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Has *Wright Line* Gone Wrong? Why Pretext Can Be Sufficient to Prove Discrimination Under the National Labor Relations Act

*Michael J. Hayes**

ABSTRACT

Every year in the United States, thousands of employees are illegally fired for joining or supporting unions. These employees must bring their claims to the National Labor Relations Board (the "Board"), which applies its famous *Wright Line* standard to decide thousands of discrimination cases each year.

Probably the most common issue in labor discrimination cases is "pretext." In virtually every case, an employer claims that it fired an employee not for an illegal antiunion motive, but for a legitimate business reason. The pretext issue arises when the evidence shows that the legitimate reason asserted by the employer was most likely not the true reason for firing the employee. The role such evidence of pretext can play in proving antiunion discrimination has been controversial. The Board's position on that issue has fluctuated over the years, and the federal circuit courts that review the Board's decisions have often disagreed with the Board.

This Article explains how the Board has resolved the pretext issue and analyzes whether the Board's resolution is correct. Based on comprehensive research of hundreds of Board and court decisions, the Article provides the first complete discussion of the role of evidence of pretext in discrimination cases.

The Article identifies two fundamental questions at the heart of the controversy over evidence of pretext, and proposes solutions to both. The first question is whether evidence regarding the employer's reason for its action, particularly when presented by the *employer*, can be considered when deciding if the *employee* has proven discrimination. The Article explains that basic evidentiary principles from ordinary civil law, largely ignored in labor discrimination cases, make clear that the answer is yes. The second question is

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whether evidence of pretext can be the primary basis for finding discriminatory motivation. Here, the Article criticizes the Board and the courts for treating all types of evidence of pretext as equal, and explains which types of evidence of pretext provide a reasonable basis for finding discrimination.

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I. INTRODUCTION

A core feature of the National Labor Relations Act ("NLRA"), and hence of American labor relations policy, is the protection of employees who join or support unions from retaliation by employers.[1] The NLRA's sponsors

1. Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1994), prohibits employers from discriminating against employees to encourage or discourage union membership or support.

recognized that this safeguard against discrimination was necessary because, without it, employees' statutory right to choose union representation would be of little practical worth.[2]

Subsequent experience has proven that the ban on discrimination is indeed of central importance. Year after year, claims of employer discrimination account for a majority of all unfair labor practice charges filed against employers.[3] Discriminatory discharges and other reprisals against union supporters have become a widespread tactic of employers in resisting unionization. In a recent study, Cornell University Professor Kate Bronfenbrenner found that thirty-two percent of employers involved with organizing campaigns fired union activists during the course of the campaign and that, on average, these employers fired at least four union supporters.[4]

Unions are also prohibited from discriminating, or causing an employer to discriminate, against an employee. *See* 29 U.S.C. § 158(b)(2) (1994). This Article focuses on employer discrimination cases because relatively few union discrimination cases are brought under the NLRA.

2. *See* S. REP. NO. 573, at 11 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 2300, 2311 (1949) (stating, with regard to the anti-discrimination provision of the NLRA, that "if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of opportunity for work"); 79 CONG. REC. 7570 (1935) (statement of Sen. Robert Wagner, chief sponsor of the NLRA), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 2321, 2335 (1949) ("This [anti-discrimination provision] is merely a logical and imperative extension of that section of the Norris-LaGuardia Act which makes the 'yellow dog' contract unenforceable in the Federal courts. If freedom of organization is to be preserved the employees must have more than the knowledge that the courts will not be used to confirm injustice. They need protection most in those very cases where the employer is strong enough to impress his will without the aid of law.").

3. *See* 63 NLRB ANN. REP. 6 (1999) (stating that in fiscal year 1998, "[t]he majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 11,763 such charges in 55 percent of the total charges that employers committed violations."); 62 NLRB ANN. REP. 6 (1998) (in fiscal year 1997, "[t]he majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 13,127 such charges in 56 percent of the total charges that employers committed violations."); 61 NLRB ANN. REP. 6 (1997) (in fiscal year 1996, "[t]he majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 13,305 such charges in 56 percent of the total charges that employers committed violations."); 60 NLRB ANN. REP. 6 (1996) (stating that in fiscal year 1995, "[t]he majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 13,298 such charges in 55 percent of the total charges that employers committed violations.").

4. *See* KATE BRONFENBRENNER, LABOR SECRETARIAT, NORTH AMERICAN COMM'N FOR LABOR COOPERATION, FINAL REPORT, THE EFFECTS OF PLANT CLOSING OR THREAT OF PLANT CLOSING ON THE RIGHT OF WORKERS TO ORGANIZE, at tbl.11 (1996), *available*

Consequently, discriminatory discharge is a serious threat to all employees who seek to exercise their right to support a union. In fact, based on the number of employees to whom the National Labor Relations Board (the "Board") has awarded reinstatement or other remedies for discriminatory termination, Harvard University Professor Paul Weiler has estimated that as many as five to ten percent of all employees who support unions in representation elections are discriminatorily discharged.[5]

In most employer discrimination cases, the employer has taken an adverse action (e.g., discharge, discipline, refusal to hire) against an employee who was undisputedly a union member or supporter. Consequently, employer discrimination cases usually turn on the employer's motivation for taking the adverse action.[6] Moreover, because employers invariably deny having an illegal

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at www.ilr.cornell.edu/library/e_archive/gov_reports.

5. In a 1983 law review article, Professor Weiler explained that in 1980, 200,000 employees voted for unions in representation campaigns, and 15,000 employees received reinstatement or other remedies for discriminatory treatment, usually termination. Because a high percentage of discriminatory discharges occur during representation election campaigns, and at least some employees have been discriminatorily discharged without prevailing in a Section 8(a)(3) case, Professor Weiler estimated that "the . . . odds are about one in twenty that a union supporter" in a representation election campaign would be fired. *See* Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983). In his 1990 book, *Governing the Workplace*, Professor Weiler observed that in 1985, though the number of employees who voted for a union had decreased to 100,000, the number of employees who secured reinstatement for dismissals in violation of Section 8(a)(3) was still somewhat higher than 10,000. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE 238-39 (1990).

6. The central importance of the employer's motivation in Section 8(a)(3) cases was affirmed by the United States Supreme Court in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44 (1954), in which the Court declared, "[t]hat Congress intended the employer's purpose in discriminating to be controlling is clear."

In unusual cases involving employer conduct that has been deemed "inherently destructive" of employee rights under the National Labor Relations Act, an affirmative showing that the employer had an unlawful motive is not required. The Supreme Court has explained that in cases of "inherently destructive" conduct, the conduct itself is sufficient to prove unlawful intent. *See* NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967). But as a leading treatise on labor law has observed, "[t]he great majority of section 8(a)(3) cases do not involve conduct 'inherently destructive of employee rights.'" THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 192 (Patrick Hardin et al. eds., 3d ed. 1992) [hereinafter Hardin]. In almost all Section 8(a)(3) cases, including discharges and discipline of union activists, refusals to hire employees considered likely to support unions, and discrimination in employment terms to penalize union supporters, unlawful motivation must be proven in order for a violation to be found. Thus, in most Section 8(a)(3) cases, "the employer's motive is determinative." *See id.*

motive, the critical issue is what evidence of illegal, antiunion motive is sufficient to prove employer discrimination.

Since 1980, the Board and the courts have applied the "*Wright Line* standard" to determine whether the employer had an illegal motive for taking an adverse action against an employee. Under the *Wright Line* standard,[7] the Board first decides whether the General Counsel of the Board[8] has proven by a preponderance of the evidence that the employee's union support or other protected activity was a motivating factor in the employer's decision to take the challenged action against the employee. If not, the employer wins. If so, the Board decides whether the employer has proven by a preponderance of the evidence that it would have taken the same adverse action regardless of the employee's protected conduct.[9] This two-step decisional process is followed by the Board, or its administrative law judges ("ALJs"), in hundreds of cases each year, and by the federal courts of appeals in dozens of appeals of Board decisions every year.[10]

Probably the most common issue in employer discrimination cases is the role of evidence of "pretext." In virtually every case employing the *Wright Line* standard, the employer claims it took the challenged action against the employee not for an unlawful motive, but for some legitimate reason. The pretext issue arises when the record in the case shows, in some way, that the legitimate reason asserted by the employer was most likely not the "true" reason for its challenged action.

Pretext can be shown in at least three different ways:

(1) The record makes clear that the facts underlying the employer's proffered reason(s) for its challenged action did not exist,
(2) There is no support in the record that the facts underlying the employer's proffered reason(s) did exist, or
(3) The record shows that the facts underlying the proffered reason(s) did exist, but the record shows that these facts were probably not the real reason for the challenged action.[11]

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7. *See* Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

8. The General Counsel is the name given to the prosecutorial arm of the Board. "The General Counsel has authority to investigate charges of unfair labor practices, to decide whether complaints should be issued on the basis of these charges and to direct prosecution of such complaints." ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 102 (12th ed. 1996).

9. *See Wright Line*, 251 N.L.R.B. at 1089.

10. The number of Board and court cases involving application of the *Wright Line* standard can be readily ascertained by "Shepardizing" the original *Wright Line* decision.

11. These three types of pretext are based on a discussion by then law firm partner, now Professor Kathleen M. Kelly, of categories of pretext cases in Kathleen M. Kelly, Wright Line, a Division of Wright Line, Inc., *The Right Answer to the Wrong Question:*

The Board and the courts have hardly ever acknowledged the distinctions between these means of showing pretext, and instead usually apply the unitary labels of "pretext" or "evidence of pretext" to anything in the record that suggests that the reasons the employer has offered for taking the challenged action are not the true reasons for that action. Consequently, when this Article discusses Board and court precedents, it also uses generic terms such as "pretext" and "evidence of pretext." Part V of the Article explains that the Board and the courts have erred in failing to distinguish between different types of evidence of pretext.

Although the Board tends to treat all types of evidence of pretext the same, the Board has fluctuated in its approach to evidence of pretext in the twenty years since *Wright Line* was decided.[12] In the past, the Board often took the position that evidence of pretext could not be considered in the first stage of the *Wright Line* process in deciding whether the employer had an antiunion motivation, but was relevant only in assessing the merits of the employer's defense in the second stage.[13] Currently, the Board's view is that evidence of pretext can be considered in the first stage, and can even be the primary basis for finding unlawful motivation by the employer.[14] The Board's current position is controversial, and has been questioned by some courts of appeals.[15]

The uncertainty, and disagreements, regarding the handling of evidence of pretext have resulted from varying answers to two fundamental questions: (1) Can evidence of pretext be considered in the first step of the *Wright Line* process, when the Board is deciding if the General Counsel has proven illegal motivation?, and (2) Is evidence of pretext sufficient by itself to prove illegal motivation?

This Article examines these questions in two ways. First, it describes how the Board and the federal courts of appeals have answered these questions. In so doing, the Article provides a description of the law that fills a void in the existing literature. In the early 1980s, there was a spate of articles on the Board's adoption of the *Wright Line* standard,[16] but since that time there has been little attention paid to the application of *Wright Line*. There have been many significant developments regarding the *Wright Line* standard in the past decade, particularly with respect to evidence of pretext. This Article provides

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A Review of its Impact to Date, 14 PAC. L.J. 869, 882-84 (1983).

12. *See infra* Part III.

13. *See infra* text accompanying notes 95-98.

14. *See infra* text accompanying notes 102-30.

15. *See infra* Part IV.A.

16. *See, e.g.*, Kelly, *supra* note 11, at 869; Peter Kilgore, *The Proper Test for Determining Violations in Mixed Motive Cases*, 34 LAB. L.J. 279 (1983); Madelyn C. Squire, *Good Intentions Gone Wrong: 8(a)(3) Supreme Court and Circuit Court Roundup, with a Look at* Wright Line, 26 HOW. L.J. 9 (1983); Mary Teresa Sobnosky, Note, Wright Line *and Wrongful Discharge Actions: A Uniform Standard of Review*, 33 CASE W. RES. L. REV. 404 (1983).

a much needed explanation of the development of the law on the treatment of evidence of pretext in discrimination cases.

Then, Part V of the Article recommends how the Board *should* answer the two fundamental questions underlying the controversy over evidence of pretext. The first question, whether the Board can consider evidence of pretext in the first stage of the *Wright Line* process, can be more specifically restated as: Can the Board, when considering if the General Counsel has proven its "prima facie" case, consider evidence of pretext that entered the record during presentation of the *employer's* case? Part V explains that this question can be readily resolved by looking at basic principles of evidence and procedure from ordinary civil litigation. In short, the basic rule in civil law is that a trier of fact can consider any evidence in the record, regardless of who produced that evidence. Part V will explain that this rule should apply when the Board is deciding the factual issue of the employer's motivation for the challenged action.

Given that it is appropriate for the Board to consider evidence of pretext in the first stage of the *Wright Line* process, Part V then discusses the second of the two questions: Is evidence of pretext sufficient in itself for the Board to find unlawful motivation? The key to resolving this question is the common-sense proposition, recognized in some Board and appeals court precedents,[17] and recently reaffirmed by the United States Supreme Court,[18] that when a party offers a false reason for its action, it is likely that the party is seeking to conceal an improper or unlawful motive. Accordingly, this Article contends that when evidence of pretext demonstrates or strongly indicates that the employer has engaged in deception and concealment of its true motive for an action, that is a reasonable basis for the Board to infer that the true motive is unlawful.

However, not all types of evidence of pretext are equal in terms of indicating deception and concealment. Part V explains that there are multiple types of evidence of pretext with differing probative values. The type of evidence of pretext with the strongest probative value is clear proof that the employer deliberately fabricated the reasons for its action, and the weakest evidence of pretext is discrediting the testimony of the employer's witnesses on the basis of demeanor. The major differences between the probative values of different types of evidence of pretext are completely lost in the Board's and the courts' current approach of treating "evidence of pretext" as a unitary whole. Consequently, the Article concludes by recommending that the Board and the courts expressly acknowledge the differing probative values of the different types of evidence of pretext, and that they explain more clearly why the

17. *See infra* text accompanying notes 131-42, 340-45, 363-70 and text between notes 398-99 (discussing Ninth Circuit's seminal decision in *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), and its progeny).

18. *See* Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2108-09 (2000); *see also infra* Part IV.B.2. (discussing *Reeves*).

"stronger" types of evidence of pretext provide a reasonable basis for finding that the employer had an unlawful antiunion motivation.

II. THE *WRIGHT LINE* STANDARD

A. The Wright Line *Decision*

For an employer to be held liable for discrimination under Section 8(a)(3) of the NLRA, the Board must find that the employer was *motivated* by antiunion animus in making the decision at issue. Section 10(c) of the NLRA requires that the Board must find all unfair labor practices, including Section 8(a)(3) violations, by a "preponderance of the testimony."[19] Therefore, an employer's action against an employee cannot be deemed to breach Section 8(a)(3) unless the Board finds, by a preponderance of the evidence, that the action was motivated by antiunion animus.[20]

The NLRA, however, does not define the extent to which an employer's action must be motivated by antiunion animus in order to be deemed unlawful under Section 8(a)(3). Does animus have to be the *sole* cause of the action, the *primary* cause of the action, or is it sufficient that antiunion animus be a *contributing* cause of the action? For many years, the federal courts of appeals disagreed among themselves, and with the Board, on the "quantum of animus" that was sufficient to find a violation of Section 8(a)(3).[21] In 1980, the Board undertook to resolve this dispute and to establish a standard for assessing Section 8(a)(3) violations in *Wright Line*.[22] The Board announced in *Wright Line* that it was adopting a new test for deciding Section 8(a)(3) cases, and that its test would be based largely on the United States Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*.[23]

In *Mt. Healthy*, a public school district had refused to renew a teacher's contract, and the district had both legitimate motives (such as the teacher's making an obscene gesture to female students), and an illegitimate motive (penalizing the teacher for exercising his First Amendment rights) for its

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19. 29 U.S.C. § 160(c) (1994).

20. In cases of discharge or discipline of employees, this principle is reinforced by another provision of Section 10(c), which states, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged *for cause*." 29 U.S.C. § 160(c) (1994) (emphasis added). Thus, if the discipline or discharge was motivated by a "cause" other than antiunion animus, the employer could not be held liable for that adverse employment action.

21. *See* Hardin, *supra* note 6, at 193 & nn.47-52; Kelly, *supra* note 11, at 873-77 (discussing the division over this issue prior to the Board's decision in *Wright Line*).

22. *See* Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

23. 429 U.S. 274 (1977).

decision.[24] The lower courts had ruled that the school district had violated the First Amendment because its illegitimate motive played a "substantial part" in its decision.[25] The Supreme Court disagreed. In place of the lower courts' standard, the Court established a two-stage test to be applied in "dual motivation" cases, like *Mt. Healthy*, where both legitimate and illegitimate reasons motivated the employer's action. The Court held that in the first stage, the burden was on the employee to show that his protected conduct "was a 'substantial factor' or a 'motivating factor' in the [employer's] decision not to rehire him."[26] If the employee satisfied that burden, the Court held, the court should have "gone on to determine whether the [employer] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."[27]

In *Wright Line*, the Board offered three reasons why the two-stage *Mt. Healthy* standard should also apply in Section 8(a)(3) cases. First, the Board found that the legislative history of the NLRA and Supreme Court precedent supported the notion that a two-stage, burden-shifting process was appropriate in Section 8(a)(3) cases.[28] Second, the Board found that this approach was also consistent with its own precedents.[29] Finally, and most important, the Board declared that the two-stage process "accommodates the legitimate competing interests" of employers and employees in Section 8(a)(3) cases, and furthered "the policies and objectives of Section 8(a)(3) of the Act."[30]

The Board defined its new standard as follows:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[31]

This definition still accurately describes the major features of the "*Wright Line* standard" used to decide Section 8(a)(3) cases.

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24. *Id.* at 281-82. The specific First Amendment activity that was penalized was the teacher's disclosure to a local radio station of the school's new dress and appearance policy for teachers. *Id.* at 282-83.

25. *Id.* at 283-85.

26. *Id.* at 287.

27. *Id.*

28. *See* Wright Line, 251 N.L.R.B. 1083, 1088 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

29. *Id.*

30. *Id.* at 1088-89.

31. *Id.* at 1089.

Although the *Mt. Healthy* test on which the *Wright Line* standard was based was developed for "dual motive" cases, the Board indicated in *Wright Line* that the standard would apply to both pretext and dual motive cases. Near the beginning of its analysis in *Wright Line*, the Board explained the distinction between pretext and dual motive cases. The Board began by discussing the similarities between pretext and dual motive cases, observing that in virtually all Section 8(a)(3) cases, the employer does not admit that it took action against an employee because of union activities.[32] "Instead," the Board pointed out, the employer "will generally advance what it asserts to be a legitimate business reason for its action."[33] Thus, both pretext and dual motive cases share the common feature that the employer asserts it had a legitimate reason for taking the adverse action against the employee.

The difference between pretext and dual motive cases, the Board explained in *Wright Line*, was what the evidence revealed about the legitimate reason the employer proffered for its action. The Board effectively defined a pretext case as one in which "examination of the evidence . . . reveal[s] . . . that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon."[34] Such cases should be termed pretext cases, the Board reasoned, because "no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive."[35] On the other hand, in dual motive cases, the evidence reveals the "existence of both a 'good' and 'bad' reason for the employer's action."[36]

After explaining the difference between pretext and dual motive cases, the Board noted, "Unfortunately, the distinction between a pretext case and a dual motive case is sometimes difficult to discern. This is especially true since the appropriate designation seldom can be made until after the presentation of all relevant evidence."[37] In other words, a Section 8(a)(3) case cannot be categorized as a pretext or a dual motive case until there is enough evidence in the record to judge the authenticity of the employer's proffered reason. The fact that categorization of a case is contingent on the state of the record creates what the Board in *Wright Line* called "conceptual problems," and makes it difficult for ALJs and the Board to adjudicate Section 8(a)(3) cases when the standards for pretext and dual motive cases are different.[38]

Therefore, as the Board noted repeatedly in *Wright Line*, one advantage of the *Wright Line* standard is that "there is no real need to distinguish between

32. *Id.* at 1083.
33. *Id.* at 1083-84.
34. *Id.* at 1084.
35. *Id.*
36. *Id.*
37. *Id.* at 1084 n.5.
38. *Id.*

pretext and dual motive cases."[39] After discussing the difficulties in drawing that distinction, the Board asserted, "The conceptual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense,"[40] which, the Board implied, is what the *Wright Line* standard does. The Board explained that treating the employer's justification as an affirmative defense would clarify the issues in the litigation of Section 8(a)(3) cases: "Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a 'dual motive' may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained."[41]

As some of the passages quoted above demonstrate, the Board in *Wright Line* consistently referred to the second stage of the new standard as an "affirmative defense" for the employer. The use of this term was closely related to the Board's position that the *Wright Line* standard complied with the requirement in Section 10(c) of the NLRA that the General Counsel bear the burden of proving the commission of an unfair labor practice. The Board explained:

> It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense . . . to overcome the prima facie case of wrongful motive. Such a requirement does not shift the ultimate burden.[42]

This reasoning meant that the General Counsel's evidence supporting its "prima facie case of wrongful motive" had to be sufficient to sustain a finding that the employer violated Section 8(a)(3).

In *Wright Line*, the Board provided some indications of what it would require of the General Counsel at the first stage of the *Wright Line* process. At one point, the Board described the first stage of the process as "an inquiry as to whether protected activities *played a role* in the employer's decision."[43] The Board then explained that the second stage involved a determination of whether the employer's evidence regarding its asserted reason for its action "negate[d] the General Counsel's showing of prohibited motivation."[44] The Board then added in footnote twelve that "[t]he absence of any legitimate basis for an action,

39. *Id.* at 1083 n.4.
40. *Id.* at 1084 n.5.
41. *Id.*
42. *Id.* at 1088 n.11.
43. *Id.* at 1088 (emphasis added).
44. *Id.*

of course, may form part of the proof of the General Counsel's case."[45] As will be discussed below, this statement by the Board in footnote twelve of *Wright Line* has played an important role in many of the Board's decisions in pretext cases.

In explaining how the *Wright Line* standard appropriately balanced the interests of employees and employers, the Board described what was required to meet the General Counsel's burden at the first stage of the standard: "[T]he aggrieved employee is afforded protection since he or she is only required initially to show that protected activities *played a role* in the employer's decision."[46] In the second stage, the Board explained, the employer is given the opportunity to "establish its asserted legitimate justification," and "if the employer cannot make the necessary showing" at the second stage, "it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes."[47] Thus, the Board suggested that a showing by the General Counsel that antiunion animus had "played a role" in an employer's adverse decision against an employee was sufficient to shift the burden to the employer to prove that even without the union animus, it would have made the same decision for a legitimate reason, and to establish a Section 8(a)(3) violation if the employer failed to meet that burden.

In the final section of its *Wright Line* opinion, the Board applied its new standard to the facts of the case. Of particular relevance to this Article, the Board placed considerable reliance on evidence of pretext in finding that the employer violated Section 8(a)(3). In *Wright Line*, the employer asserted that it had discharged the discriminatee "for violating a plant rule against 'knowingly altering, or falsifying production time reports, payroll records, time cards.'"[48] During its discussion of the prima facie case, the Board expressly stated that one of its bases for concluding that the General Counsel had proven its prima facie case was that the reason the employer proffered for the discharge was false. Specifically, the Board relied on the facts that other employees commonly completed time sheets in the same manner without being disciplined, that two employees who had deliberately falsified time cards were disciplined through warnings rather than termination, and that the employer had departed from its usual practice when it fired the discriminatee without first issuing a warning.[49]

45. *Id.* at 1088 n.12 (citing Shattuck Denn Mining Co. v. NLRB, 362 F.2d 466 (9th Cir. 1966)).

46. *Id.* at 1089 (emphasis added).

47. *Id.*

48. *Id.*

49. *Id.* at 1090-91.

B. The Transportation Management *Decision*

In the first few years following the Board's decision in *Wright Line,* most of the federal courts of appeals upheld the Board's new two-stage standard.[50] However, by 1982, at least three federal circuit courts had criticized the *Wright Line* standard's shifting of the burden of persuasion to the employer at the second stage. These courts contended that such burden-shifting was inconsistent with Section 10(c) of the NLRA, which they read as requiring the General Counsel to prove that the unlawful motive was the predominant, or "but for" cause, of the challenged action against the employee.[51] This division between the federal courts of appeals led the Supreme Court to grant certiorari in *NLRB v. Transportation Management Corp.*,[52] to resolve whether the *Wright Line* standard was valid under the NLRA.[53]

The Supreme Court in *Transportation Management* defined the question before it as "whether the burden placed on the employer in *Wright Line* is consistent with §§ 8(a)(1) and 8(a)(3), as well as with § 10(c) of the NLRA, which provides that the Board must find an unfair labor practice by a 'preponderance of the evidence.'"[54] The Court, reversing the First Circuit, unanimously concluded that the *Wright Line* standard was consistent with the NLRA.

The First Circuit had ruled that the NLRA required the General Counsel to prove that the employee would not have been fired had it not been for his union activities, i.e., that antiunion animus was the predominant motive for the firing.[55] The Supreme Court disagreed, observing that almost since the NLRA was passed in 1935, the Board had maintained the position that all that was necessary to find a Section 8(a)(3) violation was that "anti-union animus actually contributed to the discharge decision."[56] The Court declared, "This construction of the NLRA—that to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is *in any way motivated* by a desire to frustrate union activity—was plainly rational and acceptable."[57]

Turning to the Board's *Wright Line* standard, the Court pointed out that in *Wright Line* the Board reaffirmed that the General Counsel "had the burden of proving that the employee's conduct protected by § 7 was a substantial or a

50. *See* Kelly, *supra* note 11, at 902-04.
51. *See* Kelly, *supra* note 11, at 902-04.
52. 462 U.S. 393 (1983).
53. *See* Kelly, *supra* note 11, at 905.
54. *Transp. Mgmt.*, 462 U.S. at 395 (citations omitted).
55. *See id.* at 397.
56. *Id.* at 398.
57. *Id.* at 398-99 (emphasis added).

motivating factor in the discharge."[58] The Court then revealed its interpretation of what the General Counsel is required to prove at the first stage by noting, "The Board has not purported to shift the burden of persuasion on the question of whether the employer fired [the employee] *at least in part* because he engaged in protected activities. The General Counsel satisfied his burden in this respect and no one disputes it."[59] Even after the General Counsel has met this burden, the Court observed, the *Wright Line* standard gives the employer an opportunity to avoid liability under Section 8(a)(3) by proving that even if the employee had not been involved in union activity, the employer would have taken the same action against the employee. The Court explained that in giving the employer this opportunity, even after the General Counsel had proven all that was needed to establish a Section 8(a)(3) violation, the *Wright Line* standard made it "clear . . . that proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence."[60]

The Court then explained that the basis for its disagreement with the First Circuit over the *Wright Line* standard was that the First Circuit had misinterpreted Section 10(c) of the NLRA. The Supreme Court noted that the First Circuit's view was that the burden could not be shifted to the employer because "[t]he General Counsel . . . had the burden of showing not only that a forbidden motivation contributed to the discharge but also that the discharge would not have taken place independently of the protected conduct of the employee."[61] The Court stated that there was no dispute that, under Section 10(c) of the NLRA, "throughout the proceedings, the General Counsel carries the burden of proving the elements of an unfair labor practice." However, the Supreme Court held, "the Court of Appeals erred in holding that § 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons."[62]

The Supreme Court then fully set forth the interpretation of the NLRA that it had sketched out in its summary of the *Wright Line* standard. The Court began by explaining:

> As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on anti-union animus—or as the Board now puts it, that the employee's protected conduct was a

58. *Id.* at 400.
59. *Id.* at 400 n.5 (emphasis added).
60. *Id.* at 400.
61. *Id.* at 400-01.
62. *Id.* at 401.

> substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under § 10(c).[63]

The Court thus indicated that proof that antiunion animus was a "partial" cause of the adverse action was sufficient to sustain the finding of a Section 8(a)(3) violation.

The Court next explained that in adopting the *Wright Line* standard, the Board had given employers an opportunity to escape Section 8(a)(3) liability even if the General Counsel proved that antiunion animus contributed to the challenged decision:

> [T]he Board's construction of the statute [in *Wright Line*] permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c).[64]

The Court added, in a footnote, a statement that succinctly described its view of what Section 10(c) required: "Section 10(c) places the burden on the General Counsel only to prove the unfair labor practice, not to disprove an affirmative defense."[65]

According to the Supreme Court, the Board's *Wright Line* standard fell within a range of permissible constructions of the NLRA. The Board could have construed the NLRA as requiring more, or less, from the General Counsel. For instance, the Board could have construed the NLRA as imposing the additional requirement demanded by the First Circuit—that the General Counsel bear the burden of proving that the challenged action would not have taken place but for the unlawful motive. On the other hand, the Court noted, the Board could have reasonably concluded that once an unlawful motive was proven, the existence of other motives was irrelevant to the finding of a violation, and affected only "the permissible remedy, in which event the burden of proof could surely have been put on the employer."[66] Instead, the Board chose the middle ground in

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63. *Id.*

64. *Id.*

65. *Id.* at 401 n.6. The Supreme Court also explained that the *Wright Line* standard did not conflict with the provision in Section 10(c) that "directed that no order of the Board reinstate or compensate any employee who was fired for cause," as that provision was intended to apply only to cases in which antiunion animus played *no* part in the employer's decision. *Id.*

66. *Id.* at 402. Former NLRB Chairman William Gould argued, in effect, that the Board should adopt this construction of the NLRA. In *Frick Paper Co.*, 319 N.L.R.B. 9, 12 (1995), Chairman Gould contended that in dual motive cases, if antiunion

making proof of other, legitimate grounds for the challenged decision an affirmative defense. The Supreme Court ruled that this was a permissible construction of the NLRA.[67]

Significantly, the Supreme Court offered a strong policy rationale for why it was reasonable to shift the burden of proof to the employer under the *Wright Line* standard. The Court declared:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.[68]

Thus, the Supreme Court in *Transportation Management* held that once the General Counsel has shown that an employer took an adverse action against an employee that was even *partially* based on antiunion animus, that employer can be considered a "wrongdoer."[69] As the passage quoted above reveals, that is because the statute makes such decisions "illegitimate": Employers are not permitted to take antiunion animus into account in making employment decisions.

After upholding the *Wright Line* standard, the Supreme Court affirmed the Board's finding that Transportation Management had violated Section 8(a)(3) in firing the discriminatee, Mr. Santillo. Significantly, the Supreme Court relied on evidence of pretext in reaching this conclusion. Specifically, the employer asserted that it had terminated Mr. Santillo for leaving the ignition keys in his bus and for taking unauthorized breaks. Although Mr. Santillo had in fact done these things, the Court agreed with the Board that the record demonstrated that these were not the *true* reasons for his discharge. The evidence of pretext in this case was similar to that in *Wright Line* itself: the record showed that the employer had never before disciplined any employee for the "commonplace" kinds of actions taken by Mr. Santillo, and that the employer had departed from its usual practice of issuing warnings before disciplining employees.[70] The Court concluded that these types of "evidence of pretext" were "substantial evidence" in support of the Board's conclusion that the employer violated Section 8(a)(3).[71]

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discrimination played a role in the challenged decision, there is a violation of Section 8(a)(3), and an employer's showing it would have taken the same action anyway should affect only the remedy in the case.

67. *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 402-03 (1983).

68. *Id.* at 403.

69. *Id.*

70. *Id.* at 404.

71. *Id.* at 405.

Thus, under *Transportation Management*, the foundation of the *Wright Line* standard, and hence the law of Section 8(a)(3) of the NLRA, was established: the General Counsel must prove in its prima facie case that antiunion animus played a part in the employer's challenged decision. Consequently, the amount and kind of evidence required for the General Counsel to meet this burden of proof is of central importance, and is the chief concern of this Article.

C. A Brief Overview of the Operation of the Wright Line *Standard Since* Transportation Management

The Board continues to apply the *Wright Line* standard to most complaints of violations of Section 8(a)(3). Since the Supreme Court approved the Board's *Wright Line* standard in 1983, the Board has filled in some of the details on what is to occur at each stage of adjudication under the *Wright Line* process.

The Board generally describes the first stage of the *Wright Line* process as requiring the General Counsel to establish a "prima facie showing" that the aggrieved employee's union activity was a "motivating factor" in the employer's decision to take an adverse action against that employee.[72] The General Counsel may use both direct evidence and circumstantial evidence to make this showing. But, as the Board noted in *Wright Line* itself, employers rarely openly reveal antiunion motivations for actions taken against employees,[73] and so direct evidence of discriminatory motivation is uncommon.[74] Consequently, in most Section 8(a)(3) cases, the General Counsel relies on circumstantial evidence to prove its prima facie case.

The Board typically requires the General Counsel to show four circumstances, or elements, to prove a prima facie case: (1) union activity by the aggrieved employee, (2) employer knowledge of that employee's union activity, (3) timing that suggests a link between the employee's activity and the employer's challenged action, and (4) employer antiunion animus.[75] If the General Counsel proves each of these elements, then the decisionmaker (the ALJ

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72. *See, e.g.*, Greg Murrieta, 323 N.L.R.B. 125, 128 (1997); Yesterday's Children, Inc., 321 N.L.R.B. 766, 768 (1996), *enforced in relevant part*, 115 F.3d 36 (1st Cir. 1997); Best Plumbing Supply, Inc., 310 N.L.R.B. 143, 143 (1993).

73. *See* Wright Line, 251 N.L.R.B. 1083, 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

74. *See* Brown & Root USA, Inc., 319 N.L.R.B. 1009, 1066 (1995); Interstate Material Corp., 290 N.L.R.B. 362, 370 (1988), *enforced*, 902 F.2d 37 (7th Cir. 1990); Sahara Las Vegas Corp., 284 N.L.R.B. 337, 347 (1987), *enforced*, 886 F.2d 1320 (9th Cir. 1989) (examples of decisions observing that direct evidence of unlawful motivation is rarely available).

75. *See, e.g., Yesterday's Children*, 321 N.L.R.B. at 768; Olathe Healthcare Ctr., Inc., 314 N.L.R.B. 54, 58 (1994); *Best Plumbing Supply*, 310 N.L.R.B. at 143 (examples of decisions setting forth the required elements of a prima facie case).

or the Board) will find that the prima facie case of unlawful motivation was established, and move on to the second stage of the *Wright Line* process.

At the second stage, "the burden shifts to the employer to demonstrate that it would have taken the adverse action against the employee even in the absence of the protected activity."[76] If the employer satisfies this burden, then the Section 8(a)(3) charge against it will be dismissed. On the other hand, if the employer fails to offer sufficient evidence for its defense, or if the defense is unpersuasive to the decisionmaker, then the decisionmaker will rule that the employer has failed to meet its *Wright Line* burden and is guilty of violating Section 8(a)(3).

This is the typical pattern of analyzing Section 8(a)(3) claims under the *Wright Line* standard, applied by ALJs and the Board in hundreds of cases every year. This Article will now turn to how pretext cases are typically handled by the Board under the *Wright Line* standard.

III. THE NATIONAL LABOR RELATIONS BOARD'S APPLICATION OF THE *WRIGHT LINE* STANDARD TO CASES INVOLVING EVIDENCE OF PRETEXT

Although, as noted previously, the Board stated in *Wright Line* that the standard it was adopting made it unnecessary to distinguish between pretext and dual motive cases,[77] for the first few years following the *Wright Line* decision, there was disagreement among members of the Board as to whether the standard should be applied in cases where the employer's asserted reason was found to be pretextual. In numerous cases from 1981 to 1983, Board Member Howard Jenkins expressed his view that *Wright Line* did not apply to pretext cases.[78] In the first of these opinions, *The Bond Press, Inc.*,[79] Member Jenkins explained that he found it unnecessary to rely on *Wright Line* because "here, after all the detailed examination of Respondent's reasons for defenses of the discharges, the upshot is that its reasons must be rejected as untrue, and the case is thus one of 'pretext,' as to which a *Wright Line* analysis adds nothing."[80]

76. *Best Plumbing Supply*, 310 N.L.R.B. at 143.

77. *See* Wright Line, 251 N.L.R.B. 1083, 1083 n.4 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

78. *See, e.g.*, Brigadier Indus., 267 N.L.R.B. 559, 559 n.4 (1983); St. Mary's Infant Home, Inc., 264 N.L.R.B. 1227, 1227 n.2 (1982); The Bond Press, Inc., 254 N.L.R.B. 1227, 1227 n.2 (1981); *see also* Kelly, *supra* note 11, at 906-10 (discussing the disagreement between Member Jenkins and other Board members over the application of *Wright Line* to pretext cases).

79. 254 N.L.R.B. 1227 (1981).

80. *Id.* at 1227 n.2.

Shortly after Member Jenkins announced this position, the Board noted in *Limestone Apparel Corp.*[81] that *Wright Line* had indicated that the Board would apply that analysis to all discrimination cases turning on employer motivation. The Board then explained:

> However, we find it unnecessary formally to set forth that analysis in those cases where an administrative law judge's findings and conclusions fully satisfy the analytical objectives of *Wright Line*. . . . Thus, where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon.[82]

A few weeks later in *Castle Instant Maintenance/Maid, Inc.*,[83] Member Jenkins cited *Limestone Apparel* as supporting his position.[84] The Board majority in *Castle Instant* (consisting of Members Fanning and Zimmerman) responded that it did not. They asserted that:

> *Limestone* holds that the Board will not find it necessary to apply the specific formulaic approach set forth in *Wright Line*, or to make reference to an administrative law judge's failure to do so where it affirms his finding that the respondent's justification for discharge or discipline against the General Counsel's prima facie showing of impermissible motivation was pretextual.[85]

In 1983, Member Jenkins left the Board,[86] and by 1984, the Board had firmly decided that the *Wright Line* analysis applied to pretext as well as dual motive cases. That year, in *Frank Black Mechanical Services, Inc.*,[87] the Board stated, without dissent, "It is clear, however, that the Board's *Wright Line* analysis applies to all 8(a)(3) and (1) discharge cases regardless of the Board's ultimate conclusion as to motive."[88] The following year, in *Taylor & Gaskin, Inc.*,[89] the Board said, "We do not agree with the [administrative law] judge that

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81. 255 N.L.R.B. 722 (1981).
82. *Id.*
83. 256 N.L.R.B. 130 (1981).
84. *Id.* at 130 n.1.
85. *Id.*
86. *See* Pete Early, *Sole Black on NLRB Steps Down*, WASH. POST, Aug. 26, 1983, at A15.
87. 271 N.L.R.B. 1302 (1984).
88. *Id.* at 1302 n.1.
89. 277 N.L.R.B. 563 (1985).

Wright Line does not apply to pretext cases."[90] Since 1985, *Frank Black* and *Taylor & Gaskin* have been cited many times for the proposition that the *Wright Line* analysis unquestionably applies to pretext cases.[91]

A trace of the pre-1984 opinions that questioned the need to apply the *Wright Line* analysis to pretext cases survives in a current doctrine. The Board has a policy that ALJs are not required to explicitly go through the entire *Wright Line* analysis in pretext cases.[92] Specifically, where a judge considers the employer's asserted reasons for the challenged action and concludes that they are pretextual, the judge need not go through the second, "burden-shifting" stage of *Wright Line*.[93] As stated in a 1996 Board decision:

> When it is shown that the business reason advanced by the employer for its action was a pretext—that is, that the reason either does not exist or was not in fact relied on—it necessarily follows that the employer has not met its burden and the inquiry is logically at an end.[94]

Implicit in this policy is the view that it is permissible for an ALJ, and the Board, to assess the employer's asserted reasons for its action during the initial, prima facie stage of the *Wright Line* analysis. This raises the second issue that generated controversy in the Board's application of *Wright Line* to pretext cases: whether the employer's defense and the evidence offered in support of it can be considered when ruling on the General Counsel's prima facie case. From 1982 until 1992, the Board issued inconsistent decisions on this question.[95] In 1982, in *Hillside Bus Corp.*,[96] the Board held that "in assessing whether a prima facie case has been presented, an administrative law judge must view the General Counsel's evidence in isolation, apart from the respondent's proffered defense. It is only after the General Counsel's prima facie requirement has been met that

90. *Id.* at 563 n.2.

91. *See, e.g.*, Ferguson-Williams, Inc., 322 N.L.R.B. 695, 703 (1996) (citing *Frank Black*, the ALJ explains: "The [*Wright Line*] test applies regardless of whether the case involves pretextual reasons or dual motivation."); Laidlaw Transit, Inc., 315 N.L.R.B. 79, 84 (1994) (ALJ cites *Frank Black* in holding that "the [*Wright Line*] test applies regardless of whether the case involves pretextual reasons or dual motivation."); Casey Elec., Inc., 313 N.L.R.B. 774, 774 n.2 (1994) (Board cites *Taylor & Gaskin* after stating, "[W]e do not agree with the judge that *Wright Line* 'does not apply' to pretext cases.").

92. *See* Arthur Young & Co., 291 N.L.R.B. 39 (1988), *enforced*, 884 F.2d 1387 (4th Cir. 1989).

93. *Id.*

94. Thermon Heat Tracing Servs., Inc., 320 N.L.R.B. 1035, 1058 (1996), *enforced*, 143 F.3d 181 (5th Cir. 1998).

95. *See* Hardin, *supra* note 6, at 75 & nn.9-12 (3d ed. Supp. 1995).

96. 262 N.L.R.B. 1254 (1982).

an administrative law judge must consider the respondent's defense."[97] Over the next ten years, several other Board decisions stated that the respondent employer's evidence should not be considered in determining whether the General Counsel had established a prima facie case.[98]

Meanwhile, in numerous other decisions in the 1980s, the Board tacitly rejected the *Hillside Bus* rule by assessing, or adopting ALJ decisions that assessed, the employer's evidence in judging the sufficiency of the prima facie case.[99] Then, in 1990, in *Golden Flake Snack Foods*,[100] the Board expressly disavowed a statement by the ALJ that at the prima facie stage the General Counsel's evidence must be viewed in isolation from the respondent employer's defense. The Board declared, "We note in this regard that it is the evidence as presented at the hearing, *drawn from whatever source*, which precisely determines whether or not there is a prima facie case of unlawful conduct."[101]

Two years later, the Board made clear that it had abandoned the *Hillside Bus* limit on the consideration of evidence at the prima facie stage. In *Greco & Haines, Inc.*,[102] the Board held, "Under Board precedent, a prima facie case may be established by the record as a whole and is not limited to evidence presented by the General Counsel. Thus, the absence of any legitimate basis for an action may form part of the proof of the General Counsel's case."[103] Since 1992, several decisions have followed *Greco & Haines* in holding that the evidence offered by the employer in its defense can be considered in deciding whether the General Counsel has met its prima facie case.[104] In 1996, in *Pace Industries, Inc. (Precision Industries)*,[105] the Board attempted to harmonize this rule with its inconsistent *Hillside Bus* precedents. The Board explained:

> That the judge must consider the General Counsel's prima facie case separately from the Respondent's *Wright Line* defense . . . means only that the judge need not address the Respondent's defense at all unless

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97. *Id.*

98. *See, e.g.*, Cine Enters., Inc., 301 N.L.R.B. 446, 447 (1991), *enforced*, 978 F.2d 715 (9th Cir. 1992); Bali Blinds Midwest, 292 N.L.R.B. 243, 243 n.2 (1988).

99. *See, e.g.*, Active Transp., 296 N.L.R.B. 431, 432 & n.8 (1989), *enforced mem.*, 924 F.2d 1057 (6th Cir. 1991); Murd Indus., Inc., 287 N.L.R.B. 864, 864, 868-70 (1987); Heritage Manor Convalescent Ctr., Inc., 269 N.L.R.B. 408, 413 (1984).

100. 297 N.L.R.B. 594 (1990).

101. *Id.* at 594 n.2 (emphasis added).

102. 306 N.L.R.B. 634 (1992).

103. *Id.* (citing *Golden Flake*, 297 N.L.R.B. at 594).

104. *See, e.g.*, Electro-Voice, Inc., 320 N.L.R.B. 1094, 1110 n.20 (1996); TNT Skypak, Inc., 317 N.L.R.B. 659, 659 n.2 (1995); Pepsi-Cola Bottling Co., 315 N.L.R.B. 882, 890 n.20 (1994) (discharge of Robert Munn), *enforced in relevant part*, No. 95-1924, 1996 U.S. App. LEXIS 23936, at *7 n.2 (4th Cir. Sept. 10, 1996); Peter Vitalie Co., 313 N.L.R.B. 971, 972-73 (1994).

105. 320 N.L.R.B. 661 (1996), *enforced*, 118 F.3d 585 (8th Cir. 1997).

> he first finds that the General Counsel has proved that the Respondent acted, at least in part, from unlawful motives. It does not mean that the judge, in determining whether the General Counsel has carried his prima facie burden, may not consider evidence that also bears on the Respondent's defense.[106]

In sum, by 1993 the Board had resolved two areas of uncertainty: the *Wright Line* standard analysis applied to pretext cases, and all record evidence, including the employer's defense, could be considered in ruling on the prima facie stage of that analysis. However, several issues remained for the Board to resolve: (1) what role evidence of pretext should play in assessing the General Counsel's prima facie case, (2) what elements of the prima facie case could evidence of pretext be used to support, and (3) how significant a factor could pretext be in deciding whether a prima facie case of unlawful motive had been presented?

The Board has not been as explicit in addressing these questions as it was in resolving the pretext issues discussed in the preceding paragraphs. But as the Board has considered and discussed evidence of pretext in deciding *Wright Line* cases, some principles and patterns have emerged.

In many cases, the Board has found that evidence of pretext served to establish one or more of the standard elements of the prima facie case. For example, in *Whitesville Mill Service Co.*,[107] the Board relied on evidence of pretext to find that the element of animus was satisfied. The Board stated that, unlike the ALJ, it did not base its finding of animus on the plant manager's testimony that he was shocked by the presence of union activity. The Board explained, "Although we agree that the Respondent harbored union animus, we find it unnecessary to rely on [the plant manager's] testimony . . . Rather we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility."[108]

Since *Whitesville*, the Board has affirmed ALJ decisions that relied on *Whitesville* to hold that evidence of pretext is sufficient to prove animus.[109] Furthermore, both before and after *Whitesville*, the Board has affirmed other ALJ

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106. *Id.* at 662 n.7 (citation omitted).

107. 307 N.L.R.B. 937 (1992).

108. *Id.*

109. *See, e.g.*, Parsippany Hotel Mgmt. Co., 319 N.L.R.B. 114, 129 (1995), *enforced*, 99 F.3d 413 (D.C. Cir. 1996) (citing *Whitesville* for the proposition that "even if there were an absence of proof of union animus by Respondent," animus can be inferred from circumstantial evidence, including the "pretextual nature of the reasons" given by the Respondent); Horizons Hotel Corp., 312 N.L.R.B. 1212, 1224 n.37 (1993), *enforced*, 49 F.3d 795 (1st Cir. 1995) ("It is also inferred from the pretextual nature of the reasons for the discharges advanced by the Respondent that the Respondent was motivated by union hostility." (citing *Whitesville*, 307 N.L.R.B. 937 (1992))).

decisions in which the ALJ used evidence of pretext to support a finding of animus.[110]

The Board has also held that evidence of pretext can be used to establish the knowledge element of the prima facie case. In 1995, in *Montgomery Ward & Co.*,[111] the Board explained that the employer's knowledge of a discriminatee's union activities "need not be established directly . . . but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn."[112] After listing several examples of evidence that may be used to infer knowledge, the Board stated:

> Finally, the Board has inferred knowledge where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. Even where the employer's rationale is not patently contrived, the Board has held that the 'weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation.'[113]

Thus, in *Montgomery Ward*, the Board expressly declared that evidence of pretext is sufficient to prove the element of knowledge.

The Board issued a similar ruling in 1987, in *Abbey's Transportation Services, Inc.*[114] In *Abbey's*, the Board noted that there was no direct evidence of the employer's knowledge of the discriminatees' union activities, but found that circumstantial evidence, including the pretextual nature of the reasons given for the discriminatees' discharges, gave rise to an inference of such knowledge.[115] The Board then explained that "'[t]he same set of circumstances may be relied upon to support both an inference of knowledge and an inference of discrimination.'"[116] In a few other decisions, the Board has included evidence of pretext as one of the factors that supported an inference of employer knowledge of the discriminatee's union activities.[117]

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110. *See, e.g.*, Custom Top Soil, Inc., 327 N.L.R.B. No. 34, at *1 (1998) (in which the Board itself stated, "There remains substantial evidence of animus, particularly including the Respondent's . . . pretextual reasons for not hiring the discriminatees."); Sports Shinko (Waikiki) Corp., 316 N.L.R.B. 655, 671 (1995); Asociacion Hosp. del Maestro, Inc., 291 N.L.R.B. 198, 204 (1988); Birch Run Welding & Fabricating, Inc., 269 N.L.R.B. 756, 765 (1984), *enforced*, 761 F.2d 1175 (6th Cir. 1985).

111. 316 N.L.R.B. 1248 (1995), *enforced*, 97 F.3d 1448 (4th Cir. 1996).

112. *Id.* at 1253.

113. *Id.* (citations omitted).

114. 284 N.L.R.B. 698 (1987).

115. *Id.* at 700.

116. *Id.* at 701 (quoting Coca-Cola Bottling Co., 237 N.L.R.B. 936, 944 (1978)).

117. *See, e.g.*, Greco & Haines, Inc., 306 N.L.R.B. 634 (1992); Baumgardner, 288 N.L.R.B. 977, 977 n.4 (1988), *enforced*, 866 F.2d 1411 (3d Cir. 1988).

In several cases, rather than finding that evidence of pretext supports one of the standard elements of a prima facie case, such as animus or knowledge, the Board has found that pretext is itself an independent element that helps to prove the prima facie case. For example, in *Transmart, Inc. (Cincinnati Truck Center)*,[118] the Board overturned the ALJ's conclusion that the General Counsel failed to prove its prima facie case, and found that the prima facie case had been established by evidence of the discriminatee's union activity, the employer's knowledge of that activity, statements indicating the employer's animus, *and* "the implausibility of the reasons assigned for the warning and discharge at issue."[119] Similarly, in *Hi-Tech Cable Corp.*,[120] the Board held:

> [B]ased on proof of the Respondent's union animus, its knowledge of Jones' prounion attitude, *and* the inference of unlawful motivation drawn from the assertion of pretextual reasons, we find that the General Counsel established that Jones' protected conduct was a substantial or motivating factor in the Respondent's decision not to hire him.[121]

In addition to the above cases in which the Board simply included pretext in its list of the elements supporting the prima facie case, there have been other cases in which the Board has expressly pointed out that it relied on evidence of pretext, in addition to standard elements such as animus or knowledge, in finding that the General Counsel met its prima facie case. For example, in *Ellis (Ellis Electric)*,[122] the Board stated, "In affirming the judge's finding that the credible evidence establishes a prima facie case of unlawful motivation for the March 9, 1993 layoffs, we make clear that we rely on the pretextual nature of the reasons the Respondent asserted as its defense."[123] The Board has also affirmed many ALJ decisions in which the judge identified evidence of pretext as one of the

118. 315 N.L.R.B. 554 (1994), *enforced*, 117 F.3d 1421 (6th Cir. 1997).

119. *Id.* at 555.

120. 318 N.L.R.B. 280 (1995), *enforced in relevant part*, 128 F.3d 271 (5th Cir. 1997).

121. *Id.* at 293 (emphasis added); *see also* Lancaster-Fairfield Cmty. Hosp., 303 N.L.R.B. 238, 238 (1991), *enforced*, 968 F.2d 1215 (6th Cir. 1992) ("Thus, the judge's finding that the Respondent's asserted reasons for its actions were pretextual, a finding which we adopt, when combined with the timing of the transfer decisions after the Respondent learned of the Union's organizing campaign, Paxton's role as a leading union supporter, and the questionable handling of his first transfer request, provides an independent basis for our determination that the Respondent's actions were unlawfully based on Paxton's union activities.").

122. 315 N.L.R.B. 1187 (1994).

123. *Id.* at 1187 n.2 (1994) (citations omitted).

factors that supported the conclusion that the General Counsel had met its prima facie case.[124]

The cases discussed to this point demonstrate that the Board has often relied on evidence of pretext as an important factor supporting its finding that the General Counsel proved its prima facie case. In other cases, the Board has relied even more heavily on pretext. In numerous cases, a showing of pretext has been the primary reason, or one of the primary reasons, that the Board concluded that the General Counsel proved its prima facie case.

For example, in *Active Transportation*,[125] the Board identified pretext as the most important factor supporting the prima facie case: "The threat . . . , the interrogations . . . , the timing of the discharges . . . , and *most significantly* the pretextual reasons advanced for the discharges are indicative of illegal motivation for the discharges."[126] Similarly, in *Richardson Bros. South*,[127] the Board held that "particularly in light of the judge's rejection of the Respondent's stated explanation for refusing to rehire [the discriminatee] . . . , the finding that the Respondent's true motive was an unlawful one is warranted."[128] In other decisions, the Board has concentrated almost exclusively on evidence of pretext in deciding that the prima facie case was satisfied.[129] Moreover, the Board has adopted many ALJ decisions that relied almost entirely on evidence of pretext in finding that the General Counsel met its prima facie case.[130]

In many of the decisions where the Board upheld the prima facie case based largely on evidence of pretext, the Board relied on the reasoning of a 1966 decision of the Ninth Circuit, *Shattuck Denn Mining Corp. v. NLRB*,[131] which was cited with approval in *Wright Line*.[132] In *Shattuck Denn*, the Ninth Circuit

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124. *See, e.g.*, 87-10 51st Ave. Owners Corp., 320 N.L.R.B. 993, 998 (1996); Braden Mfg., Inc., 315 N.L.R.B. 1145, 1148 (1994); Murd Indus., Inc., 287 N.L.R.B. 864, 864, 868-70 (1987).

125. 296 N.L.R.B. 431 (1989), *enforced mem.*, 924 F.2d 1057 (6th Cir. 1991).

126. *Id.* at 432 (emphasis added).

127. 312 N.L.R.B. 534 (1993).

128. *Id.*

129. *See, e.g.*, Beverly Cal. Corp., 326 N.L.R.B. No. 29 (1998) (discharge of employee Tausch); Fluor Daniel, Inc., 311 N.L.R.B. 498, 498-500 (1993), *enforced in relevant part*, 102 F.3d 818 (6th Cir. 1996); Mullican Lumber Co., 310 N.L.R.B. 836, 836-37 (1993).

130. *See, e.g.*, Aloha Temp. Serv., Inc., 318 N.L.R.B. 972, 974 (1995) (failure to hire discriminatees Conroy, Clothier, Pietschmann, and Cochard); Adco Elec., Inc., 307 N.L.R.B. 1113, 1126-29 (1992) (discharge of Eric Muncy), *enforced*, 6 F.3d 1110 (5th Cir. 1993); Heritage Manor Convalescent Ctr., Inc., 269 N.L.R.B. 408, 413 (1984) (discharge of Linnell Key).

131. 362 F.2d 466 (9th Cir. 1966).

132. *See* Wright Line, 251 N.L.R.B. 1083, 1088 n.12 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

upheld the Board's reliance on evidence of pretext in finding that the employer had unlawfully discharged a union activist. The Ninth Circuit held:

> If [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.[133]

In *Wright Line*, the Board specially dropped a footnote, footnote twelve, in order to assert, based on *Shattuck Denn*, that "[t]he absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case."[134]

In several decisions, the Board has relied on *Shattuck Denn* or footnote twelve of *Wright Line*, or both, to support its position that evidence of pretext can play a leading role in proving the prima facie case. For example, in *Fluor Daniel, Inc.*,[135] the Board opened its examination of the Section 8(a)(3) issue with a summary of the *Wright Line* analysis, and then immediately added:

> It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved.[136]

In *Active Transportation*, to support its assertion that pretext was the most significant factor supporting the prima facie case, the Board explained in a footnote, "If the proffered reason for a discharge is false, one may infer that there is another reason (an unlawful reason) for the discharge that the employer wishes to hide, where the surrounding facts tend to reinforce that inference."[137] The Board again cited both *Shattuck Denn* and footnote twelve of *Wright Line* in its *Mullican Lumber Co.*[138] decision in concluding that "we infer from the pretextual nature of the reason for Richards' termination advanced by the Respondent that it was motivated by union animus and hostility toward Richards' anticipated exercise of his Section 7 rights."[139] In addition, there have been many other

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133. *Shattuck Denn*, 362 F.2d at 470.

134. *Wright Line*, 251 N.L.R.B. at 1088 n.12 (citing *Shattuck Denn*).

135. 311 N.L.R.B. 498 (1993), *enforced in relevant part*, 102 F.3d 818 (6th Cir. 1996).

136. *Id.* at 498 & n.5 (citing *Shattuck Denn*).

137. 296 N.L.R.B. 431, 432 n.8 (1989), *enforced mem.*, 924 F.2d 1057 (6th Cir. 1991) (citing *Shattuck Denn* and footnote 12 of *Wright Line*).

138. 310 N.L.R.B. 836 (1993).

139. *Id.* at 837.

cases in which the Board has cited *Shattuck Denn* or footnote twelve of *Wright Line* to support its finding that evidence of pretext helped to establish the prima facie case.[140]

In sum, the Board has repeatedly held that evidence of pretext can be used to establish the prima facie case. Particularly in those decisions using the "*Shattuck Denn*" rationale, evidence of pretext has been the primary, or even the sole basis, for concluding that the General Counsel proved its prima facie case. These decisions strongly suggest that evidence of pretext is itself sufficient to prove a Section 8(a)(3) violation. Evidence of pretext serves to satisfy the first stage of the *Wright Line* analysis, and as for the second stage, the finding of pretext also undermines any argument by the employer that it had a legitimate reason for taking the challenged action.[141] Thus, numerous Board decisions have indicated that a finding that the employer's asserted reasons for its challenged action are pretextual leads to the conclusion, practically as a matter of law, that the challenged action violated Section 8(a)(3).[142]

In light of these Board precedents, it is not surprising that at least one ALJ has concluded that instead of going through the entire *Wright Line* analysis, one could rely on a finding of pretext as an alternative means of determining that the employer had violated Section 8(a)(3). In *Precision Industries*, ALJ Thomas Wilks engaged in the following reasoning:

> Because the Board has adopted the Wright Line evidentiary rule with respect to mixed motivation cases, it did not preclude the possibility that *the General Counsel could sustain his case by proving that the proffered alleged business reason for the adverse action was entirely false and pretextual*, i.e., there was no mixed motivation at all. Thus it may be found that *where the Respondent's proffered nondiscriminatory motivational explanation is so consummately false, even in the absence of direct evidence of knowledge of and animus toward the protected activity, the trier of fact is constrained to infer unlawful motivation.* [citing *Shattuck Denn*]. The Board, however, often construes the record which discloses such falsity of proffered explanation as in the nature of a respondent having failed to meet its

140. *See, e.g.*, Poly-America, Inc., 328 N.L.R.B. No. 88 (1999); Richardson Bros. S., 312 N.L.R.B. 534, 534 (1993) (citing *Shattuck Denn*); Weco Cleaning Specialists, Inc., 308 N.L.R.B. 310, 310 n.4 (1992) (citing *Shattuck Denn* and footnote 12 of *Wright Line*); Whitesville Mill Serv. Co., 307 N.L.R.B. 937, 937 (1992) (citing *Shattuck Denn*); Lancaster-Fairfield Cmty. Hosp., 303 N.L.R.B. 238, 238 (citing *Shattuck Denn* and footnote 12 of *Wright Line*).

141. *See, e.g.*, *Richardson Bros.*, 312 N.L.R.B. at 540 ("In light of the judge's further rejection of the Respondent's proffered reason for its action, the Respondent clearly failed to carry its burden of showing that it would have taken the same action with respect to Rawls absent his union activity.").

142. *See supra* text accompanying notes 125-40.

> *Wright Line* burden of proof. However, *the Board has recently made it clear that it adheres to the Shattuck Denn rationale* as it has stated in a case of falsity of defense: 'The Board is entitled to infer that the Respondent's true motive was unlawful, i.e., because of the [discriminatee's] protected activity.'[143]
>
> . . . [W]e are confronted with an astonishing body of inconsistences, contradictions, improbabilities, and aberrational and shifting explanations that are so gross as to permit no room for any conclusion other than that such testimony was the product of deliberate mendacity or a total malfunction of all of the Respondent witnesses' recollective capacities. *I conclude that such testimony necessarily compels the conclusion* that Respondent's true motivation for implementing any kind of a screening-testing-physical examination procedure at the Malvern plant in the fall of 1989 was unlawful, i.e., discriminatory under the Act. . . . I further find that the *General Counsel has proven by virtue of such evidence that Respondent was possessed of no other nondiscriminatory motivation and that all references thereto by Respondent's agents are false and pretextual.*[144]

Notably, ALJ Wilks's opinion described reliance on evidence of pretext to prove a Section 8(a)(3) violation as the "*Shattuck Denn* rationale." Indeed, ALJ Wilks's reasoning seems completely consistent with the line of Board precedents that relied on *Shattuck Denn* or footnote twelve of *Wright Line* in holding that evidence of pretext could establish a prima facie case of discrimination.[145] However, the Board, in its 1996 review of ALJ Wilks's decision in *Precision Industries*, expressly disavowed his reasoning.[146] The Board's bases for doing so, and its decision in *Precision Industries*, will be discussed more fully in Part IV.C.[147] For now, the salient point is that the Board's ruling in *Precision Industries* was influenced, at least in part, by judicial developments, the subject to which this Article now turns.

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143. Pace Indus., Inc. (Precision Indus.), 320 N.L.R.B. 661, 707 (1996), *enforced*, 118 F.3d 585 (8th Cir. 1997) (emphases added) (quoting Williams Contracting, Inc., 309 N.L.R.B. 433 (1992)).

144. *Id.* (emphases added).

145. *See supra* text accompanying notes 131-40.

146. *See Precision Indus.*, 320 N.L.R.B. at 661 & n.4.

147. *See infra* text accompanying notes 295-302.

IV. JUDICIAL DEVELOPMENTS AFFECTING PRETEXT CASES

A. The Federal Courts of Appeals' Responses to the National Labor Relations Board's Approach to Pretext

After the Supreme Court upheld the *Wright Line* standard in 1983, for the next several years the federal courts of appeals engaged in little discussion of the Board's practice of relying on evidence of pretext to find violations of Section 8(a)(3). In numerous cases, courts of appeals, with at most limited discussion, affirmed the Board's rulings that evidence of pretext could be used to establish a prima facie case of discrimination.[148] In a few decisions, courts questioned in dicta whether the Board could consider the employer's reasons for the challenged action at the prima facie stage of the *Wright Line* analysis.[149] But on both sides of the pretext issue, courts of appeals did not thoroughly examine the subject until the 1990s.

The first circuit court to engage in a substantial discussion of how the Board should treat evidence of pretext was the Second Circuit, in its second decision in *Holo-Krome Co. v. NLRB*.[150] The *Holo-Krome* case had a protracted history, coming before the Board twice and the Second Circuit three times. The underlying discrimination charge in *Holo-Krome* was that the company had violated Sections 8(a)(3) and (1) of the NLRA in refusing to rehire from layoff in 1986 two employees, Mr. Pace and Mr. Rutkauski, who had been active in a union campaign the year before.[151]

In its first decision, the Board explained that its conclusion that the General Counsel had established its first stage case was based in part on evidence of pretext. The Board relied on the "*Shattuck Denn*" rationale[152] by asserting, "The Board's decision in *Wright Line* did not disturb the well-established principle that if the stated motive for a discharge (or refusal to hire) is false, the trier of

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148. *See, e.g.*, Property Res. Corp. v. NLRB, 863 F.2d 964, 967 (D.C. Cir. 1988) (noting that the Board's reliance on pretext, and on other factors, was "amply supported by precedent"); Southwire Co. v. NLRB, 820 F.2d 453, 460-61, 464 (D.C. Cir. 1987) (court relied on "pretextual reasons" to find Section 8(a)(3) violations in discharges of David Huckeba, Danny Ray Rowell, and suspension of Buford Amburgey); Turnbull Cone Baking Co. v. NLRB, 778 F.2d 292, 297 (6th Cir. 1985) ("Anti-union motivation may reasonably be inferred from a variety of factors, such as . . . the inconsistencies between the proffered reason and other actions of the employer . . . .").

149. *See, e.g.*, NLRB v. Acme Die Casting Corp., 728 F.2d 959, 961 (7th Cir. 1984) ("The National Labor Relations Act does not require a company to give reasons for laying off a worker . . . . We thus have disapproved the drawing of an inference of improper motive from the fact that the employer is unable to give a good reason for firing or laying off a worker who happens to be a union supporter.").

150. 947 F.2d 588 (2d Cir. 1991).

151. Holo-Krome Co., 293 N.L.R.B. 594, 594-96 (1989).

152. *See supra* text accompanying notes 131-34.

fact may infer that there is another motive that the employer wishes to conceal—an unlawful motive—where the surrounding facts tend to reinforce that inference."[153] Applying the *Shattuck Denn* rationale to the facts, the Board concluded that the falsity of Holo-Krome's asserted reasons for not rehiring Mr. Pace and Mr. Rutkauski "reinforces the inference that the Respondent's true reasons were unlawful."[154]

The Second Circuit overturned the Board's finding of a Section 8(a)(3) violation, but did so almost entirely on the ground that the Board had erred in considering Holo-Krome's lawful expressions of opposition to unionization as evidence of animus.[155] The Second Circuit remanded the case to the Board to reconsider whether the refusal to rehire Mr. Pace and Mr. Rutkauski was unlawfully motivated, without reference to the employer's lawful antiunion statements.[156] On remand, the Board again found that Holo-Krome's failure to rehire the employees violated Section 8(a)(3).[157] The Board again relied on the *Shattuck Denn* rationale in holding that evidence of pretext could be used to establish the first stage case.[158]

The Second Circuit also overturned the Board's second decision, and this time the court squarely addressed the Board's finding that evidence of pretext supported the first stage case. In *Holo-Krome Co. v. NLRB (Holo-Krome II)*,[159] the Second Circuit ruled that when the Board had considered Holo-Krome's proffered reasons for its action at the first stage of the analysis, the Board had "misallocated" the burden of proof.[160] According to the court, those reasons should not be considered until the *second* stage of the *Wright Line* analysis. The court explained that because the "ALJ in this case found that the General Counsel failed to make an adequate prima facie case, Holo-Krome's

153. *Holo-Krome*, 293 N.L.R.B. at 596 (citing *Shattuck Denn* and footnote 12 of *Wright Line*).

154. *Id.*

155. Holo-Krome Co. v. NLRB (Holo-Krome I), 907 F.2d 1343, 1345-47 (2d Cir. 1990). The Second Circuit reasoned that this was contrary to Section 8(c) of the NLRA, which protects employer communications regarding unionization so long as they do not contain threats against employees or promises of benefits. *Id.* The Second Circuit's ruling on the "employer speech" issue conflicts with the current position of the Board, and some other courts of appeals. This conflict over the "employer speech" issue has received some scholarly attention. *See, e.g.*, Ian Adams & Richard L. Wyatt, Jr., *Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment*, 22 J. CONTEMP. L. 19 (1996); Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive under the National Labor Relations Act*, 53 OHIO ST. L.J. 1 (1992).

156. *Holo-Krome I*, 907 F.2d at 1347.

157. *See* Holo-Krome Co., 302 N.L.R.B. 452 (1991).

158. *Id.* at 452.

159. 947 F.2d 588 (2d Cir. 1991).

160. *Id.* at 592.

explanations of why it acted as it did toward Pace and Rutkauski were not initially at issue."[161] Therefore, the court reasoned, "The Board . . . should not have evaluated Holo-Krome's rebuttal evidence until it found that the General Counsel had indeed presented an adequate prima facie case."[162] After holding that the evidence of pretext should not have been considered in assessing the General Counsel's prima facie case, the Second Circuit found that the remaining evidence was insufficient to support that prima facie case, and therefore the case against Holo-Krome must be dismissed.[163]

The Board petitioned the Second Circuit for rehearing of the *Holo-Krome II* case, and particularly asked the court to reconsider its ruling that the Board had erred in examining the validity of the employer's reasons for its challenged action at the prima facie stage of the case. In its petition, the Board "vigorously urg[ed]" the court not to bar the Board from considering evidence of pretext in its review of the prima facie case, "contending that the decision to give such consideration to the employer's explanation is within the administrative competence of the Board and that the Board has regularly done so in the past."[164] The Second Circuit agreed to clarify its decision in *Holo-Krome II*, finding that "our prior opinion in this case requires a slight refinement."[165] In *Holo-Krome Co. v. NLRB (Holo-Krome III)*,[166] the Second Circuit's final decision in the *Holo-Krome* case, the court engaged in a thoughtful analysis of the appropriate role of evidence of pretext in the *Wright Line* analysis, and the decision is recognized as an important statement on that issue.[167]

In *Holo-Krome III*, the Second Circuit recognized that when the Board applies the *Wright Line* standard, it "uses the phrase 'prima facie case' to mean the General Counsel's burden to prove by a preponderance of the evidence that protected activity was at least part of the motivation for the employer's adverse action."[168] The court observed that this definition of the prima facie stage of the *Wright Line* analysis was approved by the Supreme Court in *Transportation Management*.[169] But the Second Circuit also pointed out that this definition of "prima facie" was different from the meaning of the phrase in other contexts, when it can mean a quantum of facts sufficient to require the defendant to

161. *Id.*

162. *Id.*

163. *Id.* at 592-95.

164. Holo-Krome Co. v. NLRB (Holo-Krome III), 954 F.2d 108, 109-10 (2d Cir. 1992).

165. *Id.* at 110.

166. 954 F.2d 108 (2d Cir. 1992).

167. *See* Hardin, *supra* note 6, at 82 (discussing *Holo-Krome*'s assessment of the Board's approach to evidence of pretext); Union-Tribune Publ'g Co. v. NLRB, 1 F.3d 486, 491 (describing *Holo-Krome* as a "scholarly opinion" on the Board's approach to evidence of pretext).

168. *Holo-Krome III*, 954 F.2d at 111.

169. *Id.* at 111-12.

present an affirmative defense.[170] Therefore, the Second Circuit recommended that the Board cease using the phrase "prima facie case" to describe the first stage of the *Wright Line* standard.[171] As will be discussed below, other circuit courts have joined the Second Circuit in calling for the Board to stop using the phrase "prima facie case," and the Board has responded to this advice.[172]

The Second Circuit next began to examine the central issue before it, whether the Board could consider the pretextual nature of the employer's reasons for its actions at the prima facie stage of the *Wright Line* analysis. The court focused on footnote twelve of the *Wright Line* decision, the footnote in which the Board, relying on *Shattuck Denn*, had stated, "'The absence of any legitimate basis for an action may, of course, form part of the proof of the General Counsel's case.'"[173] The court found that the scope of the principle expressed in the footnote was unclear:

> It was not clear in *Shattuck Denn*, and it became no clearer in footnote 12 of *Wright Line*, whether the Board thought that the absence of an employer's legitimate basis for its adverse action could be gleaned only from the employer's failure to provide a credible explanation to the employee *during the episode* or also from the failure to *provide a credible explanation* to the administrative law judge *during the Board hearing*.[174]

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170. *Id.* at 111.

171. *Id.* at 112 ("Though we now know that the Board uses the phrase 'prima facie case' to mean evidence that proves that protected conduct was a motivating factor, it would be helpful if the Board would abandon the phrase, in view of its entirely different meaning in other contexts, and adopt some terminology that connotes proof of the elements of liability.").

172. *See infra* note 214 (Fourth Circuit suggests Board no longer use the phrase prima facie case); *infra* notes 278-87 and accompanying text (D.C. Circuit recommends that Board abandon use of the phrase); *infra* notes 288-94 and accompanying text (Board's discussion of these recommendations). In Part V, this Article recommends that the Board follow these courts' advice and should discontinue using the term "prima facie" to refer to the General Counsel's burden under the *Wright Line* standard. *See infra* text accompanying notes 431-33. However, most Board decisions, and some court decisions, continue to use the term "prima facie" in referring to the first stage of the *Wright Line* process. Consequently, many quotations of cases in this Article include the term "prima facie." Therefore, to avoid the confusion that would be created by differences in terminology between the quotations and the original language of this Article, this Article continues to use the phrase "prima facie" to refer to the first stage of the *Wright Line* process.

173. Holo-Krome Co. v. NLRB (Holo-Krome III), 954 F.2d 108, 112 (2d Cir. 1992) (quoting Wright Line, 251 N.L.R.B. 1083, 1088 n.12 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)).

174. *Id.* (emphasis added).

The court then summarized the Board's inconsistent precedents on whether the defense offered by the employer at the hearing can be considered when ruling on whether the General Counsel has met its prima facie burden.[175]

The Second Circuit determined that, despite the "needless confusion" created by the conflicting Board decisions, "there appears to be a consistent rule in practice."[176] The court described that rule as follows:

> The Board wants the ALJ to make an initial determination as to whether the General Counsel has proved that protected activity was part of the motivation of the employer's conduct. In making that determination, the ALJ may use all of the record evidence. This clearly includes whatever explanation the employer gave to the employees during the episode, and, it apparently also includes the explanation that the employer presented at the hearing. Where the Board draws the line, however, is in the consideration of the employer's affirmative defense. That defense is not to be considered until the ALJ has determined that the General Counsel has presented a prima facie case. Thus, the employer's explanation *for the action it took* can be assessed in determining whether a prima facie case has been shown, but the employer's affirmative defense *as to the action it would have taken if no improper motivation had existed* cannot be assessed until the prima facie case has been proven.[177]

This passage in *Holo-Krome III* was not really a description of what the Board had done in pretext cases, but was more a recital of what the Second Circuit decided the Board *should* do. The differentiation between evidence regarding "the action the employer took" and evidence regarding "the action the employer would have taken" did not derive from Board precedents, but from a distinction the Second Circuit itself drew between pretext cases and dual motive cases earlier in its *Holo-Krome III* decision.[178] The passage implied that although an ALJ and the Board could consider employer explanations in the record in assessing the prima facie case, they could not rule on the validity of the employer explanations underlying the employer's affirmative defense until after they concluded that the General Counsel had proven its prima facie case.

The Second Circuit then explained, essentially, that the appropriate determinant of whether evidence of the employer's reasons for its action could be considered in assessing the prima facie case was *how* that evidence had been

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175. *See supra* notes 95-106 and accompanying text. That earlier discussion explains that the Board finally resolved that conflict in *Greco & Haines, Inc.*, 306 N.L.R.B. 634 (1992), issued two months after the Second Circuit's last decision in *Holo-Krome III.*

176. *Holo-Krome III*, 954 F.2d at 113.

177. *Id.* (emphases added).

178. *See id.* at 110.

brought into the record. "Obviously," the court declared, "the General Counsel's 'prima facie case' cannot consist of evidence that the General Counsel has failed to elicit."[179] This brought the court to its clarification of its earlier opinion in *Holo-Krome II*:

> The point we sought to make in our original opinion was that the General Counsel's prima facie case could not include explanations of the employer that the General Counsel had not elicited. To whatever extent the opinion might be read to imply that the *prima facie* case cannot include assessment by the ALJ of the employer's explanation *as elicited by the General Counsel* (whether the explanation was offered during the episode or during the hearing), the opinion was a shade too broad. And, *if the employer elects to offer evidence rebutting the General Counsel's prima facie case* (whether or not framed as an affirmative defense), the ALJ is entitled to assess the entire record in determining whether the *prima facie* case remains proven.[180]

The Second Circuit thus held that evidence regarding the employer's reasons for the challenged action *could* be considered by an ALJ and the Board in assessing the General Counsel's prima facie case, as long as that evidence was presented as part of the General Counsel's case, or was offered by the employer to rebut the General Counsel's case.[181]

Following the Second Circuit's decision in *Holo-Krome III*, the Board issued a series of decisions in 1992 and 1993 in which the Board asserted that its practice of considering evidence of pretext in assessing the General Counsel's prima facie case was consistent with the Second Circuit's decision.[182] In each of these decisions, the Board quoted the passage from *Holo-Krome III* stating that the Board could consider "the entire record" in determining whether unlawful motivation was proven. Thus, the Board has read *Holo-Krome III* as endorsing its policy of considering evidence of pretext in evaluating the prima facie case. The Board has never discussed the limitations that *Holo-Krome III* suggested the Board should observe in relying on evidence of pretext.

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179. *Id.* at 113.

180. *Id.* (emphases added).

181. The Second Circuit did recognize that, in practice, it would be difficult to discern exactly how evidence of the employer's reasons came into the record, because "the employer's testimony will probably not be particularly precise in distinguishing between the reason for the adverse action actually taken and the reason that would have motivated the adverse action in the absence of protected activity." *Id.* at 113-14.

182. *See* Diesel Truck Driving Training Sch., Inc., 311 N.L.R.B. 963, 964 (1993); Williams Contracting, Inc., 309 N.L.R.B. 433, 433 n.2 (1992); Weco Cleaning Specialists, Inc., 308 N.L.R.B. 310, 310 n.4 (1992); Greco & Haines, Inc., 306 N.L.R.B. 634 (1992).

The Seventh Circuit relied on *Holo-Krome III* in *Union-Tribune Publishing Co. v. NLRB*,[183] the Seventh Circuit's leading ruling on whether the Board can consider evidence of pretext in evaluating the prima facie case. The *Union-Tribune* case involved the discharge of Ms. Nancy Tetrault, a district manager and member of the Newspaper Guild's bargaining committee. In ALJ Gerald Wacknov's decision in the case, his conclusion that Ms. Tetrault's discharge was unlawful was based almost entirely on his finding that the employer's asserted reasons for terminating her were pretextual.[184] In particular, the ALJ found that the alleged bases for Ms. Tetrault's discharge were all practices that were routinely engaged in by many district managers, and that these practices had never been the basis for discipline of any other district manager.[185] On appeal to the Board, the employer challenged the ALJ's reliance on evidence of pretext, arguing that the ALJ had "incorrectly bootstrapped his finding that the Respondent's reasons for the termination of Tetrault were pretextual into a conclusion that the Respondent's pretext established union animus."[186] The Board rejected the employer's argument, identifying a number of other factors discussed by the judge that also indicated animus. The Board ruled, "Based on the foregoing factors, *as well as the judge's finding that the Respondent's asserted reasons for its action were pretextual*, we conclude that the judge's inference of antiunion animus was well supported by the surrounding circumstances."[187]

In its appeal to the Seventh Circuit, Union-Tribune contended that the ALJ had failed to comply with *Wright Line*'s two-step analysis, which the employer argued "requires an initial finding that protected activity motivated the employer's action, and only then examines whether the employer's proffered reasons for the action were pretextual."[188] The employer further claimed that the Board had perpetuated the ALJ's error by identifying pretext as one of the factors supporting a finding of unlawful motivation. Therefore, Union-Tribune maintained, "the Board's approach still inverts the proper procedure for analyzing NLRA violations."[189]

The Seventh Circuit rejected Union-Tribune's challenge to the Board's use of evidence of pretext. The Seventh Circuit relied on the Second Circuit's decision in *Holo-Krome III*, noting that "[t]he Second Circuit recently published a scholarly opinion upholding the Board's new approach and concluding that it

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183. 1 F.3d 486 (7th Cir. 1993).

184. *See* Union-Tribune Publ'g Co., 307 N.L.R.B. 25, 48-51 (1992), *enforced*, 1 F.3d 486 (7th Cir. 1993) (analysis by ALJ Wacknov).

185. *Id.*; *see also Union-Tribune*, 1 F.3d at 492 (Seventh Circuit affirms this finding of the ALJ).

186. *Union-Tribune*, 307 N.L.R.B. at 25.

187. *Id.* (emphasis added).

188. *Union-Tribune*, 1 F.3d at 490.

189. *Id.*

is not inconsistent with Supreme Court precedent."[190] The Seventh Circuit added that, in its own past decisions, it had also "approved reliance on an employer's implausible explanations to support the General Counsel's prima facie case," though the court noted that its prior decisions had not distinguished between employer explanations given at the time of the challenged action and explanations provided at the unfair labor practice hearing.[191] Based on *Holo-Krome III* and its own past precedents, the Seventh Circuit declared, "we endorse the ALJ's use of Union-Tribune's explanations here."[192]

The Seventh Circuit immediately imposed a limitation on its endorsement, stating that it agreed with Union-Tribune's assertion that "even if an ALJ may consider the employer's explanation in assessing the prima facie case, the ALJ may not rest its entire decision on that ground."[193] The court explained, "It is inaccurate to state, as a general matter, that once a finding is made that an employer's proposed justification is pretextual, the analysis of the employer's motivation is at an end . . . . A finding of pretext, standing alone, does not support a conclusion that a firing was improperly motivated."[194] The court went on to find that, in this particular case, the other evidence of animus that supplemented the finding of pretext was sufficient to uphold the Board's judgment that Union-Tribune's discharge of Ms. Tetrault violated Section 8(a)(3) of the NLRA.[195]

For the purpose of reviewing Board policies, the most important court of appeals is the District of Columbia Circuit, because Section 10(f) of the NLRA provides that "any person aggrieved by a final order of the Board" may obtain review of that order in the D.C. Circuit.[196] Consequently, if the D.C. Circuit were to rule that the Board cannot consider evidence of pretext in assessing the prima facie case, and the Supreme Court did not review that decision, then in any case where the Board did consider evidence of pretext at the prima facie stage, the employer could simply appeal to the D.C. Circuit to have that decision

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190. *Id.* at 491 (citing Holo-Krome Co. v. NLRB (Holo-Krome III), 954 F.2d 108, 113 (2d Cir. 1992)).

191. *Id.* (citing NLRB v. Indus. Erectors, Inc., 712 F.2d 1131, 1137 (7th Cir. 1983); NLRB v. Rich's Precision Foundry, Inc., 667 F.2d 613, 626-27 (7th Cir. 1981)).

192. *Id.* As recently as 1998, the Seventh Circuit has reaffirmed its position that it is appropriate for the Board to consider evidence presented by the employer in assessing whether the General Counsel has proven its "prima facie" case. In *NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 356 n. 2 (7th Cir. 1998), the Seventh Circuit stated, "Whether the General Counsel has carried the burden of persuasion is . . . [a question] that will usually be addressed at the conclusion of the hearing. Indeed, Board precedent indicates that the answer to this question must be based on the record as a whole, including whatever evidence the employer has presented."

193. Union-Tribune Publ'g Co. v. NLRB, 1 F.3d 486, 491 (7th Cir. 1993).

194. *Id.* (citing NLRB v. Hawkins Constr. Co., 857 F.2d 1224 (8th Cir. 1988); Roper Corp. v. NLRB, 712 F.2d 306, 310-11 (7th Cir. 1983)).

195. *Id.* at 491-92.

196. 29 U.S.C. § 160(f) (1994).

overturned. Therefore, it is significant that the D.C. Circuit has held, in a number of decisions, that the Board *can* rely on evidence of pretext in determining that the General Counsel has proven a prima facie case.

In November 1994, in *Power, Inc. v. NLRB*,[197] in a two-to-one panel decision, the D.C. Circuit upheld the Board's ruling that the employer had violated Section 8(a)(3) in refusing to rehire employee Robert Dillen, a ruling that rested largely on the Board's judgment that the employer's reasons for refusing to hire Mr. Dillen were pretextual.[198] The D.C. Circuit, after discussing the evidence concerning the employer's reasons for rejecting Mr. Dillen, held that "[u]nder these circumstances, the Board could reasonably find that the decision not to rehire Dillen was based on antiunion animus, and conclude that the company's post-hoc explanation of the decision was 'pretextual.'"[199] Judge Karen LeCraft Henderson dissented from this portion of the majority decision, contending that "the question of pretext 'does not even enter the picture until some evidence of a discriminatory discharge has been brought forward.'"[200]

Again in 1995, in *Laro Maintenance Corp. v. NLRB*,[201] a D.C. Circuit panel majority upheld the Board's consideration of pretext at the prima facie stage. The Board had found that Laro Maintenance, a cleaning contractor that had taken over the cleaning of a government building from a unionized contractor, had violated Section 8(a)(3) in refusing to hire thirteen of the employees of the previous contractor.[202] In its decision, the D.C. Circuit assessed Laro's argument that the Board's finding of a prima facie case was not supported by substantial evidence.[203] In the course of that discussion, the court observed that the Board's finding of a prima facie case was based in part on its determination that Laro's explanations for refusing to hire the thirteen workers were pretextual.[204] Specifically, Laro's assertion that it had rejected those workers in favor of "better quality employees" was belied by evidence showing that Laro hired workers whom it knew had poor work records and workers with no relevant experience, and that Laro had made no effort to investigate the quality of the predecessor contractor's employees.[205]

In upholding the Board's decision, the D.C. Circuit noted approvingly that "the Board has held that a 'case of discriminatory motivation may be supported by consideration of the lack of any legitimate basis for a respondent's actions,'" adding that "[t]his is especially true when the employer presents a legitimate

197. 40 F.3d 409 (D.C. Cir. 1994).

198. *See id.* at 419-20.

199. *Id.* at 420.

200. *Id.* at 426 (quoting Goldtex, Inc. v. NLRB, 14 F.3d 1008, 1012 (4th Cir. 1994)).

201. 56 F.3d 224 (D.C. Cir. 1995).

202. *Id.* at 226-27.

203. *See id.* at 228-32.

204. *See id.* at 230.

205. *See id.* at 231.

basis for its actions which the factfinder concludes is pretextual."[206] The court then held that reliance on evidence of pretext at the prima facie stage is appropriate, stating that in cases where the employer's reasons for its action are deemed pretextual, "the factfinder may not only properly infer that there is some other motive, but 'that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding circumstances tend to reinforce that inference.'"[207]

The D.C. Circuit did indicate that there were limits on the extent to which the Board could rely on pretext, by quoting *Union-Tribune*'s statement that "'A finding of pretext, *standing alone*, does not support a conclusion that [an employment action] was improperly motivated.'"[208] The court went on to find that in this case the evidence of pretext, along with other factors, was sufficient to support the prima facie case.[209]

Thus, in the past several years, the Second, Seventh, and D.C. Circuits have expressly approved, with some limitations, the Board's policy that evidence of pretext can be used to establish the prima facie case. The Fifth Circuit, with less discussion, has also upheld that policy.[210]

Beginning in 1994, the Fourth Circuit has issued conflicting rulings on the role of evidence of pretext in the "prima facie stage" of the case. In the 1994 decision *Goldtex, Inc. v. NLRB*,[211] a three judge panel of the Fourth Circuit, consisting of Judge Wilkinson, Judge Hamilton, and a federal district court judge sitting by designation, held that evidence of pretext should not be considered in the first stage of the *Wright Line* process. In *Goldtex*, the Fourth Circuit reversed the Board's finding that evidence showing that the employer's reasons for firing two union supporters were pretextual could be used to support the prima facie case. The Fourth Circuit held, "Evidence of pretext, if such it be, does not even enter the picture until some evidence of discriminatory discharge has been brought forward."[212]

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206. *Id.* at 230 (quoting Weco Cleaning Specialists, Inc., 308 N.L.R.B. 310, 310 n.4 (1992); Wright Line, 251 N.L.R.B. 1083, 1088 n.12 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)).

207. *Id.* (quoting Shattuck Denn Mining Co. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966)).

208. *Id.* (alteration and emphasis added by *Laro Maintenance*) (quoting Union-Tribune Publ'g Co. v. NLRB, 1 F.3d 486, 491 (7th Cir. 1993)).

209. *Id.* at 231. The D.C. Circuit also upheld the Board's consideration of evidence of pretext in *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995), a decision that is discussed in Part IV.C. of this Article. *See infra* text accompanying notes 274-82.

210. *See* NLRB v. ADCO Elec., Inc., 6 F.3d 1110, 1119 (5th Cir. 1993) (holding that "[e]vidence which tends to suggest that the stated reasons are pretext is relevant in determining if an unlawful motive can be inferred").

211. 14 F.3d 1008 (4th Cir. 1994).

212. *Id.* at 1012; *see also* Power, Inc. v. NLRB, 40 F.3d 409, 426 (D.C. Cir. 1994)

In 1997, in *NLRB v. CWI of Maryland, Inc.*,[213] a panel of three other judges of the Fourth Circuit (Judges Michael, Motz, and Niemeyer) took a different position on whether evidence regarding the employer's proffered reasons should be considered at the first stage of the *Wright Line* process. Relying on the Second Circuit's decision in *Holo-Krome III*, the Fourth Circuit panel declared that "an ALJ must consider the entire record" in determining whether the General Counsel has proven its prima facie case.[214] But in contrast to the Second Circuit in *Holo-Krome III*, and the other circuit court decisions previously discussed, the Fourth Circuit did not find that evidence presented by CWI had supported the General Counsel's case. Instead, the Fourth Circuit asserted that the employer's evidence of legitimate reasons for its action effectively *rebutted* the General Counsel's prima facie case. In *CWI*, the Fourth Circuit noted its acceptance of the Board's holding in *Wright Line* that "[t]he absence of any legitimate basis for an [employer's] action, of course, may form part of the proof of the General Counsel's case," but the court immediately added its own view that "[c]onversely, the presence of a legitimate explanation may work to negate the General Counsel's case."[215]

In 1998, in *Medeco Security Locks, Inc. v. NLRB*,[216] the Fourth Circuit reaffirmed the position it took in *CWI*, holding, "Of course, the absence of a legitimate basis for an employer's action may form part of the proof of the General Counsel's case, while the presence of legitimate reasons can work to negate proof of antiunion animus."[217] Neither in *Medeco* nor *CWI* does the Fourth Circuit refer to its contradictory decision in *Goldtex*, but at this point it seems fair to conclude that the Fourth Circuit has practically overruled *Goldtex*, particularly given that Chief Judge Wilkinson, who wrote the *Goldtex* opinion, joined the majority opinion in *Medeco*.

Like the Fourth Circuit, the Sixth Circuit has rendered inconsistent decisions on whether evidence of the employer's reason for its challenged action can be considered at the first stage of the *Wright Line* process. In 1993, in *NLRB*

(Henderson, J., dissenting) (relying on *Goldtex* in contending that "the question of pretext" should not be considered until after a prima facie case has been established).

213. 127 F.3d 319 (4th Cir. 1997).

214. *Id.* at 332 n.8. The Fourth Circuit in *CWI* also announced another point of agreement with the Second Circuit's decision in *Holo-Krome III*: "Because of the continuing confusion surrounding the nature of the General Counsel's burden, we agree with those courts who have suggested that the Board no longer use the term 'prima facie case' in the *Wright Line* context." *Id.* at 331 n.7.

215. *Id.* at 332. As is discussed below, the Fourth Circuit's view that a "legitimate explanation . . . negate[s]" the prima facie case is in conflict with *Wright Line* and *Transportation Management*. *See infra* notes 322, 344.

216. 142 F.3d 733 (4th Cir. 1998).

217. *Id.* at 742 (citing NLRB v. CWI of Maryland, Inc., 127 F.3d 319, 332 (4th Cir. 1997)).

v. Vemco, Inc.,[218] the Sixth Circuit expressed disapproval of the Board's reliance on "inconsistencies between the proffered reason for the discharge and other actions of the employer" as a factor supporting the prima facie case.[219] In dicta, the court commented, "A real question arises here as to the appropriateness of this factor. Technically, the [General Counsel's] prima facie case should be evaluated before evidence is heard on Vemco's affirmative defense. This means Vemco's reasons for the layoff should not even be in evidence when the existence of the inference of causation is being considered."[220] On the other hand, in at least two decisions since *Vemco*, the Sixth Circuit has, with little or no discussion, upheld the Board's practice of considering pretext in assessing the prima facie case.[221]

In sum, during the past several years, the federal courts of appeals have issued a range of opinions on whether it is appropriate for the Board to consider evidence of pretext in assessing whether the General Counsel has proven its prima facie case. To date, the Supreme Court has never entered this fray to directly address the Board's use of evidence of pretext in evaluating the prima facie case. However, since 1992, the Supreme Court has issued three decisions outside the context of the NLRA that could have implications for the Board's treatment of pretext. This Article will now discuss these Supreme Court decisions, and their possible bearing on pretext cases under the NLRA.

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218. 989 F.2d 1468 (6th Cir. 1993).

219. *Id.* at 1479.

220. *Id.* at 1479 n.12. The comment was dicta because the court went on to find that the record did not actually support the finding of "inconsistencies," and so the factor did not exist at all. *Id.* at 1479-80.

221. *See, e.g.*, NLRB v. Taylor Mach. Prods., Inc., 136 F.3d 507, 515 (6th Cir. 1998); Dunham's Athleisure Corp. v. NLRB, No. 95-6321, 1996 U.S. App. LEXIS 39934, at *10, *13-14 (6th Cir. Nov. 7, 1996) (unpublished decision); *see also* Turnbull Cone Baking Co. v. NLRB, 778 F.2d 292, 297 (6th Cir. 1985) (discussed *supra* note 148).

In recent years, the Sixth Circuit has also changed its position on whether *Wright Line* should even apply to all types of Section 8(a)(3) cases. In 1996, in *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 818 (6th Cir. 1996), the Sixth Circuit held that the first stage of the *Wright Line* standard should not be applied to refusal to hire cases, and should be replaced in such cases by application of the *McDonnell Douglas* standard from discrimination law. *Id.* at 831-34. In 1998, the Sixth Circuit withdrew its 1996 opinion in *Fluor Daniel*, and issued a new opinion. *See* NLRB v. Fluor Daniel Inc., 161 F.3d 953 (6th Cir. 1998). In its new decision, the Sixth Circuit also withdrew its substitution of a new standard for refusal to hire cases, declaring that "[h]appily, this case does not require us to decide whether the principles of *McDonnell Douglas* can or should be grafted onto the *Wright Line* test, because even under the unadorned *Wright Line* analysis the NLRB has failed to carry its burden." *Id.* at 966. The Sixth Circuit then interpreted the *Wright Line* standard as requiring the General Counsel to prove in the first stage, in refusal to hire cases, that the employer had available positions that the discriminatee was qualified to fill. *Id.* at 966-68.

B. Recent Supreme Court Decisions

1. *St. Mary's Honor Center v. Hicks*[222]

Hicks is a landmark employment discrimination decision under Title VII of the Civil Rights Act of 1964. In *Hicks*, the Supreme Court resolved a division among the federal courts of appeals over whether, in an employment discrimination case under Title VII, "the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff."[223] More precisely, the issue in *Hicks* was: if the plaintiff proved his or her "prima facie case" of discrimination,[224] and the plaintiff persuaded the trier of fact that the employer's asserted reasons for its challenged action were false, was the plaintiff therefore entitled to judgment as a matter of law? The Supreme Court held that the answer was no.

The effect of *Hicks* on employment discrimination law has been addressed in many scholarly articles,[225] and this Article will not go over that ground again. This Article will limit its discussion to various statements made in *Hicks* that could be deemed relevant to the role that evidence of pretext should play in determining whether the employer had an unlawful motivation for taking an adverse action against an employee.

In employment discrimination law, after the plaintiff proves his or her prima facie case of discrimination, a burden of *production* (not persuasion) shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for the employment action at issue.[226] After the employer has met this burden of production, the burden shifts back to the plaintiff to prove that the "legitimate

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222. 509 U.S. 502 (1993).

223. *Id.* at 504.

224. It is important to recognize that the elements of a "prima facie case" in employment discrimination law are very different from the elements of the prima facie case in the *Wright Line* analysis under the NLRA.

The elements of a prima facie case in employment discrimination vary depending on the type of adverse employment action being challenged (e.g., discharge, failure to hire), and on the federal circuit in which the claim is brought, but the elements can be fairly summarized as follows: (1) the plaintiff belongs to a protected class (e.g., the plaintiff is a female, or a member of a minority group); (2) the plaintiff met the qualifications of the position at issue; (3) the employer took an adverse employment action against the plaintiff; and (4) the employer looked for a replacement for the plaintiff, or for an applicant other than the plaintiff, to fill the position. *See generally* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 703 & nn.4-5, 729 & n.146, 731 & n.154 (1995) (discussing elements of prima facie case for different types of claims).

225. *See generally* Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, 93 MICH. L. REV. 2229, 2235 n.28 (1995) (citing several of the articles discussing *Hicks*).

226. *See Hicks*, 509 U.S. at 506-07.

reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[227] The meaning of this standard for what the plaintiff was required to prove was the central issue in *Hicks*. The dissent in *Hicks*, as well as many lower courts, interpreted this standard as "mean[ing] that if the plaintiff proves the asserted reason to be *false*, the plaintiff wins."[228] The majority in *Hicks* rejected that view, holding "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."[229] Consistent with this position, the *Hicks* majority declared that all references in past Supreme Court discrimination decisions to the plaintiff proving "pretext" did not merely mean proving that the employer's asserted reason was false, but that the employer's false reason was a "coverup" for discrimination.[230]

In *Hicks*, the Supreme Court held that evidence that the employer's asserted reason for its action is pretextual is *not* sufficient to *compel* the factfinder to find unlawful discrimination. The Court stressed:

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated. . . . [N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.[231]

Later in its opinion, the Court reiterated, "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that

227. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981), *quoted in Hicks*, 509 U.S. at 515.

228. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (emphasis added). *See also* Dister v. Cont'l Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) ("[A] plaintiff may prevail upon a showing that the employer's given legitimate reason is unworthy of credence. . . ."); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 895 (3d Cir. 1997), *cert. dismissed*, 483 U.S. 1052 (1987) (if the plaintiff proves a prima facie case and "that it is more likely than not that the employer did not act for its proffered reason" then that is sufficient to grant summary judgment for the plaintiff); Tye v. Bd. of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 319-20 (6th Cir. 1987), *cert. denied*, 484 U.S. 10 (1987) (plaintiff who proves a prima facie case and that the employer's reasons for the adverse action are false is entitled to summary judgment); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) ("[A] plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendants' rebuttal should prevail.").

229. *Hicks*, 509 U.S. at 515.

230. *Id.* at 515-16 & n.6.

231. *Id.* at 514-15.

the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review. . . ."[232]

In *Hicks*, the Supreme Court emphasized that a finding that the employer's asserted explanation for its action is false should not be equated with the conclusion that the employer's action must have been unlawfully motivated. Whether this holding undermines those Board precedents in which the Board relied exclusively, or primarily, on evidence of pretext to find that the employer violated Section 8(a)(3) of the NLRA will be examined in Part V of this Article.[233]

2. *Reeves v. Sanderson Plumbing Products, Inc.*[234]

Reeves is another major employment discrimination decision, in which the Supreme Court decided an issue that had been left unsettled by *Hicks*.[235] After *Hicks* established that evidence proving the plaintiff's prima facie case and evidence the employer's reason was false did not *compel* a finding of unlawful discrimination, the federal circuit courts divided over whether such evidence was sufficient to *permit* a trier of fact to find unlawful discrimination.[236] The Supreme Court decided to resolve this dispute in *Reeves*.[237]

The Court held that evidence proving the plaintiff's prima facie case, combined with evidence that could lead a reasonable trier of fact to disbelieve the employer's reason for its action, could be sufficient as a matter of law to sustain a finding of intentional discrimination.[238] In summarizing its holding, the Court stated, "Thus, a plaintiff's prima facie case, combined with sufficient

232. *Id.* at 524.

233. *See infra* notes 273-81, 351-57 and accompanying text.

234. 120 S. Ct. 2097 (2000).

235. Unlike *Hicks*, *Reeves* did not involve a claim under Title VII, but rather a claim under the Age Discrimination in Employment Act ("ADEA"). *See Reeves*, 120 S. Ct. at 2103. Nonetheless, it is virtually certain that the Court's holding in *Reeves* extends to Title VII as well as ADEA cases. The Court in *Reeves* formulated its decision as an interpretation of the three-stage framework applied in Title VII cases, *see id.* at 2105-06, and as an interpretation of its Title VII precedent in *Hicks*. Moreover, lower federal courts have already begun applying *Reeves* to Title VII claims. *See, e.g.*, Malacara v. City of Madison, 224 F.3d 727, 731-32 (7th Cir. 2000); Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 9 (1st Cir. 2000); Griffin v. Ambika Corp., 103 F. Supp. 2d 297, 306 (S.D.N.Y. 2000).

236. *Reeves*, 120 S. Ct. at 2104-05 (summarizing the division in the federal circuit courts on this issue).

237. *Id.* at 2103 (defining the question presented as whether evidence proving the prima facie case and evidence of pretext was insufficient as a matter of law to support a finding of discrimination).

238. *Id.* at 2108-09.

evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[239]

The Court based its conclusion on basic principles of evidence and factfinding. The Court explained that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."[240] In a statement reminiscent of the Board's *Shattuck Denn*[241] rationale for using evidence of pretext to find discrimination,[242] the Court declared, "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."[243] The Court observed that "[s]uch an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"[244] The Court also pointed out that "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."[245]

The Court then cautioned that, despite the probative value of evidence of pretext, it would not always be sufficient to sustain a finding of discrimination. The Court explained, "Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory."[246] The Court then specifically identified two situations when evidence of pretext would be insufficient to support a finding of discrimination: (1) when "the record conclusively revealed" that even though the reason proffered by the employer was false, there was another non-discriminatory reason for the employer's action;[247] and (2) when "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."[248]

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239. *Id.* at 2109.

240. *Id.* at 2108 (citations omitted).

241. *See* Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466 (9th Cir. 1966).

242. *See supra* text accompanying notes 131-40 (discussing the Board's reliance on the *Shattuck Denn* rationale).

243. Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2108 (2000).

244. *Id.* (quoting Wright v. West, 505 U.S. 277, 296 (1992)) (citing Wilson v. United States, 162 U.S. 613, 620-21 (1896); 2 J. WIGMORE, EVIDENCE § 278(2), at 133 (J. Chadwick rev. ed. 1979)).

245. *Id.* at 2108-09.

246. *Id.* at 2109.

247. *Id.*

248. *Id.* (citations omitted).

The Court made clear that these two examples did not exhaust the situations in which evidence proving the prima facie case and evidence of pretext would be insufficient to support a finding of discrimination. The Court explained that whether such evidence permitted a finding of discrimination "in any particular case will depend on a number of factors."[249] According to the Court, such factors included "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on [an employer's] motion for judgment as a matter of law."[250]

Justice Ginsburg wrote a separate concurrence to emphasize her position that evidence of the prima facie case and evidence of pretext should *usually* be sufficient to support a finding of discrimination. Justice Ginsburg stated, "I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law."[251] She then asserted, "I anticipate that such circumstances will be uncommon."[252] To support her assertion, Justice Ginsburg restated the Court's point that "it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability."[253] Justice Ginsburg further elaborated on this point, explaining:

> Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a *rational inference* that the defendant could be masking its illegal motivation. Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide . . . . But the inference remains—unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above.[254]

Thus, Justice Ginsburg maintained that it is rational for a trier of fact to infer a discriminatory motive based on evidence of pretext, and therefore, triers of fact

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249. *Id.*
250. *Id.*
251. *Id.* at 2112.
252. *Id.*
253. *Id.*
254. *Id.* (emphasis added) (citations omitted).

should ordinarily be permitted to find discrimination based only on evidence proving the prima facie case combined with evidence of pretext.

The Supreme Court's decision in *Reeves* is a strong endorsement of the probative value of evidence of pretext in finding discriminatory motivation. Whether the Court's holding in *Reeves* is pertinent to pretext cases under the NLRA depends on whether the role of the Board and its ALJs in Section 8(a)(3) cases is fairly analogous to the role of triers of fact in employment discrimination cases. Moreover, if *Reeves* is relevant to Section 8(a)(3) cases, then the Board must deal with the same issue the Supreme Court provided guidance on, but did not resolve, in *Reeves*—in what situations will evidence of pretext *not* be sufficient to support a finding of discrimination? The implications of *Reeves* for the Board's reliance on pretext to find discrimination will be discussed in Part V.

3. *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*[255]

In *Greenwich Collieries*, the Supreme Court interpreted a key provision of the Administrative Procedure Act ("APA"),[256] the principal federal statute governing practice and proceedings before federal administrative agencies,[257] including the National Labor Relations Board.[258] In the course of interpreting the APA, the Court overruled one of its holdings in *Transportation Management*, the decision in which the Court upheld the *Wright Line* analysis.[259] The Court in *Greenwich Collieries* promptly provided assurances that the Board's *Wright Line* analysis remained valid, but *Greenwich Collieries'* revisitation of *Transportation Management* certainly bears examination, because it could affect the Board's *application* of the *Wright Line* analysis.

The issue directly before the Court in *Greenwich Collieries* was the validity of the Department of Labor's "true doubt" rule.[260] Under the "true doubt" rule, which the Department of Labor applied in adjudicating claims for benefits under the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act, when the evidence for and against the claimant's entitlement to benefits was equally balanced, the claimant won.[261] In *Greenwich Collieries*, the Supreme Court struck down the "true doubt" rule, holding that it violated

255. 512 U.S. 267 (1994).

256. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1994).

257. *See* BLACK'S LAW DICTIONARY 46 (6th ed. 1990) (defining APA).

258. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

259. *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983).

260. *See Greenwich Collieries*, 512 U.S. at 269.

261. *Id.*; *see also* Allan W. Brown, Note, Director, OWCP v. Greenwich Collieries*: The End of the True Doubt Rule*, 97 W. VA. L. REV. 1053, 1056-57 (1995); Jeffrey Thomas Skinner, Note, *Resolving the Doubt About the True Doubt Rule in* Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 73 N.C. L. REV. 1299, 1306-08 (1995) (discussing the history and meaning of the "true doubt" rule).

Section 7(c) of the APA, which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[262]

The Court devoted most of its opinion in *Greenwich Collieries* to determining the meaning of the phrase "burden of proof" in Section 7(c) of the APA.[263] Specifically, the Court considered whether the phrase meant the burden of *persuasion* as to the ultimate fact in dispute, or merely, as the Department of Labor contended, "the burden of *production* (i.e., the burden of going forward with evidence)."[264] The Court decided that "burden of proof" in Section 7(c) meant the burden of persuasion, and that this in turn meant that in cases where the evidence was evenly balanced, the claimant had failed to sustain the "burden of proof" and so must lose. Thus, the "true doubt" rule, which provided that the claimant *won* when the evidence was evenly balanced, was therefore inconsistent with Section 7(c) of the APA, and therefore was invalid.[265]

In finding that "burden of proof" in Section 7(c) meant the burden of persuasion, the Court in *Greenwich Collieries* had to overrule a statement to the contrary in *Transportation Management.* The Court explained that in *Transportation Management*, the employer had argued that the Board's *Wright Line* analysis "violated Section 7(c)'s burden of proof provision, which the employer read as imposing the burden of persuasion on the employee."[266] The Court observed that "[i]n a footnote, we summarily rejected this argument, concluding that '[Section 7(c)] . . . determines only the burden of going forward, not the burden of persuasion.'"[267] The Court then declared, "we do not think our cursory conclusion in the *Transportation Management* footnote withstands scrutiny . . . *Transportation Management*'s cursory answer to an ancillary and largely unbriefed question does not warrant the same level of deference we typically give our precedents."[268]

A few paragraphs later, the Court reaffirmed its holding in *Transportation Management*, explaining that it was consistent with the Court's new construction of Section 7(c) of the APA:

> [A]lthough we reject *Transportation Management*'s reading of § 7(c), the holding in that case remains intact. The NLRB's approach in *Transportation Management* is consistent with § 7(c) because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then did the

262. 5 U.S.C. § 556(d) (1994), *quoted in* Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 269 (1994).

263. *See Greenwich Collieries*, 512 U.S. at 272-81.

264. *Id.* at 272.

265. *See id.* at 281.

266. *Id.* at 277.

267. *Id.* (quoting NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 404 n.7 (1983)).

268. *Id.*

NLRB place the burden of persuasion on the employer as to its affirmative defense.[269]

Thus, the Supreme Court in *Greenwich Collieries* interpreted Section 7(c) of the APA as meaning that the "proponent of a rule" bears the burden of persuasion. In a discrimination case under Section 8(a)(3) of the NLRA, the "proponent of the rule" for purposes of Section 7(c) is the Board, or, more specifically, the General Counsel.[270] In *Greenwich Collieries*, the Supreme Court held that the *Wright Line* analysis was consistent with the Court's new reading of Section 7(c), because under *Wright Line*, the General Counsel does bear the requisite burden of proving that "antiunion sentiment contributed to the employer's decision."[271] Whether the Board has consistently required the General Counsel to truly meet this burden in cases involving evidence of pretext, and accordingly whether the Board has consistently adhered to *Greenwich Collieries*' new construction of Section 7(c), will be discussed in Part V.[272]

C. *The Board's and Courts' Application of* Hicks *and* Greenwich Collieries *to Section 8(a)(3) Cases*

The Board and the federal courts of appeals have acknowledged that Supreme Court precedents under the APA and federal discrimination statutes are relevant to the Board's approach to discrimination cases. The Supreme Court's decision in *Reeves* was issued in June 2000, and the Board and the courts to date have not yet considered its effect on Section 8(a)(3) cases. The Board and some courts have, however, discussed the implications of both *Hicks* and *Greeenwich Collieries* for Section 8(a)(3) cases.

One particularly notable example is the D.C. Circuit's decision in *Southwest Merchandising Corp. v. NLRB*,[273] in which the court extensively discussed how *Hicks* and *Greenwich Collieries* may affect the Board's handling of Section 8(a)(3) cases. In *Southwest Merchandising*, the D.C. Circuit upheld the Board's ruling that the employer, a grocery store chain, had violated Section 8(a)(3) when, after it purchased a bankrupt grocery store chain, it refused to hire former employees of the purchasee who had engaged in a strike against the purchasee the year before it went out of business.[274]

The court began its analysis by setting forth the *Wright Line* standard. The court then noted that the Supreme Court had upheld the *Wright Line* test in

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269. *Id.* at 278.

270. *See Transp. Mgmt.*, 462 U.S. at 404 n.7.

271. Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 278 (1994).

272. *See infra* text accompanying notes 325-30.

273. 53 F.3d 1334 (1995).

274. *See id.* at 1336-38 (discussing the facts of the case).

Transportation Management, but then in *Greenwich Collieries* the Court had overruled the portion of *Transportation Management* construing Section 7(c) of the APA.[275] The D.C. Circuit pointed out that in *Greenwich Collieries*, the Supreme Court had "concluded that the Board's *Wright Line* test was permissible because it does no more than impose the burden of proving an affirmative defense on the employer."[276]

The D.C. Circuit then set forth its interpretation of how the *Wright Line* analysis should be applied after *Greenwich Collieries*:

> Reading *Greenwich Collieries* and *Wright Line* together, then, the General Counsel bears the burden of demonstrating that the employer acted with discriminatory motive throughout the case. Although the Board labels the General Counsel's burden that of establishing a 'prima facie' case, it has, in fact, traditionally required the General Counsel to sustain the burden of proving that the employer was motivated by antiunion animus.[277]

In a footnote, the D.C. Circuit asserted, as the Second Circuit had in *Holo-Krome III*, that the term "prima facie case" should not be used in applying the *Wright Line* test: "Presumably, in the wake of *Greenwich Collieries*, it will no longer be appropriate to term the General Counsel's burden that of mounting a prima facie case; his burden is to persuade the Board that the employer acted out of antiunion animus."[278]

Although the court faulted the use of the phrase "prima facie case" to refer to the first stage of the *Wright Line* test, the court reaffirmed that the General Counsel could use evidence of pretext to meet its burden at that stage. The D.C. Circuit held:

> The General Counsel may, of course, use the employer's own response to the charges as part of his evidence of antiunion animus. As the Board explained in *Wright Line*, 'the absence of any legitimate basis for an action'—i.e., the absence of a credible explanation from the employer—'may form part of the proof of the General Counsel's case.'[279]

The court explained that in *Wright Line*, the Board based its principle on the Ninth Circuit's ruling in *Shattuck Denn* that a finding that "the stated motive for

275. *See id.* at 1339-40.

276. *Id.* at 1340.

277. *Id.*

278. *Id.* at 1340 n.8.

279. *Id.* at 1340 (quoting Wright Line, 251 N.L.R.B. 1083, 1088 n.12 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)).

a discharge is false" permits the factfinder to infer that the true motive is an unlawful one.[280]

The D.C. Circuit suggested that this reliance on evidence of pretext was also consistent with the Supreme Court's decision in *Hicks*. After discussing *Shattuck Denn*, the D.C. Circuit mentioned that in a prior employment discrimination case, it had interpreted *Hicks* as meaning that "[u]nder the Title VII framework, 'a factfinder's rejection of the employer's nondiscriminatory reasons, while not sufficient to *compel* a finding of discrimination, nonetheless suffices to *permit* such a finding.'"[281] Thus, in *Southwest Merchandising*, the D.C. Circuit ruled that the Board's policy of allowing the General Counsel to use evidence of pretext to meet its burden at the first stage of the *Wright Line* analysis was consistent with the Supreme Court's decisions in both *Hicks* and *Greenwich Collieries*.

The D.C. Circuit reaffirmed that position in 1997 in *Schaeff, Inc. v. NLRB*.[282] In *Schaeff*, both the employer and the Board offered arguments on the meaning of *Greenwich Collieries*. The employer argued that, "unlike the Supreme Court's earlier interpretation of *Wright Line, Greenwich Collieries* places the burden of persuasion on the General Counsel at all times," while the Board claimed that "*Greenwich Collieries* reaffirms the *Wright Line* test."[283] The D.C. Circuit explained that there was no inconsistency between these two arguments:

> Both are correct. *Greenwich Collieries* does hold that the ultimate burden of persuasion remains with the General Counsel. It thus overrules the portion of *NLRB v. Transportation Management Corp.* holding that the General Counsel has only the burden of going forward with evidence of discrimination and does not retain the burden of persuasion throughout the proceeding. But the Court added that, once the General Counsel establishes that anti-union animus was a motivating factor, the employer bears the burden of establishing any affirmative defense such as the inevitability of termination.[284]

The D.C. Circuit then reiterated *Southwest Merchandising*'s point that "[t]he practical effect of *Greenwich Collieries* thus may be no more than the abandonment of the term 'prima facie case' to describe the General Counsel's

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280. *Id.* (quoting Shattuck Denn Mining Co. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966)).

281. *Id.* (quoting Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995)). The D.C. Circuit's construction of *Hicks* has since been affirmed by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2108 (2000).

282. 113 F.3d 264 (D.C. Cir. 1997).

283. *Id.* at 266 n.5.

284. *Id.* at 267 (citations omitted).

burden."[285] The court went on to uphold the Board's finding of Section 8(a)(3) violations by Schaeff.[286]

The Board has discussed the recommendation made by the D.C. Circuit and other courts[287] that it stop using the term "prima facie" in describing the first stage of the *Wright Line* process. In 1996, in *Manno Electric, Inc.*,[288] the Board noted that in *Southwest Merchandising*, "[t]he D.C. Circuit has suggested that in light of [*Greenwich Collieries*] . . . 'it will no longer be appropriate to term the General Counsel's burden that of mounting a prima facie case; his burden is to persuade the Board that the employer acted out of antiunion animus.'"[289] The Board referred to this as a "change in phraseology" and asserted that it "does not represent a substantive change in the *Wright Line* test" because "[u]nder that test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision."[290]

Although the Board downplayed the significance of the phrase "prima facie case" in *Manno Electric*, in a subsequent decision the Board made a point of correcting an ALJ who stated that the Board deemed the phrase inappropriate. In *The 3E Company, Inc.*,[291] the Board noted that the ALJ had quoted the Board as stating in *Manno Electric* that it would no longer be appropriate to refer to the General Counsel's burden as the prima facie case. The Board explained this was erroneous: "We note, however, that the Board in that case actually was quoting from the D.C. Circuit Court's decision in *Southwest Merchandising Corp. v. NLRB*, suggesting that the Board take this approach in light of [*Greenwich Collieries*]."[292] Moreover, even since its decision in *Manno Electric*, the Board has continued to use the phrase "prima facie case" to refer to the General

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285. *Id.* (citing Southwest Merch. Corp. v. NLRB, 53 F.3d 1334, 1339-40 & n.8 (D.C. Cir. 1995)).

286. Relying on *Schaeff*, the Seventh Circuit also reasoned in *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307 (7th Cir. 1998), that *Greenwich Collieries* involves only "a modest refinement or clarification of the *Wright Line* standard." The Seventh Circuit, echoing the reasoning of the D.C. Circuit, explained that *Greenwich Collieries* "makes clear that the [*Wright Line*] analysis does not simply require General Counsel to establish a prima facie case. General Counsel must establish that antiunion animus was a motivating factor in the decision." *Id.* at 1314.

287. *See supra* notes 171, 214 and accompanying text (discussing the Second and Fourth Circuits' criticism of the phrase "prima facie case").

288. 321 N.L.R.B. 278 (1996).

289. *Id.* at 299 n.12 (citations omitted).

290. *Id.*; *see also* Rose Hills Mortuary L.P., 324 N.L.R.B. 406, 406 n.4 (1997), *enforced*, 203 F.3d 832 (9th Cir. 1999) (relying on its decision in *Manno Electric* to explain that "the judge's use of the term 'prima facie burden' in describing the General Counsel's burden . . . does not substantively affect her analysis or conclusions").

291. 322 N.L.R.B. 1058 (1997), *enforced*, 132 F.3d 1482 (D.C. Cir. 1997).

292. *Id.* at 1063 n.1 (citations omitted).

Counsel's burden at the first stage of the *Wright Line* analysis.[293] Thus, while the Board has acknowledged the D.C. Circuit's recommendation that it stop using the phrase "prima facie case," the Board has not adopted this recommendation.

The Board's indirect references to *Greenwich Collieries* in its decisions in *Manno Electric* and *The 3E Company* are the closest the Board has come to discussing the possible impact of the *Greenwich Collieries* decision on the *Wright Line* analysis. The Board appeared to pay closer attention to the Supreme Court's decision in *Hicks*, in the *Precision Industries* case. As mentioned in Part III,[294] in *Precision Industries* the Board disavowed ALJ Thomas Wilks's assertion that he could rely on a finding of pretext, rather than the full *Wright Line* analysis, as an alternative means of determining that the employer had violated Section 8(a)(3). In so doing, the Board referred to *Hicks*.

The Board in *Precision Industries* adopted ALJ Wilks's conclusion that the employer had violated Section 8(a)(3) because its motivation for adopting a combination of preemployment screening devices at its Malvern, Arkansas plant was to keep from hiring a majority of its labor force for this plant from the former employees of its unionized predecessor.[295] But the Board then stated, "In affirming the judge's findings, however, we disavow his implication that, disregarding other evidence of unlawful motivation, he was constrained to find a violation of Section 8(a)(3) solely because he did not believe the testimony of the Respondent's witnesses concerning the reasons for implementing the screening processes at Malvern."[296]

The Board explained that the ALJ's finding that the employer's explanations were pretextual *entitled* the ALJ to "infer that there was another reason," but it did not *compel* the conclusion that "the real reason was grounded in antiunion animus."[297] The Board observed that the employer's pretextual explanations "might have been offered in an attempt to conceal a violation of some other statute instead of the NLRA, or a motive that may have been base but not unlawful at all."[298] The Board then cited *Hicks* for the proposition that "[i]n [a] Title VII case, [the] trier of fact's rejection of defendant's proffered reasons permits, but does not compel, finding of intentional discrimination."[299] Thus, the Board relied on *Hicks* as supporting (if not mandating) the distinction the Board

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293. *See, e.g.*, Zeppelin Elec. Co., 328 N.L.R.B. No. 68 (1999); Gen. Sec. Servs. Corp., 326 N.L.R.B. No. 42 (1998); M.J. Mech. Servs., Inc., 324 N.L.R.B. 812, 816 (1997); Triple H Elec. Co., 323 N.L.R.B. 549, 549 n.2 (1997); C.R. Gen., Inc., 323 N.L.R.B. 494, 494 n.1 (1997).

294. *See supra* text accompanying notes 145-46.

295. *See* Pace Indus., Inc. (Precision Indus.), 320 N.L.R.B. 661, 661 (1996), *enforced*, 118 F.3d 585 (8th Cir. 1997).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 661 n.4 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)).

drew between evidence that permits a finding of unlawful motivation, and evidence that compels such a finding.

The Board next distinguished *Shattuck Denn* and *Williams Contracting, Inc.*,[300] on which ALJ Wilks had relied. The Board maintained, contrary to ALJ Wilks, that these two decisions supported the Board's position that evidence of pretext did not *compel* the finding of illegal motiviation.

> Both the court in *Shattuck Denn* and the Board in *Williams* inferred unlawful motive from explanations found to be pretextual, but not from the pretextual explanations alone; other evidence of unlawful motive existed as well. And both the court and the Board found that the inference of unlawful discrimination was permissible, not compelled.[301]

In accordance with the distinction between findings of pretext "permitting" or "compelling" findings of unlawful motivation, the Board declared that disbelief of the employer's explanation does not "'necessarily compel' the conclusion that the Respondent's true motive . . . was discriminatory within the meaning of the Act."[302]

Although the Board overruled ALJ Wilks's statement that pretext compelled a finding of unlawful motive, the Board affirmed the ALJ's finding of such a motive, explaining that it was permissible to base such a finding largely on evidence of pretext.[303] The Board also rejected the employer's arguments that the ALJ, by assessing the employer's explanations at the prima facie stage of the analysis, had in effect required the employer "to prove, in the prima facie stage of analysis, that it had a sufficient business justification for its actions" or "to disprove the existence of antiunion animus."[304] Relying on decisions previously discussed in this Article, the Board held that it had been appropriate for the ALJ to consider the employer's explanations in ruling on whether the General Counsel had proved its prima facie case: "The judge properly considered all the relevant record evidence, including the Respondent's witnesses' discredited testimony, in finding that the General Counsel had proved that the Respondent acted from unlawful motives."[305]

In sum, in *Precision Industries*, the Board reaffirmed that evidence that the employer's proffered reasons for its challenged action are pretextual can be

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300. 309 N.L.R.B. 433 (1992).

301. Pace Indus., Inc. (Precision Indus.), 320 N.L.R.B. 661, 661 n.4 (1996), *enforced*, 118 F.3d 585 (8th Cir. 1997).

302. *Id.* at 661.

303. *Id.* at 661-62.

304. *Id.* at 662 n.7.

305. *Id.* (citing Greco & Haines, Inc., 306 N.L.R.B. 634 (1992); Union-Tribune Publ'g Co. v. NLRB, 1 F.3d 486 (7th Cir. 1993); Wright Line, 251 N.L.R.B. 1083, 1088 n.12 (1980); Shattuck Denn Mining Co. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966)).

considered in determining whether the General Counsel has proven its prima facie case. But, the Board also announced that a finding that the employer's reasons are pretextual does not *compel* a finding of unlawful motivation. Since *Precision Industries*, the Board has not expressly addressed the related issue of whether such evidence of pretext would be *sufficient*, by itself, to *permit* a finding of unlawful motivation. Notably, in Board decisions issued since *Precision Industries*, the Board has continued to affirm ALJ decisions in which the ALJ relied substantially on evidence of pretext in determining that the General Counsel had proven its prima facie case.[306] The validity of the Board's reliance on pretext will be examined in Part V, in the context of an overall analysis of the Board's approach to the problem of pretext.

V. HAS THE NATIONAL LABOR RELATIONS BOARD GONE WRONG?: ASSESSING ITS APPROACH TO PRETEXT CASES

Within the past decade, the Board's approach to pretext cases has become fairly well-settled. Since its 1992 decision in *Greco & Haines*, the Board has maintained the position that it can consider the evidence the employer offers in its defense in determining whether the General Counsel has met its prima facie case. Thus, where the evidence of pretext derives from evidence the employer has presented in its defense of the case, the Board will consider that evidence even at the first stage of the *Wright Line* process.

In many cases in the 1990s, the Board has relied substantially, or even solely, on evidence of pretext in concluding that the employer was at least partially motivated by antiunion animus in taking the employment action at issue. In 1996, in *Precision Industries*, the Board announced that a finding that the employer's reasons are pretextual does not *compel* a finding of unlawful motivation. However, the Board implied in *Precision Industries* that evidence of pretext could *permit* a finding of unlawful motivation. Furthermore, the Board's affirmation of ALJ decisions since *Precision Industries* confirms that the Board's view is that evidence of pretext is sufficient to support the conclusion that an employer's action against a union supporter was unlawfully motivated.

Thus, the Board seems to have resolved its position on the correct approach to pretext cases. It is by no means clear, however, that the Board's position is legally permissible. The Board's resolution of the issues discussed above has

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306. *See, e.g.*, Johnson Distrib., Inc., 323 N.L.R.B. 1213, 1221-24 (1997) (relying on shifting and pretextual reasons for termination to find prima facie case was satisfied); Power Sys. Analysis, Inc., 322 N.L.R.B. 511, 514-15 (1996) (relying on "evidence of false reasons and concealment" to infer union animus); 87-10 51st Ave. Owners Corp., 320 N.L.R.B. 993, 998 (1996) (relying on the "obvious pretextual basis of the reason proffered by the [employer]" for the discharge of three employees to find that the General Counsel proved its prima facie case that these discharges were unlawful).

received a mixed reception in the federal courts of appeals. Even where courts have generally accepted the Board's approach to pretext cases, they have recommended limitations on the Board's reliance on evidence of pretext to find unlawful motivation. In light of these judicial critiques of the Board's approach to pretext cases, this Article will now evaluate the validity of that approach.

A. Should the National Labor Relations Board Consider Evidence of Pretext at the First Stage of the Wright Line *Analysis?*

As discussed earlier, there has been considerable contention in the Board and in the federal courts of appeals over whether the Board and its ALJs, in assessing whether the General Counsel has met its first stage burden, are permitted to even consider the evidence offered by the employer for its action, much less to rely heavily on findings that such evidence is pretextual in deciding that the General Counsel has established its first stage burden of proof. Thus, the threshold question in examining the Board's approach to pretext cases is whether the Board was correct in its 1992 decision in *Greco & Haines* in ruling that the "entire record," including the employer's evidence, could be considered in assessing the General Counsel's case. If *Greco & Haines* was wrongly decided, then the Board would have to alter its approach to pretext cases in a way that would greatly diminish the role of evidence of pretext in proving Section 8(a)(3) violations.

Assessment of the validity of *Greco & Haines* must begin with a review of the fundamentals of Section 8(a)(3) law. As discussed in Part I, it is well established that the central issue in virtually all Section 8(a)(3) cases is the employer's *motivation* for taking an adverse action against the employee.[307] It is also well established that motive in general, and the motivation of an employer in Section 8(a)(3) cases in particular, is a question of fact.[308] Thus, the Board, and its ALJs, act as triers of fact in determining whether an employer had an unlawful antiunion motive for taking an action against an employee.[309] The courts have recognized that in making this factual determination, the Board can rely on circumstantial evidence as well as direct evidence.[310] More specifically, courts have held that the Board can draw inferences of unlawful motive based

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307. *See supra* note 6.

308. *See, e.g.*, Concepts & Designs, Inc. v. NLRB, 101 F.3d 1243, 1244 (8th Cir. 1996); Laro Maint. Corp. v. NLRB, 56 F.3d 224, 229 (D.C. Cir. 1995); NLRB v. Mini-Togs, Inc., 980 F.2d 1027 (5th Cir. 1993); NLRB v. Rich's Precision Foundry, Inc., 667 F.2d 613, 626 (7th Cir. 1981).

309. *See generally* Section 10 of the National Labor Relations Act, 29 U.S.C. § 160 (1994), which refers in several places to the Board's making findings of fact in unfair labor practice cases.

310. *See, e.g., Mini-Togs*, 980 F.2d at 1032; *Rich's Precision Foundry*, 667 F.2d at 626.

on circumstantial evidence.[311] In basing findings of unlawful motive on evidence of pretext, the Board, in its capacity as trier of fact, is exercising its authority to infer unlawful motive from circumstantial evidence.

In acting as trier of fact, the Board must be cognizant of which party bears the burden of proof on relevant issues. Under the *Wright Line* standard, and under Section 10(c) of the NLRA, the General Counsel bears the burden of proving that an employer's antiunion sentiment was a motivating factor in the employer's challenged decision. Given that the Board can rely on circumstantial evidence in determining motive, it is clear that if the General Counsel presented evidence that the employer's stated reasons for its challenged decision were pretextual, the Board could consider that evidence in deciding whether the General Counsel had proven unlawful motive. But the question raised by *Greco & Haines* is: Is it proper for the Board to consider evidence presented by *the employer* in deciding whether the *General Counsel* proved unlawful motive?

In several cases, employers have strongly contended that this is improper. Employers have argued that *Wright Line* dictates a particular order of events at the hearing: that only after the ALJ has deemed the General Counsel's prima facie case sufficient is the employer even required to bring forward evidence of its reason.[312] In making this argument, employers are in effect claiming that they have a right to have the adequacy of the General Counsel's prima facie case assessed based solely on the evidence presented by the General Counsel.

In *Greco & Haines* and its progeny, the Board has implicitly rejected the existence of such a right. The employers' theory has been more explicitly rejected by ALJ Richard J. Linton, in a series of decisions adopted by the Board. ALJ Linton has directly declared that employers cannot require ALJs or the Board to evaluate the General Counsel's "prima facie" case based solely on the evidence presented by the General Counsel, *unless* the employer desists from presenting any evidence in its own defense. For example, in *Kidd Electric Co.*,[313] ALJ Linton explained that after the employer moved for dismissal of the Section 8(a)(3) allegation at the close of the General Counsel's case-in-chief, and the ALJ denied that motion:

> At that point [the employer] was faced with making an election: it could rest on its motion, or it could proceed with its case-in-chief. It could not eat its cake and keep it too. A respondent or defendant tests the sufficiency of its motion to dismiss by resting on it. If a

311. *See Concepts & Designs*, 101 F.3d at 1244 ("Motivation is a question of fact that may be inferred from both direct and circumstantial evidence."); *Laro Maint.*, 56 F.3d at 229 ("Motive is a question of fact that may be inferred from direct or circumstantial evidence . . . . Drawing such inferences from the evidence to assess an employer's hiring motive invokes the expertise of the Board . . . .").

312. *See, e.g.*, Union-Tribune Publ'g Co. v. NLRB, 1 F.3d 486, 490 (7th Cir. 1993).

313. 313 N.L.R.B. 1178 (1994).

respondent or defendant, rather than resting on its motion, proceeds with its own case-in-chief, then it waives its motion to dismiss and the trier of fact weighs all the evidence in the entire record in reaching a decision on the merits.[314]

As ALJ Linton has explained, the practical import of *Greco & Haines* for employers is that the only way they can stop the Board from considering their evidence when assessing the General Counsel's case is by not giving the Board any evidence to consider. That is, they must refrain from presenting any evidence, and thus leave the General Counsel's evidence as the only evidence in the record. Understandably, most employers have not chosen this option when defending Section 8(a)(3) charges.

Instead, many employers have maintained that (to borrow ALJ Linton's phrase) they *do* have a right to eat their cake and keep it, too. Their view is that whatever evidence is in the record, and at whatever point the ALJ and the Board are considering that evidence, the ALJ and the Board should assess the prima facie case based only on the evidence presented by the General Counsel. In the early 1990s, employers succeeded in convincing the courts of appeals that their view was correct.[315] However, the current trend is for courts of appeals to disagree with the employers' argument, and to accept the Board's *Greco & Haines* position that the "entire record" can be considered in assessing the prima facie case. Employers are still pressing the issue, however, and it is certainly possible that employers will convince one or more of the many circuit courts that have not yet considered the issue that the Board's approach is invalid.[316] Accordingly, it is worthwhile to analyze thoroughly who is correct—employers or the Board.

First, it should be considered whether the Board's *Greco & Haines* approach violates any governing legal authority, such as prior precedents in Section 8(a)(3) cases or relevant statutes. Employers, and some courts of

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314. *Id.* at 1187 (1994) (citations omitted); *see also* Peter Vitalie Co., 313 N.L.R.B. 971, 972 (1994) (ALJ Linton recounts that he told the employer's representative, after denying their motion that the case should be dismissed because the General Counsel had failed to present sufficient evidence of a prima facie case, that if the employer proceeded with presenting its defense then the employer "would be deemed to have waived its motion to dismiss, and in reaching my decision I would consider not simply the evidence as of [the employer's] motion, but the entire record."); Formosa Plastics Corp., 320 N.L.R.B. 631, 642 (1996) (ALJ Linton applies the same "waiver" rule in the context of non-Section 8(a)(3) unfair labor practices).

315. *See, e.g.*, Goldtex, Inc., 14 F.3d 1008, 1012 (4th Cir. 1994); Vemco, Inc., 989 F.2d 1468, 1477 (6th Cir. 1993); Holo-Krome Co. v. NLRB (Holo-Krome II), 947 F.2d 588 (2d Cir. 1991).

316. The circuits that have not yet considered the issue are the First, Third, Eighth, Ninth, Tenth, and Eleventh Circuits. *See supra* Part IV.A. (discussing decisions by the circuits that have considered the issue).

appeals, have contended that *Wright Line* itself dictates that the General Counsel has to prove its prima facie case before the employer need even present its evidence.[317] It is true that in some portions of *Wright Line*, the Board referred to the General Counsel's showing of a prima facie case as occurring before the burden shifts to the employer to prove its defense.[318] Throughout the decision, however, the Board made statements that demonstrate that the two-stage sequence established in *Wright Line* occurs not when the evidence is being presented, but when the Board is making its decision.

The first place in *Wright Line* where the Board indicated that the two-stage sequence occurs at the time of decision was during its discussion of the *Mt. Healthy* decision, on which it based the *Wright Line* standard. In *Wright Line*, the Board quotes a passage from *Mt. Healthy* that shows that the two stages both occur as the court is making its decision. The passage states that after the plaintiff in *Mt. Healthy* met his first stage burden, "the District Court should have gone on to determine whether the [School] Board had shown by a preponderance of the evidence that it would have reached the same decision. . . ."[319] Notably, this passage does not state that after the first stage is completed, that the court should then hear evidence regarding the second stage. Rather, it is implicit in the *Mt. Healthy* standard that all of the evidence is before the court as it applies the two-stage analysis. Thus, in the *Mt. Healthy* standard that serves as the source of the *Wright Line* test, the two-stage analysis occurs at the point of decision.

Other parts of the *Wright Line* decision make it even clearer that it is at the point of decision, not during the course of the hearing, that the two stages occur. In asserting that its new *Wright Line* standard was consistent with its historical approach to Section 8(a)(3) cases, the Board stated that "the Board's *decisional process* traditionally has involved" a two-stage inquiry.[320] Significantly, it is at this point that the Board dropped the footnote, footnote twelve, in which it relied

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317. *See Goldtex*, 14 F.3d at 1012 (referring to *Wright Line*'s and *Transportation Management*'s "burden of proof allocations" to support its conclusion that evidence regarding the employer's reason for the challenged action was "premature" at the prima facie stage).

318. *See* Wright Line, 251 N.L.R.B. 1083, 1087 (1980) ("[I]t is made abundantly clear in *Mt. Healthy* . . . that *after* an employee or, here, the General Counsel makes out a prima facie case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity."); *Id.* at 1089 (emphases added) ("*First*, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.").

319. *Id.* (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

320. *Id.* at 1088 (emphasis added).

on *Shattuck Denn* to support the proposition that the lack of a legitimate reason for the employer's action may form part of the proof of the General Counsel's case. In the crucial part of the decision, when the Board summed up what it had done in *Wright Line*, the Board explained that its new two-stage analysis would "provide the necessary clarification of *our decisional* processes. . . ."[321] The Board in *Wright Line* thus envisioned that its new two-stage test would guide the process of analysis of decisionmakers, namely ALJs and the Board itself, not that it would dictate the conduct of litigation.[322]

The *Transportation Management* decision also does not bar decisionmakers from considering evidence presented by the employer in assessing the prima facie stage of the *Wright Line* process. In fact, the Supreme Court completely left out of its *Transportation Management* decision any indication that the events in the *Wright Line* process should occur in any particular order. In its description of the *Wright Line* standard, the Court even left out the "sequential" terms that the Board used in portions of *Wright Line*, such as "first" and "after."[323] The Court in *Transportation Management* consistently described the standard in terms of what each side had to prove, without limiting in any way the evidence the parties could use to meet their proofs.[324] Perhaps most illustrative was the Supreme Court's approach in applying the *Wright Line* analysis to the facts of

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321. *Id.* at 1089 (emphasis added).

322. The Board did emphasize in *Wright Line* that in deciding Section 8(a)(3) cases, it would go through a *sequential* process, in which it would assess the General Counsel's case first, and then consider the employer's defense. *See id.* (emphasis added). This sequential process is undermined by the Fourth Circuit's rulings, in *Medeco* and *CWI*, that evidence supporting the employer's asserted reason can "negate" the General Counsel's prima facie case. *See* Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733, 742 (4th Cir. 1998); NLRB v. CWI of Maryland, Inc., 127 F.3d 319, 332 (4th Cir. 1997). The Fourth Circuit's approach calls for the Board to determine, at the first stage, whether the evidence supporting the employer's proffered reason is so strong that it proves that this reason was the predominant motive for the employer's action. This, of course, is the determination that *Wright Line* saves for the second stage of the decisionmaking process. The Fourth Circuit's approach conflates the two stages.

More importantly, the Fourth Circuit's approach affects the burden that is placed on the General Counsel at the first stage. If, as the Fourth Circuit has stated, "the presence of a legitimate explanation may work to negate the General Counsel's case," then the General Counsel, to avoid having its case negated, must prove that this legitimate reason was *not* the predominant motive for the employer's action. *CWI*, 127 F.3d at 332. This was exactly the same obligation that the First Circuit placed on the General Counsel in its decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983), and that the Supreme Court overturned. In sum, the Fourth Circuit's approach conflicts with both *Wright Line* and *Transportation Management*, and therefore is invalid.

323. *See Transp. Mgmt.*, 462 U.S. at 395 (describing *Wright Line* standard).

324. *See id.* at 400-01 (discussing "elements" that the General Counsel and employer must prove in the *Wright Line* process).

Transportation Management itself. In affirming that the Board was justified in finding a Section 8(a)(3) violation, the Court relied heavily on evidence regarding the employer's reasons for its actions (i.e., weakness of the reason given, departure from usual practices) without finding it necessary to examine from which side that evidence came. Thus, *Transportation Management* actually supports the Board's position that it can consider evidence presented by the employer in deciding whether the General Counsel has proven its prima facie case.

The statutes that regulate burdens of proof in unfair labor practice cases also do not preclude the approach adopted by the Board in *Greco & Haines*. In *Greenwich Collieries*, the Supreme Court reaffirmed that the Board is bound by the APA when adjudicating unfair labor practice cases. But review of the APA reveals that the statute does not conflict with the Board's *Greco & Haines* approach. Section 7(c) of the APA provides that "a proponent of a rule or order has the burden of proof."[325] As discussed in Part IV, the Supreme Court held in 1994 in *Greenwich Collieries* that "burden of proof" in Section 7(c) of the APA meant burden of *persuasion*.[326] Section 7(c) does not mandate that the agency decisionmaker must consider only evidence presented by the "proponent of the rule" in deciding whether that party has met its burden. The only limitation Section 7(c) of the APA imposes on the agency's use of evidence is that the agency "shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."[327]

Moreover, in *Greenwich Collieries*, the Supreme Court never indicated that the burden of persuasion must be satisfied by evidence introduced by the proponent of the rule. The Court defined burden of persuasion as "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose."[328] The Court returned to that definition in its holding, stating "Under § 7(c) . . . when the evidence is evenly balanced, the benefits claimant must lose."[329] The Court never discussed from which side that "evidence" must come.

The other statute that the Board must comply with in adjudicating cases is, of course, the NLRA. Section 10 of the NLRA prescribes the procedures the Board must follow in deciding cases. Section 10(c) of the NLRA does require that unfair labor practices be proven by a preponderance of the evidence, but it does not state that only evidence presented by the General Counsel can be used to satisfy that burden. Indeed, in defining the burden of proof, Section 10(c)

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325. 5 U.S.C. § 556(d) (1994).

326. *See* Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 276 (1994); *supra* Part IV.A.3. (discussing *Greenwich Collieries* decision).

327. 5 U.S.C. § 556(d) (1994).

328. *Greenwich Collieries*, 512 U.S. at 272.

329. *Id.* at 281.

twice uses the phrase "the preponderance of *the testimony taken*."[330] The phrase "testimony taken" is clearly broad enough to encompass the testimony and other evidence presented by the employer along with the evidence presented by the General Counsel. Hence, the language of Section 10(c) permits the Board to consider evidence produced by the employer in deciding whether the General Counsel has met its burden of proof.

Another relevant provision in Section 10 of the NLRA is Section 10(b). Section 10(b) states that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States."[331] This makes it pertinent to consider whether the Board's *Greco & Haines* position is consistent with evidentiary and procedural rules that apply in federal civil cases.

In fact, *Greco & Haines* is consistent with key doctrines of evidence and procedure. A general tenet of federal evidence law is that:

> In determining whether *any fact in issue* has been proved by a preponderance of evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.[332]

Juries are often given this rule as an instruction.[333] Moreover, where judges act as triers of fact, they also follow this principle.[334] Accordingly, under this doctrine, in ruling on the factual issue of whether antiunion sentiment was a motivating factor in the decision, the Board could consider testimony and other evidence offered by the employer, even though the General Counsel bears the burden of proof on the issue.

The *Greco & Haines* approach also conforms with the federal rules of civil procedure. Federal Rule of Civil Procedure 52 addresses findings of fact by a court. Rule 52(c) provides:

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330. 29 U.S.C. § 160(c) (1994) (emphasis added).

331. 29 U.S.C. § 160(b) (1994).

332. 3 HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.01 (4th ed. 1987) (emphasis added); *see also* Harvey v. Gen. Motors Corp., 873 F.2d 1343, 1349 (6th Cir. 1989) (invoking this rule).

333. *See* Lindsey v. Baxter Healthcare Corp., 757 F. Supp. 888, 891 (N.D. Ill. 1991) ("[J]uries are regularly instructed that they may consider all testimony (regardless of who may have called any witness) and all exhibits (regardless of who may have introduced them)."), *aff'd in relevant part*, 962 F.2d 586 (7th Cir. 1992).

334. *See, e.g.*, Merzon v. County of Suffolk, 767 F. Supp. 432, 445 (E.D.N.Y. 1991) (emphasis added) ("In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, *the Court* may consider and weigh the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.").

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, *or the court may decline to render any judgment until the close of all the evidence.*[335]

In an unfair labor practice case, the Board and, earlier in the process, an ALJ, assumes the role played by a trial judge in a trial without a jury. In a Section 8(a)(3) case, after the General Counsel has presented all its evidence on the issue whether antiunion animus was a motivating factor for the employer, and the General Counsel has thus "been fully heard" on that issue, Rule 52(c) would permit the Board to rule against the General Counsel at that point if the Board found the General Counsel had failed its burden. But under Rule 52(c), the Board would *not* be required to rule against the General Counsel at that point, that is, at the close of the General Counsel's case. The Board would have the discretion to wait until the close of *all* the evidence, that is, until after the employer had presented its evidence in defense, to decide whether the General Counsel had proven its initial burden. It follows logically that Rule 52(c) would also allow the Board to *consider* the additional evidence presented by the employer, because there is no rational reason that the Rule would permit the trier of fact to hear additional evidence that the trier of fact could not consider.

Thus, under the principles of evidence and procedure, the trier of fact can consider evidence presented *by the defendant* in deciding whether *the plaintiff* has proven its case. In *Greco & Haines*, the Board decided that it was logical and fair to apply the same rule in unfair labor practice proceedings. In reaching that conclusion, the Board implicitly presumed that it was appropriate to treat ALJs and the Board as being comparable to a finder of fact *at a civil trial.*

In fact, such a comparison is appropriate, because the role that ALJs and the Board play in unfair labor practice proceedings is similar to the role that triers of fact play in a civil case. In a civil case, the viability of the plaintiff's claim and the adequacy of the plaintiff's evidence are "screened" in pre-trial stages, through motions to dismiss and motions for summary judgment. At trial, the trier of fact decides which way to resolve remaining disputes of fact, and its determinations are usually final.[336]

Similarly, in an unfair labor practice case, the charging party's claim is "screened" before it reaches the ALJ or the Board, when the General Counsel decides whether to issue a complaint based on the charge. In making that

335. FED. R. CIV. P. 52(c) (emphasis added).

336. After trial, reviewing courts generally cannot overrule the determinations of fact unless they are "clearly erroneous." *See* FED. R. CIV. P. 52(a) (prescribing "clearly erroneous" standard for review of trial court's findings of fact); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 948 (1995).

decision, the General Counsel is required to consider the same issues as a court in a civil case would in ruling on motions for dismissal or summary judgment. The Board's *Casehandling Manual* provides that charges should be dismissed for "[l]egal insufficiency of details on the face of the charge" and for "[l]ack of sufficient evidence" supporting the charge.[337] If a claim survives this screening process and a complaint is issued, then a hearing is held before an ALJ.[338] At this stage of the unfair labor practice proceeding, the ALJ, and then the Board, play the decisive roles in deciding the remaining disputes of fact, much as a trier of fact does in a civil trial. Furthermore, like the situation after a trial in a civil case, once the Board makes its determinations of fact in an unfair labor practice proceeding, all that remains is deferential review by an appellate court.[339]

In sum, in comparing unfair labor practice proceedings to civil proceedings, it becomes clear that the functions the ALJ and the Board carry out in ruling on factual issues are closely analogous to the functions performed by the trier of fact at a civil trial. Accordingly, it is entirely reasonable for the Board, in deciding how to weigh evidence as the trier of fact, to follow the principles that apply to triers of fact in civil cases. In adopting the *Greco & Haines* approach, the Board has done exactly that.

Greco & Haines not only conforms with general principles of evidence, but it is also consistent with practical considerations. The strong practical reasons supporting the Board's approach are succinctly explained in *Shattuck Denn*, the seminal Ninth Circuit decision that the Board cited in *Wright Line* for the proposition that the employer's lack of a legitimate reason for its action could help prove the General Counsel's case.

The portion of the *Shattuck Denn* decision that discussed this proposition began with a reminder that the central issue in Section 8(a)(3) cases is "actual motive, a state of mind."[340] The court then declared that the employer's assertion of a legitimate reason for its challenged action should not be conclusive, because "[o]therwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."[341] Moreover, the court added, the trier of fact in Section 8(a)(3) was entitled to scrutinize and assess the credibility of the employer's reason: "Nor is the trier of fact—here the trial examiner—required to be any more naif than is a judge."[342] The Ninth Circuit

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337. NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL, pt. 1, UNFAIR LABOR PRACTICE PROCEEDINGS ¶ 10122.2(a), (e) (1989).

338. *See* 29 U.S.C. § 160(e) (1994); NLRB RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE § 102.34 (1996).

339. *See* 29 U.S.C. § 160(e) (1994) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.").

340. Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966).

341. *Id.*

342. *Id.*

next explained how the trier of fact could take the employer's reason into account, using the words that have been echoed in so many Board decisions:

> If he [the trier of fact] finds that the stated motive for a discharge is false, he can certainly infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.[343]

The thrust of the Ninth Circuit's reasoning is that because the credibility of the employer's reason does, as a practical matter, shed light on motive, then the trier of fact should be permitted to consider the employer's reason in assessing motive.[344] The Board's position that the employer's evidence can be considered at the prima facie stage is consistent with this common-sense reasoning. To hold otherwise would be to impose an artificial blindness, or "naivete" as the Ninth Circuit put it, on the ALJs and the Board as triers of fact. For example, even if one of the employer's witnesses were to blurt out at the hearing that the employer's asserted reasons were false and that the discriminatee had been fired for union activity, that admission could not be considered by the trier of fact, because the employer had "produced" that evidence. Such a result would defy logic and common sense.[345] And even in cases that are less blatant, the Board

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343. *Id.*; *see also supra* text accompanying notes 131-42 (discussing Board decisions relying on this passage in *Shattuck Denn*).

344. This practical insight reveals another flaw in the Fourth Circuit's reasoning, in *Medeco* and *CWI*, that just as evidence that the employer's asserted reason is false can support the prima facie case, evidence that the employer's reason could be true can negate the prima facie case. *See* Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733, 742 (4th Cir. 1998); NLRB v. CWI of Maryland, 127 F.3d 319, 332 (4th Cir. 1997). In fact, these two types of evidence are not equal in probative value. When the evidence shows that the employer's proffered reason for its action is false, that reveals that the employer has concealed its true reason, which, as the Ninth Circuit concluded in *Shattuck Denn*, strongly indicates that the true reason was improper. *See Shattuck Denn*, 362 F.2d at 470. On the other hand, if there is evidence that the proffered reason for an action is true, that does not negate the possibility that the employer's antiunion animus also contributed to that action. It just shows that there was a reason *in addition to* antiunion animus. Whether that legitimate reason predominated over the antiunion motivation is a question that should be addressed in the second stage of the *Wright Line* process, not at the first stage.

345. The same reasoning compels rejection of the Second Circuit's position in *Holo-Krome III* that the Board should consider evidence produced by the employer only when it has been "elicited" by the General Counsel. *See* Holo-Krome Co. v. NLRB (Holo-Krome III), 954 F.2d 108, 113 (2d Cir. 1992); *supra* text accompanying notes 166-82 (discussing *Holo-Krome III*). This assertion of the Second Circuit was based on the erroneous premise that "the General Counsel's 'prima facie case' cannot consist of evidence that the General Counsel has failed to elicit." *Holo-Krome III*, 954 F.2d at 113.

and ALJs, as triers of fact, should be permitted to apply the practical insight that a person asserting a false reason is usually doing so to conceal another, "improper" reason.

In sum, the Board was correct in *Greco & Haines* in holding that the entire record, including the employer's defense, can be considered in assessing the General Counsel's prima facie case.

B. Should Evidence of Pretext Play a Major Role in Supporting the Prima Facie Case?

Greco & Haines resolved only a threshold issue. It left open the question of the extent to which evidence of pretext can be relied on to find that the General Counsel has met its prima facie case. It is one thing to say that evidence of pretext can be one of numerous factors considered in deciding whether union activity was a motivating factor in a challenged action. It is quite another to say that evidence of pretext can be the primary basis for reaching that conclusion.

Before assessing the validity of the Board's reliance on evidence of pretext, it is important to understand that the extent to which the Board bases its findings of unlawful motivation on evidence of pretext is limited, even in those cases where the Board relies on such evidence most heavily. Proof that the employer gave a false reason for taking some action adverse to an employee or applicant has never been considered a sufficient basis for finding a violation of Section 8(a)(3). If it were, the NLRA would be converted into a federal wrongful discharge law: every time there was some basis for questioning the truthfulness of an employer's stated reason for an action, the Board could be called upon to decide if the employer committed an unfair labor practice. But Section 8(a)(3) of the Act, by proscribing only discrimination due to union "membership," requires that there be some nexus between the employer's action and union activity or support by the employee or applicant. In other words, for the Board to even consider a Section 8(a)(3) claim, the "first element" of the General Counsel's case—union support by the aggrieved employee—must be present.

That premise conflicts with the general rule of evidence that any fact can be proven by evidence offered by any party. *See supra* notes 332-35 and accompanying text. Based on its faulty premise, the Second Circuit imposed an unjustified and impractical limitation on the evidence that can be considered by the trier of fact. For example, under the Second Circuit's recommendation, the Board could not consider an employer's witness's "confession" that the proffered reason was false if it were made during direct testimony, but could apparently consider such a confession if it were made during cross-examination by the General Counsel. Moreover, it would be doubtful whether the Board could consider a confession made during questioning by an intervenor, such as the Charging Party, as that evidence would not be "elicited" by the General Counsel. These arbitrary results demonstrate that the distinction the Second Circuit seeks to draw between evidence that is and is not "elicited" by the General Counsel is unworkable and unwarranted.

The second element—employer knowledge of the employee's union support—is also present in virtually all cases where the Board finds a Section 8(a)(3) violation. Even in those cases, discussed in Part III, where the Board or an ALJ identified pretext as the leading factor establishing the General Counsel's first stage case, the element of knowledge was also proven.[346] Also present in most of these cases is proof of the third element, timing that suggests a link between the employee's activity and the employer's challenged action.[347]

In sum, in most cases where evidence of pretext plays a major role in the Board's finding that the General Counsel proved its first stage case, the General Counsel has proven the first three elements of that case: employee union support, employer knowledge of that support, and suspect timing. This means that the role evidence of pretext usually plays is to prove the fourth and final element, employer antiunion animus, or to serve as a substitute for that element.

In many Section 8(a)(3) cases, the animus element is the most elusive to prove, because most employers are astute enough to avoid overt antiunion conduct. Moreover, recent decisions by the federal courts of appeals are making it even more difficult to prove the animus element. A number of circuit courts have held that employer antiunion statements cannot be used as proof of animus unless those statements are themselves unlawful threats.[348] Moreover, even when an employer has made an unlawful threat, or engaged in another unfair labor practice, near the time of the alleged Section 8(a)(3) violation, that is not necessarily sufficient to prove animus. At least that is the position recently adopted by the D.C. Circuit, the court to which all Board decisions can be appealed. In *TIC, Inc. v. NLRB*,[349] the D.C. Circuit held that a showing of animus must be based on more than a "single [unlawful] comment by a

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346. *See, e.g.*, Aloha Temp. Servs., Inc., 318 N.L.R.B. 972, 973 (1995); Fluor Daniel, Inc., 311 N.L.R.B. 498, 498 (1993); Mullican Lumber Co., 310 N.L.R.B. 836, 838 (1993); Adco Elec. Inc., 307 N.L.R.B. 1113, 1126 (1992); Active Transp., 296 N.L.R.B. 431, 432 (1989), *enforced mem.*, 924 F.2d 1057 (6th Cir. 1991).

Part III also discusses a number of cases in which the Board relied on evidence of pretext to *infer* that the knowledge element was met. But in those cases, evidence of pretext was just one of many types of circumstantial evidence that the Board found supported a finding of knowledge. *See supra* text accompanying notes 111-17. So, even in those cases, there was, in addition to evidence of pretext, considerable evidence indicating employer knowledge.

347. *See, e.g.*, *Mullican Lumber*, 310 N.L.R.B. at 836; *Adco Elec.*, 307 N.L.R.B. at 1126 (Eric Muncy discharged only a month after employer learned he signed a union card); *Active Transp.*, 296 N.L.R.B. at 432.

348. *See, e.g.*, Alpo Petfoods, Inc. v. NLRB, 126 F.3d 246, 252 (4th Cir. 1997); Carry Cos. of Ill., Inc. v. NLRB, 30 F.3d 922, 927 (7th Cir. 1994); NLRB v. Vemco Inc., 989 F.2d 1468, 1474 (6th Cir. 1993); Holo-Krome Co. v. NLRB (Holo-Krome I), 907 F.2d 1343, 1345-47 (2d Cir. 1990); *see also supra* note 155 (citing law review articles discussing the split between the Board and the courts of appeals on whether lawful antiunion employer statements can be used as evidence of animus).

349. 126 F.3d 334 (D.C. Cir. 1997).

supervisor," at least where the comment is one telling an applicant that the employer does not like to hire union supporters.[350]

Given the difficulty of proving the animus element, particularly in light of these courts of appeals precedents, there are likely to be many cases where the General Counsel will turn to evidence of pretext to prove animus. So, the actual question at issue is: should the Board allow the General Counsel to prove the final element of the first stage case solely, or largely, through evidence of pretext? Or, to refine the question even further, is it lawful and appropriate for the Board to base a finding of animus on evidence of pretext, or to hold that a finding of pretext can serve as a substitute for the animus element?

Whether it is lawful for the Board to use evidence of pretext in these ways depends, of course, on the legal authorities to which the Board is bound. It depends first on the statutory requirements that bind the Board. As previously explained, Section 10(c) of the NLRA and Section 7(c) of the APA mandate that the ultimate burden of persuasion is on the General Counsel to prove that the employer's antiunion animus motivated the challenged action. Therefore, the Board must ensure that in Section 8(a)(3) cases, it does not improperly place the burden of persuasion on the employer to *disprove* that it was motivated by antiunion animus in taking an adverse action against the discriminatee.

Unlike the NLRA and the APA, the Supreme Court's decisions in *Hicks* and *Reeves* do not directly bind the Board, because these decisions involve construction of federal discrimination laws rather than the NLRA. The Board, however, must take *Hicks* and *Reeves* into account in addressing the pretext issue. The Board's decisions are subject to judicial review by the federal appellate courts, and *Hicks* and *Reeves* state the position of the highest of those courts on the appropriate use of evidence of pretext in deciding whether discriminatory motivation has been proven. The D.C. Circuit, and the Board itself, have already recognized that *Hicks* is relevant to the Board's treatment of evidence of pretext in Section 8(a)(3) cases.[351]

In *Precision Industries*, the Board recognized the central holding in *Hicks* that a finding of pretext cannot compel a finding of unlawful discrimination as a matter of law. In fact, the Board relied on *Hicks* in adopting the similar rule that a finding (by an ALJ or the Board) that the employer's proffered reasons for the challenged action are pretextual does not legally *compel* the ALJ or the Board to conclude that the employer violated Section 8(a)(3).[352] The Board thus has accepted that, in its capacity as the trier *of law*, it cannot declare that a showing of pretext can serve as the legal equivalent of a showing of unlawful motivation.

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350. *Id.* at 338.

351. *See supra* text accompanying notes 273-81 (discussing D.C. Circuit decision in *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (1995)); *supra* notes 295-305 (discussion of Board's decision in *Precision Industries*).

352. *See* Pace Indus., Inc. (Precision Indus.), 320 N.L.R.B. 661, 661 (1996); *see also supra* text accompanying notes 297-305 (discussion of *Precision Industries*).

However, in Section 8(a)(3) cases, the Board and its ALJs act as triers *of fact* when determining the employer's motive for an adverse action against an employee.[353] In *Precision Industries*, the Board interpreted *Hicks* as holding that the trier of fact's rejection of the employer proffered reasons is sufficient to *permit* the trier of fact to find unlawful motivation.[354] In *Reeves*, the Supreme Court confirmed that the Board's interpretation of *Hicks* in *Precision Industries* was correct.[355] The Supreme Court in *Reeves* declared that evidence of pretext was strong probative evidence of discriminatory motivation,[356] and the Court held 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."[357] *Reeves* thus provides support for the position that it is permissible for the Board, in its capacity as the trier of fact, to accord considerable weight to evidence of pretext in determining whether the employer has violated Section 8(a)(3).

The Board's freedom to rely on evidence of pretext to infer unlawful motivation has limits. One limit has already been identified: the Board cannot saddle the employer with the burden of *disproving* unlawful motivation. Another limit is that the inference of unlawful motivation must be reasonable. As previously discussed, when basing findings of unlawful motive on evidence of pretext, the Board, as the trier of fact, is *drawing an inference* of unlawful motive from circumstantial evidence.[358] It is an elementary rule of law that inferences are valid only if they are reasonable.[359] In Section 8(a)(3) cases, this "reasonableness" requirement is reinforced by *Transportation Management*. In that decision, the Court's finding that it was acceptable to shift the burden to the employer in the second stage of the *Wright Line* process was based on the premise that in the first stage, "the Board has *soundly concluded* that the employer had an antiunion animus and that such feelings played a role in a worker's discharge."[360] Thus, under *Transportation Management*, the Board's

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353. *See supra* text accompanying notes 307-11.

354. *See Precision Indus.*, 320 N.L.R.B. at 661 & n.4 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 502 (1993)).

355. Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2108 (2000) (explaining the meaning of *Hicks*).

356. *Id.*

357. *Id.* at 2109.

358. *See supra* text accompanying note 311.

359. *See* DEVITT, *supra* note 332, § 72.04 ("You are permitted to draw from facts . . . such reasonable inferences as seem justified in light of your experience. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case."). *See also* Tot v. United States, 319 U.S. 463, 467-68 (1942) (establishing rule that even inferences enacted by legislative action must be "reasonable," and not "strained" or "arbitrary").

360. NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 n.6 (1983) (emphasis added).

finding that the General Counsel has proven the prima facie case must be "soundly" based on evidence that reasonably supports that conclusion.

The Seventh Circuit, and possibly the D.C. Circuit, have imposed a more explicit limit on the Board's ability to rely on evidence of pretext to infer a violation. As discussed in Part IV, the Seventh Circuit in *Union-Tribune* held that a finding of pretext, by itself, was not sufficient to support a conclusion that the employer had an unlawful motivation, and the D.C. Circuit quoted that holding approvingly in *Laro Maintenance*.[361] In effect, the Seventh Circuit has held that it is *never* reasonable for the Board to infer unlawful motivation, and to find the prima facie case is satisfied, based solely on evidence of pretext.

This is one possible resolution of the appropriate role of evidence of pretext in Section 8(a)(3) cases: that such evidence can play a supporting, but never a solo, role in establishing the prima facie case. Evidence of pretext could be used to support a prima facie showing of unlawful motivation, but it would have to be accompanied by other evidence tending to show such a motivation. Given that union activity by the discriminatee and employer knowledge of that activity is almost always present in cases where the Board relies on evidence of pretext to find a violation, the "other evidence" that would have to accompany evidence of pretext would most likely be evidence of antiunion animus.[362]

This would be a defensible and straightforward resolution of the pretext issue, but it would not be the correct one. The problem is that it unduly restricts the logical and reasonable inferences that a factfinder can draw from evidence of pretext. The "pretext is not sufficient" approach ignores the crucial insight of *Shattuck Denn*, recently endorsed by the Supreme Court in *Reeves*, that when a party raises a false motive for its actions, it is logical to infer that the party is seeking to conceal an unlawful motive. In *Shattuck Denn*, the Ninth Circuit reasoned that "[i]f [the trier of fact] finds that the stated motive for a discharge is false . . . he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference."[363] Echoing this statement in *Shattuck Denn*, the Supreme Court in *Reeves* held that "[i]n 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."[364]

Thus, *Shattuck Denn* and, more importantly, *Reeves*, hold that evidence of pretext can be sufficient to support an inference of discriminatory motivation. However, both decisions also state that evidence of pretext is not *always* a sufficient basis for inferring discrimination. *Shattuck Denn* said that the

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361. *See* Union-Tribune Publ'g Co. v. NLRB, 1 F.3d 486, 491 (7th Cir. 1993); Laro Maint. Corp. v. NLRB, 56 F.3d 224, 230 (D.C. Cir. 1995); *see also supra* text accompanying notes 183-95, 201-09 (discussing *Union-Tribune* and *Laro Maintenance*).

362. *See supra* text accompanying note 75 (discussing the elements typically required to prove a prima facie case).

363. Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966).

364. Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2108 (2000).

inference is justified when "the surrounding facts tend to reinforce it";[365] *Reeves* held that the inference was reasonable "in appropriate circumstances."[366] The Supreme Court in *Reeves* went on to amplify this point, stating that its holding did not mean that "such a showing by the plaintiff [of proof of the prima facie case and evidence of pretext] will *always* be adequate to sustain a jury's finding of liability."[367] The Court offered some guidance on when evidence of pretext would not be sufficient to permit a finding of discrimination, giving examples of situations where "no rational factfinder could conclude that the action was discriminatory,"[368] and explaining that whether evidence of pretext in a particular case supports a reasonable inference of discrimination "will depend on a number of factors."[369]

Shattuck Denn and *Reeves* point toward the conclusion that the Seventh Circuit and other courts have been wrong in holding that evidence of pretext is *never* sufficient to support an inference of discrimination, and that the correct answer is that evidence of pretext is *sometimes* enough to find discrimination. That, of course, raises the question: *When* is evidence of pretext a sufficient basis for finding discrimination under Section 8(a)(3)? More specifically, what are the "appropriate circumstances"[370] in which the Board should be allowed to reasonably infer an unlawful motivation based solely, or largely, on evidence of pretext?

The key to answering this question is recognition that the phrase "evidence of pretext" is a blanket term that actually covers different types of evidence with varying probative values. A useful reference point in distinguishing among the different types of evidence of pretext is the three categories of pretext discussed in Part I.[371] To recapitulate, those categories are:

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365. *Shattuck Denn*, 362 F.2d at 470.

366. *Reeves*, 120 S. Ct. at 2108.

367. *Id.* at 2109.

368. *Id.* (The examples the Court gave were (1) when "the record conclusively revealed" that even though the reason proffered by the employer was false, there was another non-discriminatory reason for the employer's action; and (2) when "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.").

369. *Id.* (The Court said that the relevant factors included "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on [an employer's] motion for judgment as a matter of law.").

370. *Id.* at 2108.

371. *See supra* note 11 and accompanying text (discussing the categories identified by Professor Kathleen M. Kelly).

(1) The record makes clear that the facts underlying the employer's proffered reason(s) for its challenged action did not exist,
(2) There is no support in the record that the facts underlying the employer's proffered reason(s) did exist, or
(3) The record shows that the facts underlying the proffered reason(s) did exist, but the record shows that these facts were probably not the real reason for the challenged action.[372]

As will be discussed below, these three categories can be further divided into more specific types of evidence of pretext.

The Board and the courts have recognized, at least implicitly, that the evidence of pretext that provides the *weakest* support for an inference of discrimination is evidence in the second category: lack of evidence in the record to support the employer's reasons for its action. In these cases, there is no affirmative evidence in the record that the employer's reason is *false*, but there is also little or no credible evidence in the record to show that the employer's reason is *true*.

When the record lacks support for the employer's proffered reason, it is almost always because the employer has failed to present credible evidence for that reason.[373] A common situation in which this occurs is when the ALJ discredits, on demeanor grounds, the testimony of the employer's witnesses on the employer's reasons for its action. If the ALJ's discrediting of the employer's witnesses on demeanor grounds is the sole type of evidence of pretext in the case, then a general principle of evidence law dictates that this evidence of pretext is *not* sufficient to support a finding of discrimination.

The principle is that a party cannot prove a proposition solely by convincing the trier of fact to disbelieve the witnesses of its adversary. The Supreme Court applied this principle in 1984 in *Bose Corp. v. Consumers Union*,[374] holding, "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."[375] Many federal courts of appeals have held that an issue may not be submitted to a trier of fact if the only evidence to

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372. *See* Kelly, *supra* note 11, at 882-84.

373. In Section 8(a)(3) cases, under the *Wright Line* standard, the General Counsel presents evidence that tends to show that the employer had an antiunion motivation for the challenged decision. It is up to the employer to present evidence that it had a legitimate, non-discriminatory reason for the decision. *See supra* Part II (discussing the evidence presented by the General Counsel and by the employer in Section 8(a)(3) cases).

374. 466 U.S. 485 (1984).

375. *Id.* at 512.; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986) (relying on this ruling in *Bose* to hold that the fact that a jury might disbelieve a defendant's testimony about his or her state of mind is not a sufficient basis for denying a defendant's motion for summary judgment).

support it is the possibility that the trier of fact will disbelieve witnesses who testify to the contrary.[376]

Most importantly for our purposes, the Board has also accepted this principle. In *Associated Musicians of Greater New York*,[377] the Board noted that the ALJ, based on his observation of a witness's demeanor, had disbelieved the witness's testimony denying that he had been threatened. The Board then explained that the ALJ's disbelief of that denial "does not, of course, convert a denial into affirmative evidence" that the threat had occurred.[378] In *Lockwoven Co.*,[379] the Board affirmed an ALJ decision that expressly rejected the General Counsel's argument that disbelieving the employer's witnesses' testimony warranted the inference that the opposite of their testimony was true.[380] The ALJ acknowledged that he disbelieved the testimony of these witnesses, who he stated were "inconsistent" and "evasive," and had "claimed lack of memory."[381] But the ALJ then explained that "any inference that the opposite occurred" could not come solely from disbelief of the witnesses' testimony, but "must be drawn from all the surrounding circumstances."[382] Based on all these precedents, it is clear that in a Section 8(a)(3) case, the Board could not base a finding that the General Counsel proved its prima facie case solely on the fact that the ALJ discredited on demeanor grounds the testimony of the employer's witnesses on the employer's reasons for the challenged action.

When the Seventh Circuit held in *Union-Tribune* that evidence of pretext was insufficient by itself to support a finding of discrimination, the type of evidence of pretext the court apparently had in mind was disbelief of the employer's testimony on demeanor grounds.[383] The only authority the Seventh Circuit cited for the proposition that evidence of pretext is insufficient was the court's prior decision in *Roper Corp. v. NLRB*.[384] In *Roper*, the ALJ and Board had found that the General Counsel had proven an element of an unfair labor practice claim—that the employer never notified the union of its intention to change a term of employment—even though the General Counsel presented no

376. *See, e.g.*, United States v. Marchand, 564 F.2d 983, 986 (2d Cir. 1977) (emphasis added) ("a jury is free, on the basis of a witness' demeanor, to 'assume the truth of what he denies,' *although a court cannot allow a civil action, much less a criminal prosecution, to go to the jury on the basis of this alone.*"); Janigan v. Taylor, 344 F.2d 781, 784-85 (1st Cir. 1965) (reasoning that "[w]ere the rule otherwise a case could be made for any proposition in the world by the simple process of calling one's adversary and arguing to the jury that he was not to be believed.").

377. 212 N.L.R.B. 645 (1974).

378. *Id.* at 646.

379. 245 N.L.R.B. 1362 (1979)

380. *Id.* at 1370.

381. *Id.*

382. *Id.*

383. *See* Union-Tribune Publ'g Co. v. NLRB, 1 F.3d 486, 491 (7th Cir. 1993).

384. *See id.* (citing Roper Corp. v. NLRB, 712 F.2d 306 (7th Cir. 1983)).

evidence on that element.[385] The ALJ found, and the Board affirmed, that the element had been proven because the ALJ disbelieved the employer witnesses, whose demeanor the ALJ regarded as "less than candid and forthright," when they testified that the employer notified the union.[386] In *Roper*, the Seventh Circuit struck down the ruling that the General Counsel had proven this element, holding that a party in an NLRB proceeding cannot meet its burden of persuasion solely by convincing the ALJ to disbelieve the testimony presented by the other side.[387]

In light of its reliance on *Roper*, the Seventh Circuit in *Union-Tribune* was apparently concerned about a narrow class of cases, those where the finding of unlawful motive is based solely on disbelief of the employer's witnesses based on their demeanor, and yet the court applied its ruling to all cases involving a "finding of pretext." *Union-Tribune* thus illustrates a typical, and problematic, approach to pretext cases. As set forth above,[388] there are at least three distinct categories of evidence of pretext, with multiple forms of evidence within each category. Nonetheless, the Board and the courts tend to lump all types of evidence together under the unitary label of pretext. As can be seen in the discussions of Board and court cases in Parts III and IV, the Board and courts consistently use the terms "pretext" or "evidence of pretext" to refer to any type of evidence (or lack of evidence) that indicates that the employer's asserted reasons for its action may not be true.

This approach ignores the fact that not all evidence of pretext is equal. Whether it is legitimate for the Board to infer unlawful motivation based on evidence of pretext depends largely on what type of evidence of pretext it is. As explained above,[389] the Board has already recognized that it cannot base a finding of discrimination on the fact that the employer's testimony of its reasons has been discredited on demeanor grounds. This is just the clearest example of why it is inappropriate to base a finding of discrimination on "second category" evidence of pretext, the category referring to cases where the employer has failed to present credible evidence supporting its proffered reasons for its action. Basing a finding of discrimination on the employer's failure of proof effectively amounts to requiring the employer to *prove* that it had a legitimate reason for the challenged action. Placing this burden on the employer is, of course, forbidden by Section 10(c) of the NLRA and Section 7(c) of the APA, and the Supreme Court's interpretation of those provisions in *Transportation Management* and *Greenwich Collieries*.

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385. *See* Roper Corp., 263 N.L.R.B. 1073, 1074 (1982).

386. *Id.*

387. *Roper*, 712 F.2d at 310.

388. *See supra* text accompanying note 11 (identifying categories of evidence of pretext).

389. *See supra* text accompanying notes 377-78 (discussing *Associated Musicians of Greater New York*).

On the other hand, employers have gone too far in arguing, in cases like *Union-Tribune, Holo-Krome II, Holo-Krome III,* and *Precision Industries,* that the Board's reliance on *any* evidence of pretext in assessing the General Counsel's case places an impermissible burden on employers. The crucial distinction is between "second category" evidence that fails to prove the employer's reason, and evidence in the first and third categories, evidence that provides *affirmative* proof that the employer's asserted reason is not merely unproven but deliberately *false.*

First category evidence of pretext is evidence that makes it clear that the facts underlying the employer proffered reasons for its action did not exist. The most blatant form of such evidence would be affirmative proof that the employer fabricated the asserted reasons for its action. That sort of definitive, "smoking gun" evidence is quite rare. However, other forms of "first category" evidence, evidence that provides strong proof that the reasons offered by the employer were non-existent, are commonly relied on by the Board.

One particularly egregious example is *Active Transportation,* in which the employer claimed that the decision to discharge four union supporters was made based on a review of their personnel files.[390] This explanation was completely undermined by the files themselves, as none of them contained anything remotely negative about any of the discharged employees.[391] In another discharge case, *Asociacion Hospital del Maestro, Inc.,*[392] the employer asserted that a union activist was fired for taking "unauthorized liberties," when in fact the employee had been given permission by his supervisors before engaging in the activities at issue.[393] Similarly, in *Cincinnati Truck Center,* the employer's proffered reason for firing a union supporter was that the employee failed or refused to follow a supervisor's instructions, while the record showed that on the day the employee was alleged to be disobedient, the employee had at all times acted in accordance with the directions of his supervisor.[394]

The "first category" type of evidence of pretext has also been present in refusal to hire cases. For example, in *Aloha Temporary Services, Inc.,*[395] the employer maintained that its reason for rejecting four union adherents was that another employee had applied before they did, but the record showed that in fact this employee had applied after the discriminatees.[396] Such evidence of pretext was also relied on in *Laro Maintenance,* the important D.C. Circuit decision that

390. *See* Active Transp., 296 N.L.R.B. 431, 431-32 (1989), *enforced mem.,* 924 F.2d 1057 (6th Cir. 1991).

391. *Id.*

392. 291 N.L.R.B. 198, 204 (1988).

393. *Id.*

394. *See* Transmart, Inc. (Cincinnati Truck Ctr.), 315 N.L.R.B. 554, 556-57 (1994), *enforced mem.,* 117 F.3d 1421 (6th Cir. 1997).

395. 318 N.L.R.B. 972 (1995).

396. *Id.* at 974.

affirmed the Board's approach to pretext.[397] As discussed previously, in *Laro Maintenance*, a cleaning contractor claimed it rejected the employees of the predecessor contractor because it desired "better quality" employees, while the record showed that the employer never actually investigated the quality of the predecessor's employees and the employer instead hired employees with poor work records and with no relevant experience.[398]

In all of these cases involving "first category" evidence of pretext, there was affirmative evidence that showed, or at least strongly indicated, that the reasons the employer asserted for the challenged action were false. In these cases, the Board drew the logical inference, explicated by the Ninth Circuit in *Shattuck Denn* and recently approved by the Supreme Court in *Reeves*, that the employer proffered a false reason in order to conceal an unlawful motive.

Both *Shattuck Denn* and *Reeves* state that this inference of unlawful motive may be drawn when the "surrounding facts" or "circumstances" make the inference "appropriate."[399] This test is met by a Section 8(a)(3) case involving "first category" evidence of pretext. First, as discussed above, in virtually all Section 8(a)(3) cases, it is proven that the discriminatee is a known union supporter, which establishes that it is at least possible that the employer had an antiunion motive for its action against the employee. More importantly, "first category" evidence of pretext does not consist merely of disbelief of the employer's evidence for its reasons, but is affirmative evidence that shows or strongly indicates that the employer's reason is false. Significantly, in *Reeves*, the Supreme Court held that any evidence sufficient for a reasonable trier of fact to disbelieve the employer's explanation,[400] which would include forms of evidence less probative than "first category" evidence of pretext,[401] could support

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397. *See* Laro Maint. Corp., 56 F.3d 224 (D.C. Cir. 1995); *supra* text accompanying notes 201-09 (discussing *Laro Maintenance*).

398. *See supra* text accompanying notes 201-05.

399. *See* Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (trier of fact can infer unlawful motive from false reason "where . . . the surrounding facts tend to reinforce that inference"); Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2108 (2000) (stating that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is . . . cover[ing] up a discriminatory purpose").

400. *See Reeves*, 120 S. Ct. at 2103, 2109 (referring to "sufficient evidence for the trier of fact to disbelieve the defendant's . . . explanation" and "sufficient evidence to reject the defendants's explanation").

401. The meaning of "sufficient evidence" for the trier of fact to disbelieve the employer is not specifically defined in *Reeves*. Given the Supreme Court's holding in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984), the evidence must consist of more than the trier of fact's discrediting of the testimony of the employer's witnesses. *See supra* text accompanying notes 374-75. Nonetheless, there are many forms of evidence that can support a trier of fact's disbelief of a party that are less direct and less obviously probative than the strong, "first category" evidence of pretext that the Board has relied on in many cases. *See supra* notes 390-98 and accompanying text (discussing

the inference of unlawful motivation. It follows that first category evidence of pretext should generally be sufficient to support the inference of unlawful motivation.

This conclusion that first category evidence of pretext is sufficient to infer unlawful motivation is further supported by the Supreme Court's discussion in *Reeves* of the probative worth of findings of pretext. In discussing pretext, the Court emphasized the value of affirmative proof that the employer's reason is false, which is the underlying definition of "first category" evidence of pretext. "Proof that the defendant's explanation is unworthy of credence," the Court stated in *Reeves*, "is probative of intentional discrimination, and it may be quite persuasive."[402] The Court also relied on "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"[403] Under this principle, the trier of fact should certainly be entitled to infer guilt based on first category evidence of pretext that affirmatively demonstrates the employer's "dishonesty" about the centrally "material" fact of its reason for the challenged action.

Thus, in Section 8(a)(3) cases in which there is first category, affirmative proof that the employer's reason is false, it is certainly "appropriate" under *Shattuck Denn* and *Reeves* for the Board as trier of fact to infer unlawful motivation. In sum, where the discriminatee is a union activist or supporter, and the evidence shows that the employer has misrepresented and hidden its true reason for its action against the employee, it is certainly reasonable for the trier of fact to infer that the hidden motive is retaliation for the discriminatee's union activity.

It is possible that the motive the employer is hiding is something other than antiunion animus. The employer may be concealing a motive not because it violates the NLRA, but because it is embarrassing, immoral, or violative of some other statute.[404] This possibility was the basis for the Board's holding in *Precision Industries*[405] that evidence of pretext cannot *compel* a finding of a Section 8(a)(3) violation as a matter of law.[406] However, the possibility that an employer could be concealing a motive other than antiunion animus does not change the fact that when the employee is a known union supporter, and evidence shows that all the reasons the employer has given for acting against the

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examples of cases where the Board relied on "first category" evidence of pretext to infer unlawful motivation).

402. *Reeves*, 120 S. Ct. at 2108.

403. *Id.* (quoting Wright v. West, 505 U.S. 277, 296 (1992)).

404. *See, e.g.*, Mid-State, Inc., 331 N.L.R.B. No. 185 (2000); Hoboken Shipyards, 275 N.L.R.B. 1507 (1985); Perko's Inc., 236 N.L.R.B. 884, 899 n.41 (1978) (cases involving employees who pursued the alternative theories that the employer took adverse actions against them because of antiunion animus or because of illegal status (race, sex, age) discrimination).

405. *See* Pace Indus., Inc. (Precision Indus.), 320 N.L.R.B. 661 (1996).

406. *Id.* at 661.

employee are false, it is reasonable for the Board to conclude that the employee's union support was the *most likely* reason for the employer's action.

Such a conclusion is not only reasonable, it is also eminently fair to the employer. As the Supreme Court recently recognized in *Reeves*, "the employer is in the best position to put forth the actual reason for its decision."[407] If the employer chooses to lie about that actual reason, a reasonable employer must know that it bears the risk that its lie will be exposed. Moreover, if at an unfair labor practice hearing, the employer (or its lawyer) sees that evidence is entering the record that shows that the employer's proffered reason is false, the employer can still avoid Section 8(a)(3) liability by revealing its "true motive," if that motive is *anything* besides antiunion animus.[408] If an employer relinquishes the opportunity to reveal its true motive, then it would be audacious indeed for that employer to insist that the trier of fact cannot draw the logical inference that false reasons conceal an illegal motive because the trier of fact should first consider all the other improper motives the employer may have desired to conceal.

Thus, it is logical, and it is not unfair to the employer, to permit the Board to uphold the General Counsel's prima facie case based on affirmative evidence that the employer has lied about its reasons for an adverse action against a known union supporter. In addition, it is important as a policy matter for the Board to be permitted to uphold the prima facie case in those circumstances. As discussed above, the alternative is that an employer could never be held in violation of Section 8(a)(3) unless the General Counsel proved the "animus" element of the *Wright Line* standard.[409] That would open an avenue for antiunion employers to fire and discipline union activists and supporters with impunity. It would mean that no matter how blatantly fabricated an employer's reasons for acting against union supporters were, their falsity would never be enough to prove a prima facie case of discrimination. It would leave antiunion employers free to trump-up blatantly false charges against union supporters, as long as the employer avoided expressing antiunion animus or providing "other

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407. Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2109 (2000).

408. The only motives proscribed by Section 8(a)(3) are those relating to union activity or support. *See supra* note 1 (summarizing Section 8(a)(3)). In some cases, the employer's reluctance to disclose its true motive may stem from the fact that its true motive is illegal under some other statute (e.g., an employment discrimination statute) and it fears its admission in the NLRB case would be used as evidence in an employment discrimination suit. That is no basis for protecting the employer from the logical inferences drawn from its deception. First, an employer that has lied about its motives for its action against an employee in order to cover up an *illegal* motive for that action is in no position to complain; the employer is reaping what it has sewn. Moreover, giving deference to the possibility that the employer's lies are to conceal another unlawful motive opens the opportunity for employers to escape liability regardless of their motives, because they could always argue that they cannot be held liable under one statute (e.g., the NLRA) because they could have had a motivation that's illegal under a different statute (e.g., an employment discrimination statute).

409. *See supra* notes 348-50 and accompanying text.

evidence" of discrimination. Accordingly, the Board must retain the freedom, as a fact-finder, to infer unlawful motivation based solely on evidence of pretext in appropriate cases.

As explained above,[410] cases involving first category evidence of pretext are certainly "appropriate cases" for inferring unlawful motivation. However, most cases where the Board relies on evidence of pretext to find a Section 8(a)(3) violation involve evidence that fits in the third category, where the record shows that though the facts underlying the proffered reason did exist, it is unlikely that these facts were the real reason for the challenged action. Like first category evidence of pretext, most forms of "third category" evidence strongly imply deception and concealment by the employer, and therefore are valid bases for the Board to find unlawful motivation.

The probative value of "third category" type of evidence of pretext was implicitly endorsed in the two cases that established the *Wright Line* standard, the Supreme Court's decision in *Transportation Management* and the Board's decision in *Wright Line* itself. As discussed in Part II, evidence of pretext was relied on in both of these cases to find a Section 8(a)(3) violation.[411] In *Transportation Management*, the discriminatee, Mr. Santillo, had in fact left the ignition keys in his bus and taken unauthorized breaks, the reasons the employer gave for firing him. The Supreme Court, however, agreed with the Board that the record demonstrated that these were not the *true* reasons for the discharge, based on such evidence as the fact that the employer had never before disciplined any employee for these "commonplace" events, and the fact that the employer had departed from its usual practice of issuing warnings before disciplining employees.[412] The Supreme Court concluded that this type of "evidence of pretext" was "substantial evidence" in support of the Board's conclusion that the employer violated Section 8(a)(3).[413]

Similarly, in *Wright Line*, the discriminatee was discharged for "falsifying time reports," and the employee conceded that he had not performed certain tasks at the times indicated on his timesheet.[414] The Board found, however, that the asserted reason for the discharge was "suspect," because "the record show[ed] that employees commonly completed timesheets as [the discriminatee] had" without being penalized, and the employer had departed from its practice of warning employees before disciplining them for such violations.[415] As in *Transportation Management*, even though the facts underlying the employer's reasons did exist, the evidence that they were probably not the true reasons for

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410. *See supra* notes 390-98 and accompanying text.

411. *See supra* notes 43-47 (discussing evidence of pretext in *Wright Line*); *supra* notes 68-71 (discussing evidence of pretext in *Transportation Management*).

412. *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 404 (1983).

413. *Id.* at 405.

414. *See* Wright Line, 251 N.L.R.B. 1083, 1090 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

415. *Id.*

the challenged action supported the finding that the employer's actual motivation was unlawful.[416] Thus, from the very inception of the *Wright Line* standard, "third category" type evidence of pretext has been relied on to infer an unlawful motivation.

More specifically, in both *Transportation Management* and *Wright Line*, the factors that made the employer's proffered reason suspect were that the discriminatee was treated more harshly than employees who had engaged in similar conduct, and that the employer had departed from its past practice in disciplining the employee. Both of these factors, particularly differential treatment, are commonly relied on by the Board to find that the employer has sought to conceal the true reason for its action. A typical example of reliance on differential treatment is *ABF Freight System, Inc.*,[417] in which Michael Manso, a union supporter, was discharged for tardiness, while other workers were treated much less strictly when they were tardy.[418]

The typical example of "departure from past practice" is where an employer precipitously discharges or suspends an employee instead of following its written rules or usual practice of first resorting to warnings or supervisory counseling for an employee.[419] Departure from past practice also arises in non-discipline cases, such as Section 8(a)(3) cases involving layoffs or refusals to hire. For example, in *Property Resources Corp.*,[420] the employer claimed it had

416. *Id.* at 1090-91.

417. 304 N.L.R.B. 585 (1991), *enforced sub nom.* Miera v. NLRB, 982 F.2d 441 (10th Cir. 1992).

418. *Id.* at 590. ABF Freight appealed the Tenth Circuit's decision to the Supreme Court, arguing that the fact that Mr. Manso had lied at the unfair labor practice hearing about the reason for his tardiness should preclude him from obtaining any remedy for his unlawful discharge. The Court rejected the employer's argument, and held that when a discriminatee lies under oath at an unfair labor practice hearing, the Board is not necessarily required to deny that discriminatee a remedy. *See* ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317 (1994).

As discussed previously, "differential treatment" of the discriminatee was also the major basis for the Board's and Seventh Circuit's finding of pretext in *Union-Tribune*. *See supra* notes 183-95 and accompanying text; *see also* Transmart, Inc. (Cincinnati Truck Ctr.), 315 N.L.R.B. 554, 555, 556 (1994), *enforced*, 117 F.3d 1421 (6th Cir. 1997) (union supporter was only employee disciplined for "clocking in on an open ticket," though other employees had engaged in this practice).

419. *See, e.g.*, Pitt Ohio Express, Inc., 322 N.L.R.B. 867, 870 (1997) (employer "never counseled or warned [discriminatees] about such alleged misconduct though affording counseling to other employees for infractions of company rules or policies"); Van Dyne Crotty Co., 297 N.L.R.B. 899, 899, 902 (1990) (employer departed "from its own written rules in discharging [discriminatee] without warning"); Asociacion Hosp. del Maestro, Inc., 291 N.L.R.B. 198, 204 (1988) (discriminatee, "a longtime employee, was suspended for 30 days although, unlike other employees, he had never received a prior written warning").

420. 285 N.L.R.B. 1105 (1987), *enforced*, 863 F.2d 964 (D.C. Cir. 1988).

laid off unionized painters because of delays in receiving federal subsidies for repair and maintenance. But even at the hearing the chairman of the employer's board testified that the employer's usual practice was to make repair and maintenance work its top priority and to keep its personnel engaged in such work even when federal funds were not available.[421]

Besides differential treatment and departure from past practice, there are other kinds of "third category" evidence on which the Board relies to find pretext. Among the most common is the fact that the employer has provided "shifting" or "inconsistent" reasons for taking the challenged action. "Shifting" reasons refers to situations where the reason the employer asserts for its action changes over time, the change most commonly occurring between the time of the action and either the time of the Board's investigation of the matter, or the time of the unfair labor practice hearing.[422] "Inconsistent" reasons refers to cases where the employer's own officials provide contradictory testimony as to the reasons that motivated the challenged action.[423] In many cases where the Board has relied on the employer's provision of shifting or inconsistent reasons to find a Section 8(a)(3) violation, the Board has invoked the logical principle that "[an employer's] inability to settle upon an explanation for its conduct warrants drawing an unfavorable inference against [the employer]—in short, that its asserted reason for [its action against the discriminatee] is pretextual and an afterthought, and that the real reason is a discriminatory reason."[424]

A final significant "third category" type of evidence of pretext, which is often relied on in discipline cases, is the fact that the employer failed to investigate the allegations underlying the discipline. A typical example is the Board's 1999 decision in *Bonham Heating & Air Conditioning, Inc.*,[425] in which the employer's owner claimed his reason for personally terminating a key union supporter was that the employee had "harassed" a co-worker during an argument over a recent union election. As a basis for finding this reason to be pretextual,

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421. *Id.* at 1110-11.

422. *See, e.g.*, Ellis (Ellis Elec.), 315 N.L.R.B. 1187, 1195-97, 1202, 1204-05 (1994) (shifting reasons given for layoffs and for termination of employee Melissa Jacobs); Adco Elec., Inc., 307 N.L.R.B. 1113, 1128-29 (1992), *enforced*, 6 F.3d 1110 (5th Cir. 1993) (shifting reasons for discharge of employee Muncy); Seminole Fire Prot., Inc., 306 N.L.R.B. 590, 592 (1992) (over time, employer provided "three different versions" for why it discharged employee Bennett).

423. *See, e.g.*, Excel Container, Inc., 325 N.L.R.B. 17, 29 (1997) (inconsistencies between testimony of employer officials Fortune and Cessna as to when and why the employer discharged employee Medina); Hi-Tech Cable Corp., 318 N.L.R.B. 280, 292 (1995), *enforced in relevant part*, 128 F.3d 271 (5th Cir. 1997) (inconsistent testimony of employer agents Brown and French on why the employer rejected applicant Jones).

424. Sentry Investigation Corp., 249 N.L.R.B. 926, 928 (1980). *See also* Laidlaw Transit, Inc., 315 N.L.R.B. 509, 512 (1994); Park Manor Nursing Home, Inc., 277 N.L.R.B. 197, 205 n.14 (1985) (examples of cases invoking this same principle).

425. 328 N.L.R.B. No. 61 (1999).

the ALJ relied on the facts that "Bonham made no actual investigation of the circumstances of the argument he heard about but did not observe, and he immediately seized upon the opportunity to accuse [the discriminatee] of being the instigator without giving [the discriminatee] an opportunity to defend himself."[426] Similarly, in *Pitt Ohio Express, Inc.*,[427] the ALJ reasoned that "[t]he fact that [the employees'] version of events is not sought before the discharges is a basis to infer the Respondent seized on its own concoction as a pretext for discharging them."[428] As exemplified by these two cases, the Board regards evidence that the employer failed to investigate or confirm an allegation as a strong indication that the employer "seized upon" that allegation as an excuse to rid itself of a union supporter.

Indeed, a finding that the employer has "seized upon" some action or event to justify the challenged action is a common theme in cases where the Board relies on any of the above-described types of "third category" evidence of pretext.[429] In the third category, there are true facts underlying the employer's asserted reason for its action. The record shows that the employee did commit the act or omission that the employer proffers as the basis for discipline, or that the event or circumstance that the employer claims caused the layoff or refusal to hire did in fact occur. But the record also shows that the discriminatee, a known union supporter, was disciplined more harshly for the act or omission than co-workers ever have been before; or that the employer immediately fired a known union supporter rather than following its rule or usual practice of issuing a warning for a first offense; or that the employer fired a known union supporter without bothering to investigate the basis for the firing. In cases involving shifting or inconsistent reasons, the record shows that there are "true facts" underlying the reasons the employer proffers for a decision, but the employer is unable to consistently explain *which* of these true facts actually motivated its decision.

In these circumstances, logic and common sense dictate that it is unlikely that the underlying facts, though true, actually motivated the employer's action. It is far more likely that the employer "seized upon" these facts as an excuse to justify its action, and that is exactly the conclusion the Board reaches in most cases involving "third category" evidence of pretext. The Board logically concludes that when an employer seizes upon an excuse for its action, the employer is obviously concealing the true reason for that action. Thus, although "third category" evidence is less direct than "first category" evidence that the

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426. *Id.* at *17.

427. 322 N.L.R.B. 867 (1997).

428. *Id.* at 870.

429. *See, e.g.*, Frazier Indus. Co., 328 N.L.R.B. No. 89, at *4-5 (1999); Dravo Lime Co., 326 N.L.R.B. No. 118, at *6 (1998); Dunham's Athleisure Corp., 318 N.L.R.B. 622, 623 (1995), *enforced mem.*, 100 F.3d 956 (6th Cir. 1996); ABF Freight Sys., Inc., 304 N.L.R.B. 585, 591 (1991), *enforced sub nom.* Miera v. NLRB, 982 F.2d 441 (10th Cir. 1992); Williams Servs., Inc., 302 N.L.R.B. 492, 502 (1991).

employer's proffered reason did not exist at all, "third category" evidence is also strong evidence of deception and concealment by the employer.

In sum, in cases involving "first category" or "third category" evidence of pretext, the evidence either directly demonstrates, or strongly indicates, employer deception and concealment. As noted previously, almost all Section 8(a)(3) cases involve action taken against a known union supporter. Therefore, in cases where there is "first category" or "third category" evidence of pretext, the Board is reviewing a record that shows that the employer has taken some adverse action against a known union activist or supporter *and* that the employer is concealing its motivation for taking that action. It follows logically that the motivation being concealed *is* the employee's union activity or support, and it is manifestly reasonable for the Board to make this inference. Therefore, it is rational, and consistent with requirements of the NLRA and the APA, for the Board to base an inference of unlawful motivation largely, or even solely, on such evidence of pretext.

On the other hand, in cases where "evidence of pretext" means only disbelief of the employer's reason, based on the demeanor of the employer's witnesses or other deficiencies in the employer's evidence in support of that reason, then the Board cannot rest its finding of unlawful motivation on such evidence, as that would amount to requiring the employer to prove a legitimate reason for its action. As discussed in Part VI, this distinction between different types of evidence of pretext means it is imperative that the Board clearly explain in "pretext" cases the reasoning underlying its findings of unlawful motivation.

VI. CONCLUSION

To answer the question posited in this Article's title, the Board has *not* gone wrong in its approach to pretext cases. The Board was correct in *Greco & Haines* in holding that it can consider evidence of pretext in assessing whether the General Counsel has proven its prima facie case. In addition, contrary to the position of the Seventh Circuit in *Union-Tribune*, and to the D.C. Circuit's apparent agreement with that position in *Laro Maintenance*, the Board is also correct in cases where it relies solely on evidence of pretext to infer that an employer's action against a known union supporter was unlawfully motivated, where that evidence of pretext consists of evidence that shows, or strongly implies, that the employer has misrepresented or concealed its reason for the challenged action.

This does not mean, however, that the Board need only "stay the course" in its approach to pretext cases. First, the Board should follow the advice of the D.C., Second, and Fourth Circuits and discontinue using the term "prima facie case" to refer to the General Counsel's burden under the *Wright Line* standard. Although the Board was correct in *Manno Electric* in referring to this as merely

an issue of "phraseology,"[430] the Board should also recognize that it is desirable to avoid misleading "phraseology" in its decisions and standards, and that the use of the phrase "prima facie case" in describing the *Wright Line* standard is misleading in at least two respects.

First, as the Second Circuit discussed in *Holo-Krome III* and the D.C. Circuit discussed in *Southwest Merchandising*, the phrase "prima facie case" implies that the General Counsel need only make some preliminary showing of grounds for suspecting unlawful motivation by the employer, when in fact the Board consistently requires the General Counsel to sustain the burden of actually proving such unlawful motivation.[431]

Second, the term "prima facie case" is ordinarily used to refer to "the evidence necessary to require defendant to proceed with his case."[432] In Section 8(a)(3) cases, however, under the approach the Board established in *Greco & Haines*, the employer is *not* entitled to obtain a ruling on the sufficiency of the evidence supporting the General Counsel's "prima facie case" before the employer proceeds with its defense. As previously discussed,[433] the Board has justifiably ruled that the only way employers can require ALJs to evaluate the General Counsel's "prima facie case" based solely on the evidence presented by the General Counsel is if the employer desists from presenting any evidence in its own defense.

For these reasons, the term "prima facie case" is an inaccurate means of referring to the burden placed on the General Counsel under the *Wright Line* standard. The Board should simply refer to the General Counsel's burden as the "first stage burden," just as it typically refers to the employer's burden as the "second stage burden."

More important than discontinuing the use of the phrase "prima facie case," the Board must make a deliberate effort to explain more fully and clearly its bases for relying on evidence of pretext to find unlawful motivation. Otherwise, if the Board simply continues its present approach, it runs a serious risk of being found to have "gone wrong" in its approach to pretext cases. That is because in most pretext cases, the Board and its ALJs fail to fully explain the process of reasoning through which they use the evidence of pretext to infer an unlawful motivation by the employer. This makes it easy for employers to attack, and some courts of appeals to misunderstand, the Board's reliance on evidence of pretext.

In Section 8(a)(3) cases, the Board should explain that it is acting as the trier of fact in determining the employer's motive for the action at issue. The

430. *See supra* text accompanying notes 288-90.

431. *See supra* note 171 and accompanying text; *supra* notes 283-91 and accompanying text (discussing the Second Circuit's and D.C. Circuit's criticism of the phrase "prima facie case").

432. BLACK'S LAW DICTIONARY 1190 (6th ed. 1990) (citing White v. Abrams, 495 F.2d 724, 729 (9th Cir. 1974)).

433. *See supra* text accompanying notes 315-18.

Board should then explain that, as the trier of fact, it is entitled to consider all evidence, including evidence presented by the employer, in making its findings of fact. This explanation will make it clear that the Board is correct in holding that it can consider the employer's evidence, including evidence of pretext, in assessing the first stage of the *Wright Line* process.

In addition, when the Board relies largely on evidence of pretext to infer unlawful motivation, it should make clear the *type* of evidence of pretext on which it relies. In particular, the Board should explain that its inference of unlawful motivation is based on evidence of pretext that shows, or strongly indicates, that the employer has misrepresented the reason for its challenged action. It may well be that in cases where the Board relies heavily on evidence of pretext to infer unlawful motivation, it is implicitly determining that the inference is justified because the evidence demonstrates employer deception and concealment. If so, the Board still must make such reasoning more explicit. As discussed above, the generic terms "pretext" or "evidence of pretext" cover many different types of evidence that cast doubt on the validity of the reasons by the employer. Thus, when the Board simply uses these generic terms to describe the bases for its finding of illegal motivation, it permits employers to argue, and some courts of appeals to conclude, that the Board's ruling is improperly based merely on its disbelief of the testimony of the employer's witnesses and on the employer's failure to prove a lawful motivation.

The Board should explain that in relying on evidence of pretext, it is not relying on such relatively weak evidence of pretext, and thus the Board is not effectively placing the burden on the employer to prove a legitimate reason for its action. Rather, the Board should explain that it is basing its inference of unlawful motivation on evidence of pretext that establishes, or strongly indicates, that the employer has misrepresented its reason for the challenged action, and thus concealed its true reason for the action. The Board should then invoke the insight of *Shattuck Denn* and *Reeves*, and point out that evidence that the employer has misrepresented or concealed the motive for its challenged action against a known union supporter gives rise to the reasonable and legally permissible inference that the true motive for the challenged action is the unlawful one of antiunion animus.

The basic premise that underlies the Board's approach to pretext cases is that evidence of employer deception and concealment is strong evidence of unlawful motivation. That premise is fundamentally sound. By more fully explaining the reasoning behind that premise, the Board can ensure that this type of evidence of pretext will be permitted to play its proper role in establishing violations of Section 8(a)(3) of the National Labor Relations Act.