence, that the plaintiff lacked the announced minimal qualifications. Whether plaintiff was "qualified" thus becomes a factual issue. Only if this issue is resolved in favor of the plaintiff can the court rule that the plaintiff has established a prima facie case. Similarly, the plaintiff must prove that the employer had a vacancy at the time of

14. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Sweeney v. Board of Trustees of Keene State College, 439 U.S. 24, 25 (1978) (per curiam). The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), and Title VII share common language and history. EEOC v. Wyoming, 103 S. Ct. 1054, 1957 (1983). Consequently, lower federal courts interpreting the Age Act have adopted the *McDonnell Douglas* formula for establishing improper motivation. Plaintiff must establish that she is: (1) in the protected age group of 40-70; (2) has met applicable job qualifications; (3) applied for a vacancy; (4) was not hired; and (5) that the employer continued to seek applications from persons with similar qualifications. Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1180 (6th Cir. 1983); Lovelace v. Sherman-Williams Co., 681 F.2d 230, 238 (1982); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1011 (1st Cir. 1979); Cova v. Coca Cola Bottling Co. of St. Louis, 574 F.2d 958, 959 (8th Cir. 1978). These circuits do not require as part of a prima facie case that plaintiffs prove that someone outside the protected age group was favored. The Fifth and Eleventh Circuits, however, require such additional proof. *See* Williams v. General Motors Corp., 656 F.2d 120, 128 (5th Cir. 1981); Anderson v. Savage Laboratories, 675 F.2d 1221, 1224 (11th Cir. 1982). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its treatment. If the defendant succeeds in articulating such a reason, the issue becomes one of fact, with the burden on the plaintiff to prove by a preponderance of evidence that age was the motivating reason. In Age Act cases, unlike Title VII suits, a jury trial is provided. 29 U.S.C. § 626(c)(2) (1976). Thus, the steps must be set forth to the jury in instructions, and the jury makes ultimate factual resolutions.

15. United States Postal Serv. v. Aikens, 103 S. Ct. 1478, 1481 (1983).

the application. If this fact is denied by the defendant, the plaintiff must carry the burden of convincing the fact finder that a vacancy in fact existed. If the plaintiff succeeds in establishing her qualifications for the vacancy, the court must infer that improper considerations motivated the employer's action. If the plaintiff fails to convince the court that she is qualified or that a vacancy exists, however, there can be no inference of illegal motivation, and plaintiff's suit must be dismissed.[16]

When the plaintiff establishes the elements of a prima facie case, the defendant's attempt to satisfy its "burden" to articulate a legitimate reason might create a factual issue of the existence of the "reason." Resolution of this intermediate factual issue is no less significant than the resolution of the factual issues going to the elements of a prima facie case. The existence of the "reason" is necessary to create an inference going to the defendant's motivation.

Assume that the defendant confronts a prima facie case by pleading that the plaintiff was discharged, not because of her sex, but because she was drinking alcoholic beverages on the job (clearly a "legitimate" reason, if proved). Plaintiff denies the charge. A factual issue now is joined as to whether the plaintiff was drinking on the job. Resolution of this intermediate factual issue is significant. If the plaintiff was drinking on the job or the defendant reasonably believed that she was,[17] it is proper for a court to infer that the perceived misconduct motivated the employer action—the plaintiff was discharged "because" she was drinking. If the plaintiff is not found to have been drinking, then a court would be unable to infer that the apparent violation of a work rule motivated the employer's decision. Resolving the intermediate factual issue is necessary because the intermediate facts are the foundation upon which the inferences going to the ultimate issue of motivation are based.

B. *Two Concepts of "Burden": Production and Persuasion*

"Burden" has two meanings in the law of evidence. One burden is that of producing evidence of a particular fact,[18] sometimes called the burden of going

16. The plaintiff thus carries the burden of producing evidence and the burden of persuasion (risk of nonpersuasion) on the factual existence of the elements necessary for a prima facie case. If the plaintiff fails to carry this burden of persuasion, the defendant prevails as a matter of law. Texas Dep't of Community Affairs v. Burdine, 430 U.S. 248, 252-53 (1981); Lee v. National Can Corp., 699 F.2d 932, 936 (11th Cir.), *cert. denied,* 104 S. Ct. 148 (1983); Jackson v. United States Steel Corp., 624 F.2d 436, 442 (3d Cir. 1980); Davis v. Weidner, 596 F.2d 726, 730 (7th Cir. 1979); Simes v. Trustees of Cal. State Univ., 526 F.2d 112, 114 (9th Cir. 1975); Peters v. Jefferson Chem. Corp., 516 F.2d 447, 450 (5th Cir. 1975).

17. If the defendant in fact *believed* that the plaintiff was guilty of a rule infraction and acted on that belief, the "fact" of such a belief would suffice as a legitimate "reason." De Anda v. St. Joseph's Hosp., 671 F.2d 850, 854 (5th Cir. 1982); Turner v. Texas Instruments, 555 F.2d 1252, 1256-57 (5th Cir. 1977).

18. C. McCORMICK, McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 783 (2d ed. J. Cleary 1972); J. TRACY, HANDBOOK OF THE LAW OF EVIDENCE 22 (1961); 9 J. WIGMORE, *supra* note 10, § 2487.

forward with the evidence. If the party who has the burden of production fails to present evidence that would permit a finding on that factual issue, the party with that burden will lose. The burden of production is met, not by convincing the fact finder of the truth of the fact, but by satisfying the court that such a finding *could be made.* "The second . . . [meaning of burden] is the burden of persuading the trier of fact that the alleged fact is true."[19] This burden is called the burden of persuasion or the risk of nonpersuasion. These distinctions are particularly significant in jury trials because the burden of production is an issue of law to be decided by the court; the judge determines whether the party on whom the burden rests has presented sufficient evidence to raise genuine issues of fact that would permit a finding in his favor. The burden of persuasion, however, is an issue of fact for the jury to resolve upon proper instructions. The jury determines whether the party assigned the burden has persuaded it of the existence of the fact in issue.

There is no jury in cases arising under Title VII.[20] The trial court, therefore, must decide as a matter of law whether the evidence is legally sufficient to convince, and whether, as a matter of fact, it is convinced that a particular state of affairs exists. Since the trial judge is performing legal and factual duties, the line between the two burdens often has been blurred. The distinction, however, must be recognized so that the court can properly make findings and allocate burdens.

III. Issues and Burdens in the *McDonnell Douglas* Model

There are two separate uses of the term "burden" and two distinct factual issues to which those burdens must be addressed. As a result, there are burdens of production and persuasion relating to the plaintiff's assertion of illegal employer motivation—the ultimate issue—and burdens of production and persuasion going to the intermediate factual issue—the existence of the defendant's asserted reasons. When the term "burden" is used, it is important to define its use and identify the particular factual issue to which the defined burden is addressed.

McDonnell Douglas provides that when confronted with a prima facie case, the defendant's "burden" is to "articulate a reason" for the challenged discriminatory conduct. "Articulate" is meaningless in evidentiary terms;[21] it leaves open at least four possibilities.

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19. C. McCormick, *supra* note 18, at 783-84; 9 J. Wigmore, *supra* note 10, § 2485.

20. *See, e.g.,* United States v. Lee Way Motor Freight, 625 F.2d 918, 940 (10th Cir. 1979). In suits invoking 42 U.S.C. § 1981 (1976), which often join Title VII racial discrimination claims, there is a right to a jury trial. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975); Page v. Schlumberger Well Servs., 23 Empl. Prac. Dec. (CCH) ¶ 31,104, at 16,675 (S.D. Tex. June 13, 1980). There is a right to a jury trial under the Age Act, which employs a disparate treatment approach similar to *McDonnell Douglas.* In each of these situations, not only is it particularly important to identify the respective burdens of production and persuasion, but a problem is presented as to how much the jury should be told about the evidentiary weight of presumptions. *See also* note 14 *supra* (jury's role in age discrimination suits).

21. Mendez, *supra* note 10, at 1134 n.30, 1139.

The first and most relaxed definition of the defendant's burden to articulate a legitimate nondiscriminatory reason would be an obligation merely "to state" or "to set forth." "Articulate" suggests "statement." Dictionaries define "articulate" as "to utter distinctly."[22] This definition of the "burden" to articulate would seem to invoke only a *pleading obligation,* with no duty to support with evidence the factual existence of the reason pleaded.

A second, more stringent standard would be to plead and provide evidentiary support sufficient to permit a fact finder to conclude that the articulated reason exists. This burden would require more than simply "uttering distinctly" in a responsive pleading, more than inserting the reason in an argument of counsel, and more than a scintilla of supporting evidence. It would require the introduction of credible, objective evidence that would support a finding that the articulated reason actually existed. This approach could be classified as a *burden of presentation on the factual existence of the articulated reason.*

A third approach would impose on the defendant a burden not only of presenting evidence of sufficient probative strength to allow the fact finder to conclude that the articulated reason existed, but, in addition, to carry the burden of actually persuading the fact finder of the existence of the asserted reason. The burden to articulate thus would be a *burden of persuasion on the existence of the reason.*

The fourth and final interpretation would be a burden on defendant to persuade the fact finder that the articulated reason not only existed, but also that the reason caused or motivated the particular employment action. This would be a *burden of persuasion on the ultimate issue of the employer's motivation.*

IV. THE EXTREMES RESOLVED

A. *The Burden of Persuasion on the Ultimate Issue of Motivation*

The first Supreme Court case applying the *McDonnell Douglas* language, *Furnco Construction Corp. v. Waters,*[23] did not resolve even the threshold ambiguity of whether the burden that shifted to the defendant was one of *persuasion* on the issue of motivation or merely a burden of *production.* The Court compounded the confusion by giving conflicting signals within the same paragraph. First, the Court said: "It is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, not an illegitimate one such as race."[24] This strongly suggests that a burden has shifted to the defendant of proving that the reason motivated the employment decision. A few lines later, however, the Court

22. WEBSTER'S NEW COLLEGIATE DICTIONARY 64 (1976); *see* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 124 (unabr. 1966).
23. 438 U.S. 567 (1978).
24. *Id.* at 577.

stated: "To dispel the adverse inference from a prima facie showing under *McDonnell Douglas,* the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection.' "[25] If the burden amounts only to the articulation of valid reasons, it is at most one of presenting evidence and perhaps no more than asserting reasons in a responsive pleading.

A few months later, in *Board of Trustees of Keene State College v. Sweeney,*[26] the Court finally determined which party carried the risk of nonpersuasion on the issue of the defendant's motivation. The court of appeals had employed conflicting language, similar to that used in *Furnco.* At one point, it had indicated that the defendant must "prove the absence of discriminatory motive."[27] The Supreme Court focused on this phrase and stated that the obligation on the defendant was merely to articulate some legitimate nondiscriminatory reason. The burden of persuasion on the ultimate issue of motivation remains with the plaintiff. Thus, the lower court's apparent shifting of the burden to the defendant to prove absence of discriminatory motive was erroneous.[28]

Although the Court established that the defendant's burden was in the nature of presentation, the precise meaning of this burden was not discussed. Three possible interpretations remained: pleading the reason, producing legally sufficient evidence to support the reason's existence, or persuading the court of the existence of the reason.

B. *"Articulation": More than Pleading*

In *Texas Department of Community Affairs v. Burdine,*[29] the Fifth Circuit indicated its idea of the defendant's burden:

> Defendant may refute plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for the rejection. This court requires defendant to prove nondiscriminatory reasons by a preponderance of the evidence. This holding is not inconsistent with *Board of Trustees v. Sweeney,* which merely stated that defendant is not required to prove absence of discriminatory motive. Our 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.[30]

The court left little doubt but that it was imposing on the defendant a burden of presenting evidence and a burden of *persuasion.* The burden of persuasion as *to what issue,* however, was not clearly stated. The court could have

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25. *Id.* at 578 (quoting *McDonnell Douglas,* 411 U.S. at 802).
26. 439 U.S. 24 (1978) (per curiam).
27. Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 177 (1st Cir.), *rev'd per curiam,* 439 U.S. 24 (1978).
28. 439 U.S. at 25; *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
29. 609 F.2d 563 (5th Cir. 1979), *rev'd,* 450 U.S. 248 (1981).
30. *Id.* at 567.

been saying that the burden of persuasion went to the issue of the factual existence of the *reason.* The other possibility is imposing a burden on the defendant to prove legal motivation by persuading the trial court that the reason *caused* the particular employment action.

The Supreme Court reversed.[31] At the outset, the Court agreed that the "defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel."[32] The defendant must "clearly set forth, through the introduction of admissible evidence, the reasons for plaintiff's rejection."[33] Thus, the most relaxed definition of "articulate a reason" was rejected. Defendant's burden to "articulate" is more than a pleading obligation.

V. THE UNRESOLVED ISSUE: BURDEN OF PRODUCTION—BUT AS TO WHAT ISSUE?

Although the *Burdine* Court established that the defendant's burden was a burden of producing evidence, there are two issues to which such a burden of production could be addressed: the ultimate issue of defendant's motivation, or the intermediate issue of the existence of the reason. If the defendant's burden of production goes to the ultimate issue of motivation, the defendant would have to establish the factual existence of the reason articulated. If the defendant's burden of production goes merely to the intermediate issue of the reason's existence, however, this burden would be satisfied by introducing evidence sufficient to *allow* a finding that the reason exists. On the intermediate issue of the reason's existence, is the defendant's burden one of producing evidence or one of persuasion? *Burdine* stated:

> The burden that shifts to the defendant . . . 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. 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 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. . . .
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> We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what he has done' or produces evidence of legitimate nondiscriminatory reasons." It is plain that the Court of Appeals required much more: it placed on defendant the burden of persuading the court that it had convincing objective reasons for preferring the chosen applicant over plaintiff. . . . We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for

31. 450 U.S. 248 (1981).
32. *Id.* at 255 n.9.
33. *Id.* at 255; *see* Paxton v. Union Nat'l Bank, 688 F.2d 552, 569, 572 (8th Cir. 1982) (general allegation that person selected is better qualified is inadequate as a matter of law).

> the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which will allow the trier of fact factually to conclude that the employment decision had not been motivated by discriminatory animus. The Court of Appeals would require the defendant to introduce evidence, which in the absence of any evidence of pretext, would persuade the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.[34]

This reasoning does not resolve the issue. Some of the Court's language, perhaps even its predominant theme, indicates that it believed that the court of appeals improperly imposed on the defendant a burden to prove the "lawfulness" of its action. If the Court was saying that it is erroroneous to indirectly impose a burden of persuasion on the issue of motivation by requiring the defendant to prove that the reason caused the action, then the Court was doing no more than refining and applying the *Sweeney* doctrine. The Court did state that defendant's evidence must create "a genuine issue of fact" that the decision was not motivated by illegal animus. Creating an issue of fact on the ultimate issue of motivation would seem to require more than a presentation of some evidence on the intermediate issue of whether the reason exists; it would require the defendant to establish the existence of that reason. Nonetheless, much of the Court's language suggests that the defendant would carry its burden simply by producing evidence that the articulated reason exists. "[D]efendant must clearly set forth, through introduction of admissible evidence the reasons for plaintiff's rejection. . . . '[T]he employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons.' "[35]

Given this extreme ambiguity, the Court apparently failed to appreciate either the existence or the significance of these interpretive problems. It certainly failed to address them. Presumably, therefore, they have not been resolved.[36] The lower courts are in disarray. Some decisions give conflicting indi-

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34. 450 U.S. at 254, 256-57.

35. *Id.* at 255-56 (quoting *Sweeney*, 439 U.S. at 26 n.2).

36. In United States Postal Serv. v. Aikens, 103 S. Ct. 1478 (1983), the Court briefly addressed a reversal of a trial court finding that a plaintiff had not established a prima facie case. The Court did not clarify the *Burdine* opinion; it simply restated: "To rebut this presumption, 'the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. . . .' In other words, the defendant must 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.' " *Id.* at 1481 (quoting *Burdine*, 450 U.S. at 254, 255). Justices Blackmun and Brennan concurred, stating: "While the Court is correct that the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits, . . . the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." *Id.* at 1483 (Blackmun, J., concurring). The Court remanded the case to the trial court for an evaluation of the factual issue that the Court thought had been properly framed by defendant's articulation of a reason for the treatment of the plaintiff and the plaintiff's presentation of evidence suggesting improper racial motivation. Although the majority opinion perhaps implied that the defendant need do nothing more than present evidence that would support a finding that the reason exists, Justice Blackmun implied that the burden might be one of establishing to the court's satisfaction the existence of the reasons.

cations of the defendant's burden.[37] Some courts have held that the defendant's burden is only one of producing evidence that supports the existence of the reason. Any burden of persuading the fact finder that the reason does not exist is part of the plaintiff's burden of proving pretext.[38] Others appear to hold that the defendant's burden is one of persuasion on the existence of the reason, and if the defendant fails to prove the existence of a reason, the

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37. On remand, the Fifth Circuit stated: "In responding to a plaintiff's proof of a prima facie case of employment discrimination, the defendant employer need only produce admissible evidence that would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine v. Texas Dep't of Community Affairs, 647 F.2d 513, 514 (5th Cir. 1981). This language would not preclude imposing on the defendant a burden of convincing the fact finder of the existence of the articulated reason. As will be developed in the text, only if the reason is proved to exist could the "trier of fact rationally conclude that the employment decision had not been motivated by a discriminatory animus. . . . [D]efendant's burden in this respect is one of production only, not one of persuasion." *Id.* This statement suffers from the ambiguity of *Burdine* in that it does not define as to what issue the burden of production is addressed. In Brooks v. Ashtubula County Welfare Dept., 717 F.2d 263 (6th Cir. 1983), the trial court granted judgment for the plaintiff on the grounds that the reason articulated did not exist. The court of appeals reversed, finding that the trial court had imposed on the defendant the burden of proving that the reason motivated the decision. *Id.* at 267. The court of appeals thus confused the burden of persuasion on the issue of motivation with the burden of establishing the existence of the reason relied upon. For other examples of this confusion and uncertainty, see Verniero v. Air Force Academy School Dist. No. 20, 705 F.2d 388, 393 (10th Cir. 1983) (McKay, J., dissenting); Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1142 (11th Cir. 1983); Nanty v. Barrows Co., 660 F.2d 1327, 1333 (9th Cir. 1981).

38. Danzl v. North St. Paul-Maplewood-Oakdale Ind. School Dist. No. 662, 663 F.2d 65, 67 (8th Cir. 1981) (en banc). A pre-*Burdine* trial court decision held that the defendant's burden was to provide a legitimate nondiscriminatory reason, and ruled in favor of the plaintiff because the defendant failed to convince the court of the reason's existence. A panel of the Eighth Circuit affirmed. Danzl v. North St. Paul-Maplewood-Oakdale Ind. School Dist. No. 662, 25 Fair Emp. Prac. Cas. (BNA) 296 (8th Cir. Mar. 6, 1981). The court en banc set aside the panel affirmance and reversed the trial court ruling, stating: "[Defendant] need not prove that such a reason existed in the sense of persuading the trier of fact." 663 F.2d at 66. This is clear enough, but the court added: "The burden of persuasion remains at all times on the plaintiff." *Id.* This indicates that the court confused the burden of proving the existence of the reason with the ultimate risk of nonpersuasion on the issue of employer motivation. These are two distinct issues. In St. Peters v. Secretary of the Army, 659 F.2d 1133 (D.C. Cir. 1981), the defendant's articulated reason for not promoting the plaintiff was her inferior qualifications. The trial court found, however, that although the plaintiff had the superior qualifications, she had failed to carry the risk of non-persuasion on the issue of the illegality of the employer's motivation. The court granted judgment for the defendant. The court of appeals affirmed and indicated that the defendant met its burden of articulating a reason merely by presenting evidence of the "reason" (person selected was superior), and thus shifted the burden back to the plaintiff to prove discriminatory motive. Given the result, the defendant had no duty to convince the trial court of the existence of the "reason" (superior qualifications of the person selected). *Id.* at 1140.

Sanchez v. Texas Comm'n on Alcoholism, 660 F.2d 658 (5th Cir. 1981), addressed an argument by the plaintiff that the person selected lacked the qualification (college degree) that was articulated as the reason for rejecting the plaintiff. The court stated:

> This argument misconceives the burden of proof in a Title VII action. . . . [Defendant] does not bear the burden of proving that the . . . [person selected] in fact attended an accredited college. Rather, the . . . [defendant] need only present "clear and reasonably specific" reasons for its conduct. The task of demonstrating the falsity of these reasons forms part of the plaintiff's burden to show that the employer's reasons are pretextual.

Id. at 662. For pre-*Burdine* cases to the same effect, see Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1978); Barnes v. Saint Catherine's Hosp., 563 F.2d 324, 329 (7th Cir. 1977).

plaintiff is entitled to judgment.[39]

The ambiguity needs to be resolved. The proper resolution is that the defendant's burden is to produce evidence on the ultimate issue of motivation. To produce such evidence, the defendant must establish the factual existence of the reason allegedly relied upon.[40]

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39. Lanphear v. Prokop, 703 F.2d 1311, 1316-17 (D.C. Cir. 1983); Peters v. Lieuallen, 693 F.2d 966, 969 (9th Cir. 1982); Miller v. WFLI Radio, 687 F.2d 137, 138 (6th Cir. 1982); Schulz v. Veterans' Admin., 30 Fair Empl. Prac. Cas. (BNA) 209, 211 (D.D.C. Oct. 26, 1982). Some courts have indicated that when the trial court finds that the reason articulated by defendant does not actually exist, pretextual motivation has been established as a matter of law. *See* Martinez v. El Paso County, 710 F.2d 1102, 1105 (5th Cir. 1983); Mohammed v. Callaway, 698 F.2d 395, 399 (10th Cir. 1983); Chaline v. KCOH, Inc., 693 F.2d 477, 479 (5th Cir. 1982); Adams v. Gaudet, 515 F. Supp. 1086, 1097 (N.D. Miss. 1981). Such a holding is the functional equivalent of finding that the defendant must establish the existence of the reason. Some pre-*Burdine* cases strongly suggested that the defendant's burden is to establish the existence of the reason articulated. *See* Williams v. Bell, 587 F.2d 1240, 1245 n.45 (D.C. Cir. 1978); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1976).

40. This issue is related to, but different from, "dual motivation." Dual motivation involves a situation where a plaintiff has succeeded in establishing as a matter of fact that illegal animus played some role in the decision. The defendant asserts that notwithstanding the illegal motive, its action was ultimately caused by legal considerations. In NLRB v. Transportation Management Corp., 103 S. Ct. 2469 (1983), the Court addressed the issue of dual motivation in the context of the National Labor Relations Act, 29 U.S.C. §§ 151-167 (1976 & Supp. V 1981). The National Labor Relations Board had found that illegal anti-union animus contributed to an employee's discharge. The Board held that the employer could avoid liability only by proving that notwithstanding the animus the employee would have been fired for permissible reasons. Although the employer had apparently asserted and proved some valid reasons, the Board was not convinced that the employee would have been fired had it not been for the illegal animus. The employer responded that this approach improperly shifted the burden of proving an unfair labor practice from the Board to the charged party. The Supreme Court rejected this argument, correctly recognizing that the Board's General Counsel retained the burden of proving that the illegal motive had contributed to the employer's action. Thus, the burden of persuasion had not been shifted to the employer. The employer's claim that it would have made the same decision even absent the animus, however, is like an affirmative defense, and the employer bears the burden on the issue.

Similar results have been reached under Title VII. Once a plaintiff has carried the burden imposed by *Sweeney* and *Burdine* of proving that an illegal motive played a role in causing the decision, the employer can escape liability only by convincing the fact finder that the same decision would have been made absent the illegal motivation. International Bhd. of Teamsters v. United States, 431 U.S. 324, 357-62 (1977); Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983); Milton v. Weinberger, 696 F.2d 94, 98-99 (D.C. Cir. 1982); *see also* Mount Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977) (unconstitutional motive).

In dual motivation cases, it is accepted that the employer possessed illegal animus and that a legitimate reasons existed for discharging the plaintiff. The problem is proving which motive controlled the decision. This Article addresses a different issue: whether the plaintiff can establish that the illegal motive played *any* role in the action. Consequently, the problem is determining where to place the burden of persuading the fact finder that the reason asserted by the employer actually exists. Nevertheless, the dual motive problem is instructive. It teaches that so long as the plaintiff is required to prove the existence of illegal motivation, it is proper to place on the employer the burden of persuasion on other issues relevant to the ultimate issue. It is also permissible to shift to the employer the burdens related to the role of its articulated reasons, even though the plaintiff bears the burden of persuasion on the ultimate issue of motivation.

VI. Beyond *Burdine:* A Proposal for Future Analysis

A. *Step One: Defining the Term "Reason"*

The underlying confrontation in *Burdine* between the court of appeals and the Supreme Court finds its source in two different, but unacknowledged, definitions given to the term "reason." When the court of appeals required the defendant to prove the existence of the reason for its employment action, it appeared to assume that the word "reason" embraced solely objective facts: that a reason was a demonstrably existing state of affairs, and that the defendant's burden was to establish the existence of those objective facts. The Supreme Court, however, appeared to conclude that the word "reason" necessarily contained a subjective motivational element. Given this conception, when the court of appeals required the defendant to establish the reason, the Supreme Court concluded that the defendant was being required to prove an existing state of facts *and* that those existing facts *caused* the defendant to act. It thus appeared to the Court that when the defendant had to prove a reason, it was being forced indirectly to carry a burden of persuasion of the ultimate issue of the defendant's motivation, an obligation rejected in *Sweeney.*[41]

The interpretive problem can be resolved by refining the term "reason." The word "reason" can be divided into two elements, objective and subjective. By requiring the defendant to articulate a reason, *McDonnell Douglas* and *Burdine* made it clear that more was required than a subjective denial of illegal motivation. "Reason" necessarily presupposed the existence of underlying objective facts. Motivation must spring from facts. There must exist objective facts upon which the subjective motivation is premised. Drinking on the job, theft of company property, cursing a supervisor, fighting, tardiness, absenteeism, violation of a safety rule, and lack of work are all factually based and objectively verifiable events that exist or take place wholly apart from any issue of the subjective motivation of subsequent employer actions. These events or facts either occurred or they did not. Thus, it would be appropriate to define these facts as reasons and divorce them entirely from any issue of whether the facts or events caused a particular response. This is what the court of appeals in *Burdine* appeared to be doing.

After the underlying fact is established, the term "reason" can, but need not, imply an element of subjective motivation: whether the existing state of facts "caused" the particular response by the actor. This two-level definition of "reason" serves as a counter-proposition to the plaintiff's burden of proving discriminatory motive. If an employer action was "caused" by given employee conduct, then the action was not motivated by illegal reasons. Therefore,

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41. 439 U.S. at 25. The Eighth Circuit has suffered from the same difficulty, assuming that a burden of proving the "reason" necessarily imposed on defendant a burden of proving proper motivation. *See* Danzl v. North St. Paul-Maplewood-Oakdale Ind. School Dist., 663 F.2d 65, 67 (8th Cir. 1981) (en banc) (discussed at note 35 *supra*).

should a party be assigned a burden of proving that the misconduct was the "causal reason" for the discharge, that party would be assigned a burden of proving legal motivation. This "causal reason" idea may have been the unspoken interpretation of "reason" employed by the Supreme Court in *Burdine*. If so, its conclusion was manifestly correct; indeed, it was mandated by *Sweeney*.

The term "reason" need not, and in a Title VII context should not, be assigned a two-level meaning that includes a subjective, causational element. The concept of "reason," as used by *McDonnell Douglas*, should be limited to its purely objective base. Proving a "reason" means establishing the existence of the state of facts or events upon which the defendant's action allegedly was based. Thus, if an employee was allegedly discharged for cursing a supervisor, drinking, or fighting, the employer's burden of "articulating" a "reason" would include only convincing the fact finder that the cursing, fighting, or drinking actually took place or was believed by the employer to have taken place. Whether the reason motivated the discharge is a separate issue that is not necessarily resolved by determining that an objective reason existed.

B. *Step Two: Combining the Elements*

Framing a proper analysis of the defendant's burden requires bringing together three concepts. "Reason" must be defined in objective terms, the burdens of production and persuasion must be employed in their proper contexts, and the two levels of factual inquiry (ultimate and intermediate) must be recognized. It is important to recall the distinction between the burden of persuasion on the ultimate issue of motivation, which undoubtedly remains with the plaintiff, and the burdens relating to the intermediate issue of whether the proffered reason factually exists. When "reason" is defined in objective terms, a burden of persuading the fact finder that the articulated reason, objectively defined, actually exists does not impose on the defendant the burden of persuasion on the distinct issue of the employer's motivation.[42] Defendant can be subjected to the burden of persuading the fact finder that an intermediate fact (reason) exists, which fact (reason) evidences the ultimate fact in issue (motivation), without obligating the defendant to persuade the fact finder of the existence of the ultimate fact (motivation).

It is possible with these premises to evaluate properly the nature of the defendant's "burden" to "articulate a reason." The Supreme Court has established that the plaintiff's prima facie case creates a rebuttable presumption of illegally motivated discrimination.[43] According to the Thayer view of presump-

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42. The two burdens can exist simultaneously. J. TRACY, *supra* note 18, at 23; 9 J. WIGMORE, *supra* note 10, § 2489.

43. United States Postal Serv. v. Aikens, 103 S. Ct. 1478, 1481 (1983). In *Furnco*, the Court talked in terms of the plaintiff creating an "inference" of illegal motivation:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the condition of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do

tions,[44] adopted by the Court in *Burdine*[45] and embodied in Rule 301 of the Federal Rules of Evidence, the defendant's burden of addressing a presumption is to meet or rebut *the presumed fact* with evidence tending to establish the nonexistence of that presumed fact.[46] *Furnco* teaches that the fact presumed from plaintiff's *McDonnell Douglas* showing is *illegal motivation.* To meet or rebut the *presumed fact* of illegal motivation, the defendant must create a counter-inference of *proper motivation.* Subjective motivation is proved by inferences, and inferences can flow only from established facts.[47] Thus, to draw an inference of proper motivation, the court would have to find that basic facts upon which that inference depend actually exist.

If the reason articulated by the defendant is found to exist, that fact is significant, not because it conclusively establishes the legality of defendant's action, but because the court can infer from the factual existence of the articulated reason that the reason motivated the employment decision.[48] In such a case, the initially presumed fact of illegal motivation has been addressed and placed in issue by an inference of legal motivation properly drawn from the existence of basic facts.

If the asserted reason is found not to exist, however, there is no factual basis for inferring that the defendant's action was motivated by the reason.

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not act in a totally arbitrary manner, without any underlying reasons, especially in the business setting. Thus, when all legitimate reasons for rejecting an applicant are eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

438 U.S. at 577 (citation omitted). In *Burdine,* the Court concluded that the plaintiff's prima facie case created a "rebuttable presumption" of illegal motivation, which, unless challenged, would entitle the plaintiff to judgment. 450 U.S. at 254 n.7.

44. J. THAYER, *supra* note 12, at 346. According to this theory, a presumption merely shifts a burden of production with regard to the fact presumed. It does not shift any burden of persuasion as to the existence of that fact. Once the party against whom the presumption operates has carried that burden of production, the presumption loses all evidentiary value as to the ultimate factual issue; it "is spent and disappears." C. MCCORMICK, *supra* note 18, at 821; *see* 9 J. WIGMORE, *supra* note 10, § 2487(d).

45. 450 U.S. at 255 nn.8-10.

46. "[I]f proof of fact *B* is introduced and a presumption exists to the effect that fact *A* can be inferred from fact *B,* the party denying the existence of fact *A* must then introduce proof of its nonexistence or risk having a verdict directed against him." C. MCCORMICK, *supra* note 18, at 803; *see also* S. REPT. No. 1277, 93d Cong., 2d Sess. 9 (1974) (in the context of the federal rules of evidence, "while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts"), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7056; Mendez, *supra* note 10, at 1147-48.

47. C. MCCORMICK, *supra* note 18, at 803; J. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 453 (1935).

48. According to the strict Thayer view, once the presumption is challenged by contradictory evidence going to the fact presumed, the presumption disappears and leaves no evidentiary impact on the ultimate issue. The *Burdine* Court gave a qualified acceptance to that approach. Once the defendant properly challenges the inference of illegal motivation, the plaintiff will have to produce some evidence beyond the prima facie case that indicates the defendant's illegal motive. Nevertheless, the "evidence and inferences properly drawn . . . [from the prima facie showing] may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." 450 U.S. at 255 n.10.

Only if the reason is found to exist can a court infer that the reason motivated the action. Thus, the existence of the reason is the antecedent fact necessary for the creation of the inference going to the presumed fact of illegal motivation. If the defendant does not establish this fact (the reason) from which proper motivation can be inferred, it has failed in its burden to meet and refute the presumed fact of illegal motivation. Plaintiff would be entitled to a judgment in such cases.

As a general rule of evidence, the party seeking to create an inference has the burden of proving the existence of the facts necessary to draw the inference.[49] Furthermore, "[i]n most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well."[50] *McDonnell Douglas* placed the burden of "articulating" a "reason" on the defendant, and *Furnco* indicated that defendant's burden was to create an inference of legal motivation. Established rules of evidence, therefore, would require that the defendant's "burden to articulate reasons" must go beyond merely presenting credible evidence that the reason exists. The defendant, as the party seeking to create the inference of legal motivation and who has the burden of pleading the reason, bears the burden of persuasion on the issue of the existence of the articulated reason.

The defendant's burden is one of going forward on the ultimate issue of motivation. To carry this burden of going forward on motivation, the defendant must carry a burden of persuasion on the issue of the fact necessary to create an inference of legal motivation. This means convincing the fact finder that the "reason" exists.

Assume that a black employee who was discharged establishes the elements of a prima facie case. The employer asserts that the plaintiff was discharged for insubordination (cursing a supervisor), a fact that the plaintiff denies. At this stage there are two distinct factual issues. The ultimate, underlying issue is the employer's motivation. The intermediate issue is whether the employee cursed his supervisor. If the employee cursed his supervisor, the existence of that fact would permit an inference that it was the employee's cursing, rather than his race, that motivated the employer action. Conversely, if the employee did not curse the supervisor, it is not possible to infer that it was the cursing, rather than race, which motivated the discharge.

Continuing the example, assume that the employer offers as evidentiary support for its allegation of insubordination the sworn testimony of the supervisor involved, who states that he ordered the plaintiff to perform certain tasks, that the plaintiff refused to do as directed and responded with a series of epithets. The employer's reason thus was clear and reasonably specific, and it was supported by admission of evidence that would allow a trier of fact to rationally conclude that the plaintiff had engaged in acts warranting discharge. It may be concluded that the defendant, having met an initial production burden,

49. C. MCCORMICK, *supra* note 18, at 821; J. WIGMORE, *supra* note 47, at 453.
50. C. MCCORMICK, *supra* note 18, at 785; *see* 9 J. WIGMORE, *supra* note 10, § 2486.

would be entitled to judgment unless the plaintiff can present evidence indicating that the articulated reason did not exist. This conclusion is correct. Once the defendant has carried the initial burden of production on the issue of the reason's existence, the plaintiff appropriately could be assigned the burden to put in issue that presentation. That is, the burden of *production* on the issue of the *existence of the reason* now shifts to the plaintiff. If the plaintiff presents nothing contesting the factual existence of the articulated reason, the court must assume, from the defendant's uncontested legally sufficient evidentiary showing, that the fact of insubordination exists. In turn, the existence of the fact of insubordination requires the court to infer that the insubordination motivated the discharge.

There can be no doubt that after the defendant presents evidence of the reason's existence, *Burdine* assigns to the plaintiff a burden of producing evidence that challenges the defendant's showing.[51] Just because the burden of presenting evidence on the existence of the "reason" has shifted to the plaintiff after defendant articulates reasons, however, does not mean that the risk of persuasion on that issue also must shift. The risk of persuasion on the issue of the reason's existence should stay with the defendant.[52]

Returning to the hypothetical, assume that the plaintiff testifies (in rebuttal, or during the initial presentation) that the supervisor came to him, accused him of malingering, and uttered a series of racial insults. The plaintiff denies that he was directed to do any particular job and denies that he cursed the supervisor. With this testimony, the plaintiff has responded to the defendant's

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51. There are two approaches a trial court could take in viewing the defendant's evidence that a "reason" existed. The first is that such evidence creates a "permissible inference" that the reason existed, an inference that prohibits the court from ruling as a matter of law in favor of the plaintiff, but which the court is not compelled to find. The court could simply disbelieve the defendant's evidence and conclude that even though the evidence was legally sufficient, it did not persuade the court that the fact existed. A second approach would be that the defendant's presentation going to a fact in issue creates a "presumption" that requires a finding on the disputed fact in the defendant's favor, unless that fact is placed in issue by the plaintiff's producing legally sufficient evidence indicating its nonexistence. *See* 9 J. WIGMORE, *supra* note 10, § 2493. The *Burdine* Court adopted the approach that once legally sufficient evidence was presented by defendant on the fact in issue, a trial court would be required to find that the fact existed unless countered and placed in issue by legally sufficient evidence. 450 U.S. at 254-56.

52. The courts have utilized the approach of shifting intermediate burdens in adverse impact cases. When the plaintiff establishes adverse impact, the burden is upon the defendant to establish the "business necessity" of the criteria proved to have had the impact. *See* Dothard v. Rawlingson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The concept of necessity includes "lesser discriminatory alternatives"; a practice is not "necessary" if there are alternative devices that have less of a discriminatory impact. It is generally agreed that the burden of establishing the existence of a "lesser discriminatory alternative" is not upon the defendant, but is a burden shifted to plaintiff once the "work relatedness" of the rule had been proved by the defendant. *Id.* If the plaintiff establishes the existence of lesser discriminatory alternatives, however, she is entitled to a judgment without having to prove, as a matter of fact, that the rule was improperly motivated. Wright v. Olin Corp., 697 F.2d 1172, 1191-92 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992-94 (5th Cir. 1982). If the plaintiff cannot establish the existence of a lesser discriminatory alternative, she is still free to show that the reason was pretextual. "Necessity" and "pretext" are separate issues. *Cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (failed to recognize this duality).

production and satisfied any duty to produce contradictory evidence. The issue of the fact of the reason (insubordination) is joined. The trial judge now is faced with a classic example of a factual issue based upon credibility.

Given the above evidence, there are three conclusions that the court could reach: (1) "I don't believe the employee's version," (2) "I don't believe the supervisor's version," or (3) "I'm undecided; I don't know for sure which to believe." Analysis of the first is easy. If the judge accepts the employer's version of the incident, then the conclusion is appropriately reached that the discharge was motivated by the insubordination of the employee. Having found that the employee cursed the supervisor and refused to follow instructions, the inference will be drawn that the insubordination caused the employer reaction, thus meeting and countering the presumption created by the plaintiff's prima facie case. Absent evidence that the reason was used as a pretext, the defendant is entitled to judgment.

If the judge concludes that the plaintiff's version of the insubordination incident is the more credible ("I do not think plaintiff cursed the supervisor"), the judge cannot draw any inference that insubordination was the motive for the discharge. Even though the defendant has presented evidence on the issue of insubordination that would *permit* a finding for defendant on that issue, a faithful application of *McDonnell Douglas* and *Furnco* would indicate that the plaintiff's prima facie showing of improper motivation is yet to be placed in issue. The defendant has carried an initial burden of production on the intermediate issue of the reason's existence. Since, in light of the plaintiff's contradictory evidence, the trial court did not accept defendant's evidence as true, the defendant has failed to carry a burden of placing in issue the ultimate fact of motivation. It cannot be inferred that the defendant was motivated by the plaintiff's insubordination if it is found that the plaintiff was not insubordinate. The plaintiff should be entitled to a judgment.

If *Burdine* held that the defendant meets the totality of its burdens solely by presenting evidentiary support for its articulated "reason," with such presentation shifting back to the plaintiff the risk of convincing the fact finder of illegal motivation, totally illogical results are possible. Although the trial judge concluded that the act of insubordination did not take place, and no other reason was offered, the judge still might not be convinced that it was the plaintiff's race that motivated the discharge, and thus he would rule in favor of defendant. In short, it would be permissible for a trial judge to conclude the following: "Notwithstanding my belief that plaintiff did not curse the supervisor, the plaintiff has failed to convince me that he was discharged because of his race. Thus, judgment for the defendant."[53]

That such a result could occur demonstrates the lack of logic and the patent error of such an approach. The plaintiff has been deprived of the bene-

53. The result is not hypothetical. That is exactly what the trial court did in St. Peters v. Secretary of the Army, 659 F.2d 1133 (D.C. Cir.), *cert. denied,* 445 U.S. 1016 (1982). Sanchez v. Texas Comm'n on Alcoholism, 660 F.2d 658 (5th Cir. 1981), suggests a similar result.

fit of the presumption of racial discrimination drawn from his factually based prima facie case, without any factual support for the contradicting inference. Although the court has concluded that no legitimate reason has been established for discharging the employee, the employee was still denied a judgment. This is contrary to *Furnco,* which teaches that when no legitimate reason exists for rejecting an employee, the court *must assume* that it was more likely than not that the employer based his decision on an impermissible reason.

The third possible finding by the trial judge on the contested issue of insubordination could be: "I'm undecided. I don't know who is telling the truth. It is a 50-50 proposition." If the trial judge is unsure whether the facts upon which that inference depends actually exist, it would be impossible for the court to draw an inference of proper motivation. The burden on the defendant is to establish facts from which a court can infer legal motivation. For a court to infer that insubordination, rather than race, motivated the discharge, the judge must first conclude that the fact of insubordination took place.

If the defendant may carry its burden of "articulating a reason" solely by *presenting* evidence on the issue of insubordination, the actual result in most cases is quite predictable. The court will almost be forced to rule in favor of defendant, reasoning as follows: "Since the defendant has met its 'burden of articulating a reason' by presenting creditable evidence of insubordination, the burden is on the plaintiff to convince me that the discharge was because of his race. Since I am undecided on whether plaintiff did or did not curse his supervisor, I must conclude that plaintiff has failed to carry his burden of persuading me that it was his race that motivated his discharge."

The practical effect, therefore, of imposing on the defendant *only* a burden of producing evidence on the secondary issue of the existence of the reason, would be to force the plaintiff to disprove the existence of the articulated reason. Only by successfully disproving the existence of the articulated reason would the plaintiff have any hope of actually convincing the trial judge that it was race that motivated the discharge. A plaintiff who has a burden of proving a negative has an almost impossible burden, which, because of the difficulty, is rarely assigned.[54]

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54. *See* J. TRACY, *supra* note 18, at 24-25; 9 J. WIGMORE, *supra* note 10, § 2486. *Burdine* arguably imposed such a burden on the plaintiff:

> [Plaintiff] must now have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. . . . 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 employers proffered explanation is unworthy of credence.

450 U.S. at 256. By requiring the plaintiff to prove that the proffered explanation is unworthy of credence, the Court may be placing the burden on the plaintiff to disprove the existence of the articulated reason. Later in the opinion, the Court observed:

> [D]efendant's explanation of its legitimate reasons must be clear and reasonably specific. . . . [A]lthough defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation.

Id. at 258. These statements are extremely ambiguous. Although claiming that the defendant has

Furthermore, because of the extremely awkward position in which an employee finds herself in attempting to prove a negative proposition, the established "law" of industrial relations requires the employer to establish to the satisfaction of the fact finder the existence of the grounds for the discipline.[55] Experience has proved that is the best place for that burden. Given the significance of Title VII rights, a court should do no less.[56]

Finally, unlike the elements of a prima facie case, which the plaintiff must prove to exist, most "reasons" depend upon facts solely within the control of the defendant. It is the defendant, not the plaintiff, who knows what caused its particular actions. If it is a reason other than the most common causes for employment rejection already established by the prima facie case, the employer, who has the easiest access to the evidence, should be required to establish the existence thereof. The law of evidence traditionally places the burden of both production and proof upon the party with this access.[57] There is no reason that the courts should not follow that general rule in Title VII litigation.[58]

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no formal burden of persuasion (as to which issue the Court did not say), the Court alluded to the defendant's "incentive" to prove a legal motivation. This incentive would "normally" result in defendant "attempting" to prove a "factual basis." This says nothing about a defendant that fails in its attempt.

55. Gorske, *Burden of Proof in Grievance Arbitration,* 43 MARQ. L. REV. 135, 147-49 (1959) ("Arbitrators have almost invariably held that the burden of proving 'just cause' is on the employer."). Various rationales have been utilized by arbitrators to place this burden on employers: (1) discharge is the most severe penalty an employer can impose, thus the employer must establish the legitimacy of its action; (2) as the reasons for the action are peculiarly within the employer's knowledge, he should be required to establish them because otherwise the employee would be obligated to prove a "universal negative;" (3) persons should not be considered "wrongdoers" until proved to be; (4) sound industrial management should require an employer to have reasonable objective grounds for serious actions and should impose a duty to retrace the disciplinary process; (5) the employer's "cause" is in the nature of an "affirmative defense" to illegal action, and thus should be proved by the party asserting it.

56. In adverse impact cases, the burden imposed on the defendant by *Griggs* is to establish the "business necessity" of a practice having an adverse impact on a protected class. At the very least, this requires proof that the rule is manifestly related to bona fide employment purposes. The burden on the defendant then is to do more than simply produce evidence that would allow the fact finder to conclude that there was a business purpose being served by the discriminatory rule. Rather, the defendant must prove to the satisfaction of the court that such a purpose in fact exists and that there exists a "manifest relationship" between that purpose and the rule. Dothard v. Rawlingson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see* Uniform Guidelines on Employee Selection Procedure, 29 C.F.R. §§ 1607.1-.17 (1983).

Under the Equal Pay Act, the burden on the defendant, after the plaintiff has established a prima facie case of sex-based pay discrimination, is to establish that any distinction was based on a "factor other than sex." *See* 29 U.S.C. § 206 (d)(1)(iv) (1976). The defendant's burden on the issue is one of persuasion: to convince the fact finder that the articulated factor was the cause of the pay differential. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).

In disparate treatment cases, placing a similar burden on the defendant to establish the existence of the justification offered would provide a modicum of consistency. If the defendant's burden is merely to present evidence as to the existence of the asserted justification, however, inconsistency and potential for confusion would be injected into Title VII litigation.

57. 9 J. WIGMORE, *supra* note 10, § 2486; J. WIGMORE, *supra* note 47, at 444.

58. A number of courts have adopted this analysis. *See* note 39 *supra.* In Eastland v. Tennessee Valley Auth., 704 F.2d 613, 625-26 (11th Cir. 1983), the court found that the reason

VII. SUMMARY: A SUGGESTION FOR TRIAL FINDINGS IN DISPARATE TREATMENT CASES

The burden on the defendant is not a burden of persuasion on the ultimate issue of motivation. *Sweeney, Burdine,* and *Aikens* make that clear. The burden of persuasion on the issue of defendant's motivation stays with the plaintiff. On the other hand, when faced with a prima facie showing of illegally motivated action, the defendant has an obligation to come forward with legally sufficient evidence of a legitimate reason; this obligation is not satisfied by denying illegal motivation or pleading a reason in the answer. *Burdine* and *Aikens* did not make clear to what issue the defendant's burden of presentation is addressed. A proper analysis must recognize that in addressing the ultimate issue of motivation, a prima facie case creates a rebuttable presumption of illegal motivation, and the defendant's burden must be to challenge that presumption. Therefore, the defendant's burden is a burden of *production* on the issue of *motivation.* In addressing that issue of motivation, the defendant must establish facts from which proper motivation can be inferred. This, in turn, means that the defendant must carry a burden of persuasion on the issue of the existence of facts from which proper motivation can be inferred. Therefore, as to the issue of the existence of objectively defined "reasons," the defendant's burden is one of *persuasion.*

The first duty of the trial court in a disparate treatment case is to resolve whether the plaintiff has established the *McDonnell Douglas* elements required for a prima facie showing of discriminatory motive. If the plaintiff has not carried the burden of persuading the trial court that the six elements necessary for a prima facie case exist, the court must grant a judgment in favor of the defendant. If the prima facie case is found to exist, the defendant will have to make an evidentiary presentation that would allow the trial court to conclude that an objectively defined, legitimate reason existed for the action. If that showing is unchallenged, and there is no evidence of pretext, the defendant would be entitled to a judgment. If the factual existence of the reason is challenged by contradictory evidence, however, the defendant must carry the burden of persuading the court that the articulated reason did exist. If the trial court is not convinced that the reason exists, judgment must be given in favor of the plaintiff. If the court is convinced that the reason does exist and is legitimate, then the inference of illegal motivation has been met and refuted. The plaintiff now must present evidence going directly to the issue of motivation, and convince the court by a preponderance of the evidence that it was

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articulated at trial was not the reason given when the employment decision was made, and this established pretext as a matter of law. Thus, finding the non-existence of the reason at the time of hiring required a judgment for the plaintiff. *See also* NLRB v. Transportation Management Corp., 103 S. Ct. 2469 (1983) (discussed at note 40 *supra*). If there had been no improper shifting of the burden of proof by requiring the employer to persuade the fact finder that legal reasons would have caused the decision notwithstading an illegal motivation, it would seem that without shifting the ultimate burden of proof, an employer could be required to prove the simple existence of the reason it was asserting as the motivating purpose.

illegal considerations, not the articulated reason, that motivated the defendant—a burden of persuasion on the ultimate issue of motivation.

The trial court should thus proceed according to this sequence:

(1) Has the plaintiff established to my satisfaction the existence of the *McDonnell Douglas* elements? If not, judgment for the defendant (burden of going forward on the issue of motivation, requiring a burden of establishing the necessary facts).

(2) If yes, has the defendant articulated a reason for its action that is "legitimate"[59] and introduced admissible evidence of sufficient weight that a reasonable fact finder could conclude that the reason articulated exists? If not, judgment for the plaintiff (burden of going forward on issue of reason's existence).

(3) If yes, has the plaintiff presented legally credible evidence that the reason articulated by the defendant does not exist? If no, judgment for the defendant (burden of going forward shifted to plaintiff on the issue of the reason's existence).

(4) If yes, examining all the evidence on the issue of the existence of the reason, has the defendant convinced the court by a preponderance of the evidence that, on an objective level, the reason articulated exists? If not, judgment for the plaintiff (burden of persuasion on the issue of the reason's existence).

(5) If yes, has the plaintiff presented evidence beyond the prima facie case that indicates that the defendant had a discriminatory motivation? Is there credible evidence of "pretext"? If no, judgment for the defendant (burden of going forward on the ultimate issue of motivation).

(6) If yes, examining all of the evidence, the prima facie case, the evidence of pretext, against the strength of the inference drawn from the defendant's articulated reasons, has the plaintiff convinced me as a fact finder that the action taken by defendant was motivated by considerations made illegal by Title VII? If not, judgment for defendant. If yes, judgment for plaintiff (burden of persuasion on the ultimate issue of motivation).[60]

These six steps provide a logical guide for trial courts that is faithful to the *McDonnell Douglas-Furnco* model. It would be appropriate for appellate courts to require that trial judges make findings on each of the above eviden-

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59. "Legitimate" and "nondiscriminatory" are questions to be determined by the court as a matter of law. A reason would be legitimate and nondiscriminatory if it is lawful and sufficiently reasonable to permit a finding of fact in favor of defendant on the issue of motivation. The defendant need not establish the "necessity" of the reason, in that it is directly related to actual work performance, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-04 (1973), or that it is the "best," "least discriminatory alternative" available. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978). A defendant should be required, however, to establish the rationality of the reason. It would be impossible to infer that an irrational reason motivated the employer's treatment. *See* note 10 *supra.*

60. It is still open to the defendant to show that notwithstanding the illegal motivation, it would have made the same decision based on legal grounds. *See* note 40 *supra.*

tiary steps. In this way, more effective judicial review would be possible.[61] Certainly, it is a method much preferable to simply setting the trial court afloat on a sea of unchanneled facts from which the court would emerge at the end of the evidence and simply announce: "I find that the defendant did (did not) illegally discriminate against the plaintiff."

61. The ultimate finding of motivation is one of "fact," subject to limited review. *See* Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982); Lincoln v. Board of Regents, 697 F.2d 928, 940 (11th Cir.), *cert. denied,* 104 S. Ct. 97 (1983); FED. R. CIV. P. 52(a). The issue of the legal sufficiency of evidence to support findings on subsidiary issues is probably one of law, subject to more thorough judicial review. *Cf.* Gay v. Waiters' Union, Local 30, 694 F.2d 531 (9th Cir. 1982) (de novo standard of review applied to distrct court's finding that plaintiff failed to establish a prima facie case of intentional discrimination). *But cf.* Brown v. Eckerd Drugs, 663 F.2d 1268 (4th Cir. 1981) (court of appeals applied clearly erroneous standard to finding that plaintiff had not sustained burden of persausion on discrimination issue), *vacated,* 457 U.S. 1128 (1982).