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Allocation of Proof in ADEA Cases: A Critique of the Prima Facie Case Approach

Alan A. Blakeboro†

The issue of how to order and allocate proof in litigation under the Age Discrimination in Employment Act has been resolved inconsistently by the federal circuit courts. After an analysis of the evolving prima facie case approach utilized in Title VII actions, the author argues that the Title VII scheme should be utilized in nonjury ADEA cases without significant modification, but should be abandoned in favor of a simpler approach in ADEA jury trials.

I

INTRODUCTION

The Age Discrimination in Employment Act (ADEA)1 prohibits discrimination by employers against persons between the ages of forty and seventy,2 and grants a private cause of action to employees who have been discriminated against on account of age.3 The Act is patterned in large part after Title VII of the Civil Rights Act of 1964,4 and consequently, Title VII case law is frequently cited in ADEA cases.5 The issue addressed in this article is whether the complex plan for allocating proof in Title VII disparate treatment cases6 is appropriate in

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6. The distinction between “disparate treatment” and “disparate impact” was explained by the Supreme Court in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977): Disparate treatment... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment...
ADEA litigation.

The prima facie case approach, the scheme for allocating burdens of proof developed for Title VII cases by the Supreme Court, consists of three parts. First, the complainant must show a prima facie case of illegal discrimination. If the plaintiff is successful, the burden shifts to the defendant to produce evidence of a nondiscriminatory reason for its action. If the defendant meets this requirement, the burden reverts to the plaintiff to show that the defendant’s reason is merely a pretext for unlawful discrimination.

The question of how to order and allocate proof in private litigation under the ADEA has produced confusion and conflict among the federal circuit courts. The First Circuit has applied the prima facie case approach to ADEA cases without significant change from Title VII cases, while the Sixth Circuit has rejected it entirely. The Fifth Circuit has modified the prima facie case approach to the advantage of employers in ADEA cases, by placing a greater burden of proof on ADEA plaintiffs than on Title VII plaintiffs.

The argument presented in this article has three parts. Section II examines the development of the prima facie case approach under Title VII, and concludes that recent Supreme Court decisions have undermined the scheme’s original purpose of easing the plaintiff’s evidentiary burden. Section III contends that policy considerations do not justify placing a greater burden of proof on ADEA plaintiffs than on Title VII plaintiffs, and that therefore the prima facie case approach should not be modified significantly for non-jury ADEA trials. Unlike Title VII cases, however, many ADEA actions are tried before juries. Section IV argues that the procedural complexity and difficulty of applying the prima facie case approach to jury trials outweigh the system’s policy justifications, and concludes that in ADEA cases tried before a jury, the prima facie case approach should be rejected altogether.

Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Id. at 335 n.15. Discriminatory intent is not required for a showing of disparate impact. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Most individual ADEA actions have been brought under a theory of disparate treatment. For this reason this article will focus on disparate treatment rather than disparate impact.

II
THE PRIMA FACIE CASE APPROACH IN
TITLE VII LITIGATION

A. McDonnell Douglas v. Green

The Supreme Court’s decision in *McDonnell Douglas v. Green* involved a claim of racial discrimination brought under Title VII by a black male. In the course of a work force reduction, McDonnell Douglas discharged Green, a civil rights activist, from his position as a mechanic. Claiming that his discharge was racially motivated, Green participated in a demonstration that obstructed traffic in front of the defendant’s plant during a morning rush hour. Green later applied for reemployment with McDonnell Douglas but was refused. After exhausting his administrative remedies, Green brought a Title VII action, which was subsequently dismissed by the district court. The Eighth Circuit reversed and remanded the case for trial. The Supreme Court granted certiorari to clarify the standards of proof in individual Title VII actions.

In an opinion by Justice Powell, the Court set forth a three-stage procedure. First, the plaintiff must establish a prima facie case of unlawful discrimination.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

The Court made it clear that this formula is not immutable: “[t]he facts necessarily will vary in Title VII cases, and the ... prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.” Thus, trial courts are to administer the prima facie case requirement flexibly, altering its elements to fit the unique circumstances in each case.

If the plaintiff successfully establishes the elements of a prima facie case, “the burden then must shift to the employer to articulate some

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13. 411 U.S. at 802.
14. Id. at 802 n.13.
legitimate nondiscriminatory reason for the employee's rejection.\textsuperscript{15} Once the defendant has met its burden, the inquiry enters a third phase. The plaintiff is afforded an opportunity to show that the employer's reason is merely a "pretext" for illegal discrimination.\textsuperscript{16} To meet this burden, a plaintiff must show "that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."\textsuperscript{17}

The \textit{McDonnell Douglas} Court was noticeably silent concerning the policies underlying the prima facie case approach. However, in subsequent cases, the Court has suggested at least three reasons for its adoption: (1) it facilitates the factfinding process by providing an ordered method for evaluating evidence;\textsuperscript{18} (2) it places the burden on the defendant to produce evidence within its control;\textsuperscript{19} and (3) it allows the factfinder to infer illegal discrimination from an unrebutted prima facie case in the absence of direct evidence of discriminatory motive.\textsuperscript{20} The apparent benefit to plaintiffs of this last function, however, has been seriously undermined by subsequent Supreme Court cases, which are examined below.

\textbf{B. Defining the Burden that Shifts to the Defendant}

\textit{McDonnell Douglas} established a general scheme for individual Title VII actions but left a central issue unresolved. The Court used the ambiguous term "burden of proof" to specify the defendant's obligation to meet plaintiff's prima facie case. Burden of proof can mean either the burden of persuasion or the burden of producing evidence.\textsuperscript{21} The difference in meaning is sometimes critical to the outcome of a trial. A burden of production, \textit{i.e.}, introducing enough evidence to satisfy a judge that a fact is in issue, drops out of the case once it has been met. In contrast, the burden of persuasion, \textit{i.e.}, satisfying the trier of fact by a preponderance of the evidence, remains throughout the trial.\textsuperscript{22}

An example of the confusion that the term "burden of proof" has generated is the Supreme Court's decision in \textit{Furnco Construction Corp.}

\begin{itemize}
\item \textsuperscript{15} Id. at 802.
\item \textsuperscript{16} Id. at 804.
\item \textsuperscript{17} Id. at 805.
\item \textsuperscript{18} \textit{Furnco Constr. Corp. v. Waters}, 438 U.S. 567, 577 (1978).
\item \textsuperscript{19} \textit{International Bhd. of Teamsters v. United States}, 431 U.S. 324, 359 n.45 (1977).
\item \textsuperscript{20} Id. at 358 n.44; \textit{Furnco Constr. Corp. v. Waters}, 438 U.S. 567, 577 (1978).
\item \textsuperscript{21} 9 \textit{Wigmore on Evidence} §§ 2485, 2487 (3d ed. 1940) [hereinafter cited as \textit{Wigmore}]; \textit{C. McCormick, Handbook of the Law of Evidence} § 336 (2d ed. 1972) [hereinafter cited as \textit{McCormick}].
\item \textsuperscript{22} \textit{F. James & G. Hazard, Civil Procedure} § 7.7, at 248 (2d ed. 1977) [hereinafter cited as \textit{James & Hazard}]. In either case, if the defendant's burden is not met, the plaintiff wins by virtue of having shown a prima facie case. \textit{Furnco Constr. Corp. v. Waters}, 438 U.S. 567, 577 (1978) (a prima facie case raises an inference of illegal discrimination if otherwise unexplained).
The majority explained that the burden which shifts to the defendant is "proving that he based his employment decision on a legitimate consideration." In the same paragraph, the Court quoted *McDonnell Douglas*, which required that "the employer need only articulate some legitimate, nondiscriminatory reason for the employee's rejection." Due to the language's uncertainty, some lower courts shifted the entire burden of persuasion to the defendant in Title VII cases. These courts justified shifting the greater burden of persuasion onto the employer by citing the important social policy objectives underlying Title VII. However, the Supreme Court eliminated the ambiguity by ruling in *Board of Trustees of Keene State College v. Sweeney* that only the burden of production shifts to the defendant in Title VII cases.

In *Sweeney*, the Court considered a sex discrimination claim brought by a female college professor who was denied a promotion. In affirming the district court's finding of sex discrimination, the First Circuit recited the *McDonnell Douglas* formula almost verbatim but added that "in requiring the defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence." The Supreme Court seized on this language in vacating the First Circuit's decision, holding that the appellate court had imposed "a heavier burden on the employer than *Furnco* warrants." In so doing, the Court for the first time clearly stated that the burden shifted to the defendant is not the burden of persuasion but only the burden of producing evidence.

The Court in *Sweeney* reasoned that shifting the burden of persuasion cannot be squared with the three-phase *McDonnell Douglas* procedure. *McDonnell Douglas* states that once the defendant has articulated a legitimate reason for its decision, the burden reverts to the plaintiff to show that the defendant's reason is a pretext for illegal discrimination. If the defendant were to assume the entire burden of persuasion at the second stage of the inquiry, the Court reasoned, there

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24. *Id.* at 577 (emphasis added).
25. 411 U.S. at 802 (emphasis added).
30. 439 U.S. at 24-25.
31. *Id.* at 25 n.2.
32. *See* text accompanying notes 17-18 *supra*. 
would be no remaining issue to revert to the plaintiff at the third stage.\textsuperscript{33}

The \textit{Sweeney} decision is troublesome in many respects. The Court did not accept briefs or hear oral argument and its per curiam opinion is brief and elliptical. Pre-\textit{Sweeney} lower court decisions made convincing arguments that \textit{McDonnell Douglas} allowed a shift of the burden of persuasion in Title VII cases. For example, the Fifth Circuit, in \textit{Turner v. Texas Instruments, Inc.},\textsuperscript{34} distinguished between articulating a nondiscriminatory reason for the employee's dismissal and proving that this reason motivated the employer. According to the \textit{Turner} court, the burden of persuasion on the former issue can be allocated to the defendant and the burden of persuasion on the latter issue can be allocated to the plaintiff.\textsuperscript{35} For example, on the facts of \textit{McDonnell Douglas}, the defendant could meet its burden by showing, by a preponderance of the evidence, that the employee participated in an illegal demonstration in front of the defendant's plant. Once this was shown, the plaintiff would have the burden of showing by a preponderance of the evidence that the demonstration was not the employer's true motive for discharging the plaintiff.

This scheme partially shifts the burden of persuasion to the defendant, while remaining consistent with \textit{McDonnell Douglas}. Under the \textit{Turner} approach, the Supreme Court in \textit{McDonnell Douglas} would have been justified in concluding that the defendant had met its burden of articulating a nondiscriminatory reason because the trial court had already determined that Green had participated in the "stall-in."\textsuperscript{36} The Court's remand of \textit{McDonnell Douglas} for a determination of whether the defendant's stated reason was its true motivation is consistent with \textit{Turner}. This issue had not been previously determined and therefore was a proper issue for trial.

\textit{Turner} provides a far better model for allocating proof in Title VII cases than \textit{Sweeney}. Under \textit{Sweeney}, the defendant may meet its burden by giving some explanation of its action, no matter how tenuous that explanation may be.\textsuperscript{37} The plaintiff must show that this reason...
either has no basis in fact or is an inadequate explanation of the defendant’s action. Although Sweeney claims not to change the law, the decision significantly alters the practice of the lower courts, and it confers an advantage on employers in future litigation.

C. Evidence of a Nondiscriminatory Motive

Sweeney also affects the sorts of reasons sufficient to meet the defendant’s burden of producing evidence. Sweeney indicates that the defendant can meet its burden by introducing evidence that does little more than controvert the elements of the plaintiff’s prima facie case.

In many cases the employer’s legitimate reason involves facts independent of those used by the plaintiff to establish the prima facie case. For example, in McDonnell Douglas, the employer’s nondiscriminatory reason was the complainant’s participation in a “stall-in” which attempted to shut down the employer’s plant.\(^3\) This fact had no relation to the elements of Green’s prima facie case; it was “new” evidence and the Court was justified in finding that it met the defendant’s burden of producing evidence.

In other cases, however, the employer’s legitimate reason may amount to little more than a denial of an element of the plaintiff’s prima facie case. In Sweeney, an educational institution defended its decision not to promote a female professor by showing that she did not meet the qualifications for a tenured faculty position. This evidence did not raise a new issue, but rather contradicted what the plaintiff had attempted to prove as part of her prima facie case—that she was qualified for promotion. The trier of fact will usually have before it all the evidence which has been introduced by both parties when deciding if a prima facie case has been established, because the prima facie case approach is a conceptual tool and not necessarily the chronological order in which the parties present their cases.\(^4\) A finding that the plaintiff has shown a prima facie case by a preponderance of the evidence takes into account and discredits evidence introduced by the defendant contradicting the elements of a prima facie case. If the judge or jury rejects the defendant’s evidence as unpersuasive, the defendant should not be allowed to use this same evidence to meet its burden of production.\(^5\)

\(^{3}\) 411 U.S. at 797.

\(^{4}\) Sime v. Trustees of California State University and Colleges, 526 F.2d 1112, 1114 (9th Cir. 1975).

\(^{5}\) This view is supported by dictum of the Supreme Court in International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977);

Although the McDonnell Douglas formula does not require direct proof of discrimina-
Although this view is attractive, it was rejected by the Supreme Court in *Sweeney.* The trial court held that Ms. Sweeney had established a prima facie case, i.e., that she was qualified for promotion, despite the defendant's contrary evidence. The Court found that the defendant college had met its burden of producing a nondiscriminatory reason, citing two portions of the court of appeals opinion that discussed Sweeney's lack of qualifications. On remand the burden shifted to Sweeney to show that the college's reason—nonqualification—was a pretext for discrimination. This required that she show not only that she was qualified but also that the defendant's evidence that she was not qualified was "pretextual."

*Sweeney* lowers the defendant's "burden of proof" to an insignificant level. It is a rare defendant that cannot articulate some legitimate explanation for its action, particularly if it need only controvert one element of the plaintiff's prima facie case. In light of *Sweeney*, it is highly questionable whether the prima facie case approach serves its purpose of allowing plaintiffs to show discrimination without introducing direct evidence of discriminatory intent. Since the defendant's burden is so easily met, most cases turn on whether defendant's reason is a pretext, requiring the plaintiff to meet the heavy evidentiary burden of proving that the defendant's explanation was a coverup for a discriminatory decision.

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42. Evidence of nonqualification included a letter from a dean to Sweeney stating that her teaching and research had not been "marked by the perspective of maturity and experience, or by some creative attribute generally recognizable in the academic world as a special asset to a faculty." 569 F.2d at 173 n.5. Sweeney was also given a list of criticisms including accusations that "she had narrow, rigid and old-fashion [sic] views, tended to personalize professional matters, kept minutes of the graduate faculty meeting which fell below a professional caliber, and emphasized to her students the importance of maintaining an even height of window shades in a classroom." *Id.* at 173-74. The defendant also claimed that it had chosen extremely qualified male faculty members for promotion ahead of Sweeney. *Id.* at 179.

43. 439 U.S. at 25 n.2.

44. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1154 (1976).
III

THE ADEA AND TITLE VII: CONFLICTING APPROACHES

A. Judicial Modification of the Prima Facie Case
Approach in ADEA Cases

The Supreme Court has never decided whether the prima facie case approach is applicable to private ADEA actions, and lower courts have taken a number of conflicting approaches to the problem. The First Circuit has applied the prima facie case approach to ADEA cases without significant change,45 while the Sixth Circuit has rejected it entirely.46 Other courts have applied the prima facie case approach to ADEA cases but have altered its application.47 This section discusses judicial modification of the prima facie case approach in ADEA cases.

Some courts have altered the prima facie case approach in ADEA cases by shifting a different burden of proof to defendants. A prime advocate of this approach has been the Fifth Circuit. In Turner v. Texas Instruments,48 the court held that in Title VII cases where the defendant's articulated reason for its decision is disputed, the burden of persuasion shifts to the defendant.49 However, the Fifth Circuit has also held that in ADEA cases only the burden of production shifts to the defendant, i.e., defendant need only produce evidence of a non-discriminatory motive; the burden of persuasion remains with the plaintiff throughout the trial.50 This distinction has been justified on the grounds that there is less reason to impose a burden of persuasion on defendants in ADEA cases because age discrimination is less prevalent and less reprehensible than discrimination outlawed by Title VII.51

Since Sweeney v. Board of Trustees of Keene State College52 establishes that only the burden of production shifts to the defendant in Title VII cases,53 the Fifth Circuit's approach to ADEA cases is no longer

45. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). The court modified the prima facie case approach to make it applicable to a jury trial but did not substantively alter the elements of the prima facie case or the burden of proof. See Section IV A & B infra.
47. See, e.g., Schwager v. Sun Oil Company of Pennsylvania, 591 F.2d 58, 61 (10th Cir. 1979) (different elements of the prima facie case); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977) (different burden of proof and different elements of the prima facie case).
48. 555 F.2d 1251, 1255 (5th Cir. 1977).
49. See text accompanying notes 36-37 supra.
53. See text accompanying notes 29-32 supra.
distinct from its treatment of Title VII cases. The Fifth Circuit's opinions, however, indicate that some courts perceive age discrimination to be less serious than the types of discrimination outlawed by Title VII. This distinction continues to be reflected in decisions on the formulation of the elements of a prima facie case.

The first three elements of the *McDonnell Douglas* prima facie case have been applied to ADEA discharge cases. An ADEA plaintiff must establish that he or she belongs to the protected class, was qualified for the position, and was discharged. However, the fourth element of the Title VII prima facie case, that after the plaintiff's rejection the position remained open and the employer sought other applicants of plaintiff's qualifications, has been significantly modified in ADEA cases. Some courts have required that a discharged plaintiff show replacement by a worker who is younger while other courts have required that the replacement be under age forty.

Requiring plaintiffs to show replacement by a worker under the age of forty is particularly unjust. Under this rule a forty-one year old who is replaced by a thirty-nine year old could show the fourth element of a prima facie case while a sixty-five year old who is replaced by a forty-one year old could not. This is inequitable and is inconsistent with the statutory language. The ADEA outlaws discrimination against any worker between the ages of forty and seventy “because of . . . age.” Its terms do not limit protection to those who have been discriminated against in favor of those outside the protected class. ADEA plaintiffs should not be required to show the age of their job replacement as an element of the prima facie case. Where there has been a workforce reduction, plaintiff may not have been replaced at all. Selection of workers for termination on the basis of age is clearly

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54. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979); Schwager v. Sun Oil Co. of Pennsylvania, 591 F.2d 58, 61 (10th Cir. 1979); Marshall v. Roberts Dairy Co., 572 F.2d 1271 (8th Cir. 1978).

55. See, e.g., Marshall v. Roberts Dairy Co., 572 F.2d 1271, 1272 (8th Cir. 1978) (some work taken over by a younger worker); Price v. Maryland Cas. Co., 561 F.2d 609, 612 (5th Cir. 1977) (replaced by a person outside of the protected group); Moses v. Falstaff Brewing Co., 550 F.2d 1113, 1114 (8th Cir. 1977) (replaced by a younger worker).


57. In Schwager v. Sun Oil Co. of Pennsylvania, 591 F.2d 58, 61 (10th Cir. 1979), the court appeared to acknowledge this in holding that a prima facie case was shown because sixty percent of plaintiff's work had been taken over by "employees substantially younger than 45 years of age." Department of Labor regulations implementing the ADEA also indicate that the Act applies to discrimination within the protected group. 29 C.F.R. § 860.91 (1979).

58. See, e.g., Moore v. Sears, Roebuck and Co., 464 F. Supp. 357, 363 (N.D. Ga. 1979) (absence of one-for-one replacement need not preclude the possibility that an employer discriminated on the basis of age by abolishing the positions of older workers). The Fifth Circuit has recently held that replacement by a younger worker need not be shown. In McCorstin v. U.S. Steel Corp., 49 U.S.L.W. 2101 (5th Cir. 1980) the court held that an employer who had been laid off could state a prima facie case even though he was not replaced by a younger worker. The
a violation of the ADEA. Age discrimination can occur even when a worker is replaced by someone older, for example, when the older worker is hired to ward off a threatened discrimination suit.

B. Policy Arguments for Distinguishing Between Title VII and the ADEA

The judiciary's imposition of a more difficult burden of proof on ADEA plaintiffs may be a result of its view that age discrimination is less serious than race and sex discrimination. One source of this view is Massachusetts Board of Retirement v. Murgia. In that case, the Supreme Court, in a per curiam opinion, upheld the validity of a state law requiring state police officers to retire at the age of fifty. The Court refused to designate age a suspect class, holding that the statute was valid because it had a rational basis. This decision stands in stark contrast to equal protection cases involving racial classifications where a standard of strict scrutiny is applied. The Court justified its distinction between race and age on the grounds that older persons have not been subjected to a "history of purposeful unequal treatment," have not been discriminated against on the basis of "stereotyped characteristics not truly indicative of their abilities," and are not a "discrete and insular" minority in need of "extraordinary protection from the majoritarian political process," since aging is a process that affects everyone in society.

An examination of the two statutes reveals that nothing in Title VII or the ADEA indicates that lawsuits for race or age discrimination court observed that "[s]eldom will a 60-year-old be replaced by a person in the 20's. Eventually, a person outside the protected class will be elevated but rarely to the position of the one fired." Id. at 2102.

59. Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).
60. Id. So long as a person falls within the protected group, any consideration by the employer of status as an "older worker" — whether because of elderly appearance, mannerisms or chronological age — should be proscribed. The ADEA recognizes an exception in cases where such attributes act as a barrier to job performance; disparate treatment due to a "bona fide occupational qualification" is allowed. 28 U.S.C. § 623(f)(1) (1976). See also, Note, The Age Discrimination In Employment Act of 1967, 90 HARV. L. REV. 380, 400-10 (1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

63. 427 U.S. at 312-16.
64. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Hunter v. Erickson, 393 U.S. 385 (1969)
L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.6 (1978).
65. 427 U.S. at 313.
66. Id.
67. Id. at 313-14.
are to be treated differently. The language employed in the two statutes is nearly identical. In the absence of an expression of congressional intent to the contrary, the courts should interpret Title VII and the ADEA similarly.

The legislative history of the two acts does not indicate any intent to grant less protection to the aged than to the groups protected by Title VII. In fact, by incorporating the enforcement provision of the Fair Labor Standards Act into the ADEA, Congress has granted ADEA plaintiffs more protection by providing for a back pay award if the Act has been violated, supplemented by an equal amount of "liquidated damages" if the defendant's violations were "willful." Title VII does not provide for liquidated damages and leaves back pay a matter of equitable discretion.

Moreover, Murgia does not compel treating Title VII and the ADEA differently. Constitutional doctrines do not necessarily require distinctive statutory interpretation. For example, women and racial minorities are treated equally under Title VII but not under the equal protection clause, where sexual classifications receive a lesser standard of review. Thus, the Constitution poses no barrier to treating Title VII and the ADEA similarly.

68. Indeed, some members of Congress proposed that the ADEA simply be an extension of Title VII. See, e.g., Age Discrimination in Employment: Hearings on S. 380 and S. 878 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 35 (1967) (statement of Sen. Murphy). One of the principal reasons for adopting the ADEA as a separate act was the belief that the EEOC, created to process Title VII complaints, was overburdened and that the ADEA could be more efficiently administered by the Wage and Hour Division of the Department of Labor. Senator Smathers argued that separating the enforcement machinery was crucial so that age cases would not be "put on the back burner." Id. at 29. See also, 113 CONG. REC. 31254 (1967) (remarks by Sen. Javits); Note, The Age Discrimination in Employment Act of 1967, 90 HARV. L. REV. 380, 381 (1976). Ironically, the administration of the ADEA was transferred to the EEOC as of July 1, 1979. Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807 (1978). See A. LAUREN, 4 EMPLOYMENT DISCRIMINATION § 98.10 (1978).


71. 29 U.S.C. §§ 626(b), 216(b) (1976). Because "willful" violations result in liquidated damages some lesser standard of intent presumably is required for recovery of back wages. This level of intent may be lower than the "discriminatory motive" required for a violation of Title VII in disparate treatment cases.

72. Lorrillard v. Pons, 434 U.S. 575, 584 (1978); Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). This difference led to the Supreme Court's decision that an ADEA plaintiff has a right to a jury trial. This issue remains undecided under Title VII. See Lorrillard, 434 U.S. at 548 and the discussion in Section IV infra.


VII and the ADEA similarly.

In addition, there are strong social policy arguments for treating the two acts similarly. There is no indication that employers are any less likely to discriminate against the aged than they are to discriminate against women and racial minorities.75 Moreover, society has a strong interest in discouraging discrimination against older workers. It is imperative that society provide role models of productive older workers to encourage individuals of all ages to strive toward productive lives without the fear that they will face discrimination in later life.

Social policy goals have an important role to play in the interpretation of Title VII and the ADEA. Where Congress has clearly articulated a policy protecting a group from discrimination the courts are bound to implement that policy actively. Both the ADEA and Title VII represent strong policies against employment discrimination and both should be enforced vigorously. There may be cases where the policies of the two acts conflict and in those cases the courts are forced to make choices about the relative social priorities of the two laws.76 Determining the order and allocation of proof in individual cases, however, does not involve such a difficult choice. Altering the rules of proof will not resolve conflicts between Title VII and the ADEA but may serve to defeat legitimate ADEA claims.

Where the prima facie case approach is applied to ADEA cases, it should be just as protective of plaintiffs as it is in Title VII cases. There are procedural differences between Title VII and the ADEA, however, that militate against using the prima facie case approach in all ADEA cases. A major difference between Title VII and the ADEA is that the right to a jury trial has been extended to individual ADEA plaintiffs. A jury trial radically alters the fact-finding process. Because juries may

75. At least one commentator has argued to the contrary—that there is greater reason to suspect that decisions affecting women and racial minorities resulted from illegal discrimination than to suspect that decisions affecting older workers resulted from an illegal consideration of age. Note, The Age Discrimination In Employment Act of 1967, 90 Harv. L. Rev. 380, 394-95.

There is no objective basis for the commentator's conclusion. The commentator cites a 1965 Department of Labor report for the proposition that there is "no evidence of prejudice based on intolerance or dislike for the older worker." Id. at 383. This same study, however, did not find that age discrimination was less prevalent than race or sex discrimination. It instead concluded that erroneous assumptions about the effects of age on ability resulted in pervasive age discrimination having a debilitating impact on older workers. See U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964 at 18-19 (1965).

76. For example, a defendant in an ADEA action may claim as a defense that the plaintiff was not hired because the defendant was seeking to meet affirmative action goals for the hiring of women and minorities.

77. Reducing the number of ADEA actions might reduce the chance for conflict with affirmative action goals, but this would only be an incidental effect. Harsher rules for ADEA actions would apply in all cases, not just those where there is potential conflict with other anti-discrimination acts.
often be sympathetic to elderly plaintiffs, the right to a jury trial may adequately promote policies of nondiscrimination without resort to the prima facie case approach. Jury trials also present procedural difficulties to which the prima facie case approach is not easily adaptable. The following section argues that these differences provide a basis for abandoning the prima facie case approach altogether in ADEA jury trials.

IV
APPLICATION TO JURY TRIALS

The principal procedural difference between the ADEA and Title VII is that individual ADEA plaintiffs have a right to a jury trial. The Supreme Court has not yet decided whether a jury trial is available under Title VII, and in practice such trials are rare. Altering *McDonnell Douglas* procedures to fit a jury trial is not a simple matter. This section examines two competing approaches to the problem. The first, *Loeb v. Textron, Inc.*, suggests that adaptation is possible and desirable. The second, *Laugesen v. Anaconda Co.*, rejects the use of the prima facie case approach in jury trials. Of these two approaches *Laugesen* represents the sounder policy.

A. *LOEB V. TEXTRON, INC.*

Frank Loeb was hired by Textron as International Sales Manager. During Loeb's tenure Textron became aware that many of its management personnel were over fifty-five and adopted a program "to
ensure that the corporation would have personnel at all levels of its organization . . . in the future."85 Although it does not appear that this program involved the discharge of older employees, Textron's management was evaluated "by age and length of service to anticipate retirements or obsolescence."86 On March 19, 1975, Loeb was demoted to "Area Manager—Latin America."87 In June of 1975 the plaintiff's supervisor fired Loeb on the ground that he was not generating enough business in Latin America to justify his salary, noted "involuntary termination—poor job performance" on his personnel record and told him that there were no other openings in the International Department.88 Loeb brought an action in federal district court, alleging violation of the ADEA and seeking reinstatement and back pay.

The trial judge's jury instructions attempted to follow the McDonnell Douglas formula. The court told the jury (1) that the plaintiff had to show the elements of a prima facie case by a preponderance of the evidence or the jury was to find for the defendant; (2) that if Loeb was successful in proving a prima facie case, Textron had to show by a preponderance of the evidence that it had a legitimate reason for discharging Loeb; and (3) that if Textron showed a legitimate reason, Loeb had to demonstrate by a preponderance of the evidence that Textron's reason was a "pretext" for discrimination.89 The jury returned a verdict for the plaintiff and the defendant appealed.

The First Circuit decided the lower court's instructions to the jury were in error because they were inconsistent with Board of Trustees of Keene State College v. Sweeney.90 In Sweeney, the United States Supreme Court had vacated a First Circuit decision and held that under McDonnell Douglas the defendant's duty to articulate a nondiscriminatory reason for its action is only a burden of producing evidence.91 Contrary to Sweeney, the trial court in Loeb had required the defendant to show a nondiscriminatory reason by a preponderance of the evidence. The First Circuit therefore vacated the judgment of the trial court and remanded the case for a new trial.92

In the course of its opinion, the First Circuit set out guidelines for adapting the prima facie case approach to an ADEA jury trial. The basic premise of these guidelines is that even in a jury trial, the judge is

85. Id.
86. Id.
87. Id. at 1008.
88. Id.
89. Id. at 1008-09.
90. 439 U.S. 24 (1978). For a discussion of this case, see text accompanying notes 29-37 supra.
91. Id. at 25 n.2.
92. 600 F.2d at 1023.
the principal administrator of the prima facie case approach. The only function of the jury is to decide specific factual issues.

[O]nly the factual determinations necessary to the underlying rationale of McDonnell Douglas need be made by the jury—the burden-shifting can and should be monitored by the judge. Moreover, the term “prima facie case” need never be mentioned to the jurors; McDonnell Douglas should be used to identify the important factual issues, and these can be set out in the charge, or in specific questions, divorced from legal jargon.93

Under the Loeb guidelines the judge must first determine whether the prima facie case approach is applicable to the case. Where the plaintiff’s proof of discrimination is strong but does not conform to McDonnell Douglas, the prima facie case approach need not be applied.94 If the McDonnell Douglas procedure is appropriate, the judge must determine the elements of the prima facie case.95 These elements will vary with the facts of different cases. If the plaintiff does not introduce evidence concerning all the elements of a prima facie case, the judge must direct a verdict for the defendant.96 If the plaintiff introduces evidence of all the elements of a prima facie case, the question of whether the plaintiff has proven those elements by a preponderance of the evidence is decided by the jury.97

Before instructing the jury, the judge decides whether the defendant has introduced evidence of a legitimate motive.98 If plaintiff proves all the elements of a prima facie case and if defendant produces no evidence of a legitimate motive, the jury should be instructed to find for

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93. Id. at 1016.
94. Id. McDonnell Douglas does not apply in a case where there is little evidence of the elements of the prima facie case but where there is direct evidence of discrimination such as a statement by the defendant that the plaintiff was “too old.” In this situation the court could allow the plaintiff’s direct evidence to substitute for the prima facie case and otherwise apply McDonnell Douglas. See, e.g., Hodgson v. First Fed. Sav. & Loan Ass’n, 455 F.2d 818 (5th Cir. 1972). The Loeb court appears, however, to abandon the McDonnell Douglas approach altogether where plaintiff relies primarily on other evidence: “In cases of this type, the best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age—with adequate explanation of the meaning of the age statute, the determinative role age must have played, etc.” 600 F.2d at 1018.
95. Id. at 1017.
96. Id. at 1016. This is supported by traditional rules governing jury trials. See James & Hazard, supra note 23, § 7.7, at 246. It has been held in non-jury cases that it is proper to find for the defendant if the plaintiff has failed to show the elements of a prima facie case. Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1114 (8th Cir. 1977); Price v. Maryland Cas. Co., 561 F.2d 609 (5th Cir. 1977). Note, however, that the First Circuit’s approach in Loeb is not dogmatic about a McDonnell Douglas-style prima facie case being the only way to prove illegal discrimination. Failure to introduce evidence of the prima facie case should only result in dismissal under Loeb if the plaintiff also fails to introduce other evidence that would support a finding of discrimination.
97. 600 F.2d at 1018.
98. Id. at 1018 n.21. This follows the traditional rule that the judge decides whether evidence has been introduced. James & Hazard, supra note 22, § 7.7, at 246.
the plaintiff. If the judge decides the defendant has produced evidence of a legitimate motive, then no presumption follows from the showing of a prima facie case and the plaintiff must prove that the defendant's reason was a pretext for discrimination.

Overriding this entire process is the jury charge that the ultimate question is whether plaintiff was discharged "because of his age." This is in addition to establishing the elements of a prima facie case and showing that defendant's reasons are pretextual. Loeb indicates, however, that where the jury finds liability under McDonnell Douglas, it "would be warranted in finding for the plaintiff on the ultimate issue of age discrimination." 

**B. Analysis of Loeb**

The Loeb opinion is a credible adaptation of the McDonnell Douglas formula to ADEA jury trials. It is consistent with common law rules distinguishing the functions of the judge and jury and within these constraints is true to the Supreme Court's formulation of the prima facie case approach in McDonnell Douglas and Sweeney. The guidelines developed in Loeb, however, raise several difficult problems.

The most serious problem for the trial judge under Loeb is determining when McDonnell Douglas should be applied. The court in Loeb emphasized that the trial court has discretion to determine when to use the McDonnell Douglas formula in jury instructions but noted that in some situations its use may either be required or improper. This warrants a closer look at the circumstances under which Loeb mandates application of the McDonnell Douglas formula in a jury trial.

Where the plaintiff's proof closely resembles the elements of a McDonnell Douglas prima facie case, the court should instruct the jury

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99. 600 F.2d at 1018, 1020. This rule is consistent with Supreme Court cases holding that an unrebutted prima facie case results in a finding of discrimination. See Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 342, 358 n.44 (1977).

100. Although the court in Loeb does not make this point explicit, the common view of rebuttable presumptions is that the presumption disappears upon production of evidence and the jury is not instructed concerning it. Wigmore, supra note 21, § 2491(2), at 289; McCormick, supra note 21, § 345, at 821. The applicability of this rule is supported by the Court's holding in Furnco Const. Corp. v. Waters, 438 U.S. 567, 578 (1978), that under Title VII the presumption created by a showing of a prima facie case only has force when it is unrebutted. The jury is, however, allowed to draw inferences from the facts that make up the elements of the prima facie case. 600 F.2d at 1015 n.14. The Loeb court specifies throughout its opinion that the jury should be free to use its "common sense" to draw inferences. This is supported by common law rules. James & Hazard, supra note 22, § 7.9, at 258-261; Wigmore, supra note 21, § 2491(2), at 289.

101. 600 F.2d at 1018.

102. Id. at 1017.

103. Id. at 1018.
that it must find the elements of the prima facie case in order to return a verdict for the plaintiff. Where there is direct evidence of discrimination, and the plaintiff's case does not fit the requirements of McDonnell Douglas, the judge should not give a McDonnell Douglas instruction. In this situation, the court should only instruct the jury that the plaintiff must prove discrimination because of age. However, most cases are not so neatly packaged and have elements of both types. Therefore, the judge must evaluate each element of the fact situation to determine which instruction is the more appropriate one.

The First Circuit recognizes that there will be cases "in which proof of the McDonnell Douglas elements is a significant part of plaintiff's total evidence, but where there is also other evidence, direct or circumstantial, that might support an inference of discrimination." It will be a rare plaintiff who does not at least attempt to show the elements of a prima facie case. Failure to do so would be unwise since it is always possible that the court might require a McDonnell Douglas prima facie case as a necessary condition for maintenance of the action. In few cases will the evidence be confined to the elements of the prima facie case. Even if there is no direct evidence of discrimination, there may be circumstantial evidence that the employer was biased against older workers. For example, in the Loeb case, the defendant's program for evaluating the age of management personnel was relevant evidence, although it was neither direct evidence of discrimination nor part of any element of the prima facie case.

Such cases present the trial judge with a dilemma. If the judge instructs the jury that it must find the elements of a prima facie case in order to return a verdict for the plaintiff, the verdict may be reversed on appeal if a reasonable person could have inferred discrimination from other facts in the case. Reversal would be proper even though the jury correctly found that the elements of a prima facie case were not shown.

104. 600 F.2d at 1018.
105. Id.
106. Id.
107. Id.
108. Id. at 1019. Other courts applying McDonnell Douglas to the ADEA have treated the prima facie case as a mandatory requirement for the maintenance of an action. See, e.g., Price v. Maryland Cas. Co., 561 F.2d 609 (5th Cir. 1977); Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1114 (8th Cir. 1977).
110. Although the court recognized that Loeb fits within the category of cases in which there is only circumstantial evidence of discrimination, it refused to give the lower court specific guidance on what instructions were appropriate under the circumstances: "Here the district court will again have to exercise its judgment." 600 F.2d at 1018.
Further, if the court fails to instruct the jury concerning the prima facie case, its verdict may be reversed because, on the facts of the particular case, a showing of the elements of a prima facie case is a necessary condition to a finding of liability.

The *Loeb* court suggests one way out of this difficulty:

If either party insists that proof of one or more disputed facts related to the *McDonnell Douglas*-type prima facie case is required, however, the court may wish to ask the jury to answer separately whether that fact has been proven in order to minimize the need for a new trial should proof of such fact be ruled essential on appeal.111

What the *Loeb* court ignored, however, is that requiring the jury to make a separate finding concerning the elements of the prima facie case may prejudice their findings of fact on the general question of discrimination. Requiring the jury to make separate findings of fact on the elements of the prima facie case and the general question of liability also creates the possibility of inconsistency that will be difficult for the trial court and the appellate court to resolve without a new trial. For example, the jury may make a special finding that plaintiff has shown a prima facie case and that defendant’s reason is a pretext but may find on the basis of other evidence that the defendant did not discriminate against the plaintiff. Alternatively, the jury may find that a prima facie case was not proven but find that the plaintiff was discriminated against on the basis of age.

The *Loeb* court ostensibly chose to adapt the prima facie case approach to ADEA jury trials because it allowed the plaintiff to show with circumstantial evidence what could not be shown directly, and because it was a sensible and orderly way to evaluate evidence.112 However, neither of these objectives is furthered by the *Loeb* guidelines.

It is debatable whether the prima facie case approach gives plaintiffs an advantage even in Title VII cases, because the defendant’s burden of producing evidence is so easily met.113 Under the prima facie case approach the plaintiff will normally be required to show the elements of the prima facie case and demonstrate that defendant’s reasons are pretextual. In a *Loeb* jury trial the jury is “warranted” in finding age discrimination if plaintiff meets the required burdens.114 But even without the prima facie case approach the jury would be allowed to make the same finding and would not be hindered in reaching this conclusion by the restraints of the prima facie case approach. Presentation of the elements of the prima facie case as a condition for the plaintiff’s success may overparticularize the jury’s inquiry. The jury may be dis-

111. *Id.* at 1019.
112. 600 F.2d at 1014-15.
113. See Sections II B & C *supra*.
114. 600 F.2d at 1018.
tracted by the proof of one element of the prima facie case and lose sight of the broader question of whether the defendant's acts are discriminatory.

The McDonnell Douglas analysis is not necessarily a sensible and orderly way to evaluate evidence in a jury trial. This is a justification for requiring the prima facie case approach in Title VII cases where jury trials are rare. Under Loeb, the jury makes factual decisions without using the analytic framework of McDonnell Douglas. The jury may understand that a finding of a prima facie case will result in liability, but it will not understand why this is so. For the jury, the prima facie case approach will not seem sensible and orderly but instead will appear arbitrary and legalistic. The trial judge may not fare much better. The court in Loeb acknowledged that the “subtleties of McDonnell Douglas are confusing” and that interpreting its provisions “has caused considerable difficulty for judges of all levels.” Bifurcating McDonnell Douglas between the judge and jury will not ease the administrative burden on trial judges, but will complicate it further.

The Loeb approach to ADEA jury trials fails to solve the underlying problem of aiding the jury in making its determination. It confuses rather than clarifies the fact-finding process. Furthermore, it is a burden for the trial judge because it is difficult to administer. In direct contrast to Loeb, the Sixth Circuit has adopted a straightforward instruction to ADEA juries charging them to find for the complainant if they find discrimination by a preponderance of the evidence.

C. LAUGESEN v. ANACONDA Co.

Thor Laugesen was selected for permanent layoff by defendant Anaconda from his job as a purchasing manager. The immediate reason for his discharge was a reduction in force by the defendant, but Laugesen was selected for discharge over other employees on the basis of an employer evaluation which stated in part: “too many years in job. Became too close with vendors. Lacks personal strength.” Laugesen

115. The court states that when McDonnell Douglas is used the “jury should be told that, in order to prevail, the plaintiff must prove each such element (of the prima facie case) and also that defendant's stated reason for the discharge was a pretext.” 600 F.2d at 1018.

116. The First Circuit in Loeb recognized that this is a problem: “The court should not force a case into a McDonnell Douglas format if to do so will merely divert the jury from the real issues; rather it should use its best judgment as to the proper organization of evidence and the charge.” Id. at 1018. Of course, the difficulty is in determining when McDonnell Douglas is helpful and when it is a hindrance.

117. See text accompanying note 19 supra.

118. 600 F.2d at 1016.

119. 510 F.2d 307 (6th Cir. 1975).

120. Id. at 311. In addition, it appears that Laugesen made out a prima facie case under a modified version of McDonnell Douglas. He was 56 years of age, had been discharged, and appeared qualified for his work, which was taken over by a younger employee.
brought an ADEA action in district court and the case was tried before a jury. The court did not attempt to instruct the jury in accordance with the *McDonnell Douglas* formula. Instead, the court instructed the jury that the plaintiff had the burden of showing, by a preponderance of the evidence, "that he was discharged from his job because of his age." The jury returned a verdict for Anaconda. On appeal, Laugesen argued that the jury should have been instructed in accord with *McDonnell Douglas*. The Sixth Circuit reversed and remanded on other grounds; it supported the trial court's refusal to apply *McDonnell Douglas* to an ADEA jury trial.  

Laugesen might be criticized for failing to give plaintiffs the opportunity to make a case through circumstantial evidence. As has been discussed in the context of *Loeb*, however, the plaintiff's opportunity to argue from circumstantial evidence is not threatened by this approach. In most cases, the *Loeb* approach would require the plaintiff to prove: (1) the elements of the prima facie case, (2) that defendant's reason is a pretext, and (3) that the plaintiff was discriminated against on account of age. Under Laugesen, the plaintiff is able to reach the jury unfettered by the burden of proving an element that may not be relevant to the case. The plaintiff need only convince the jury that the facts support the claim of age discrimination.

One consequence of the Laugesen approach is that it forces courts to sacrifice the control they have exercised over fact-finding in age discrimination cases. An attribute of the *McDonnell Douglas* analysis is that it allows courts to determine the facts necessary for a finding of employment discrimination by regulating the elements of the prima facie case. The Laugesen approach returns factual analysis to the jury. The jury decides which facts are important in determining whether the plaintiff is a victim of age discrimination. Although the court may still review the jury's findings of fact, it must defer to the jury's judgment unless the facts are such that reasonable persons could not differ. Although Laugesen reduces the court's control over fact-finding, it increases the jury's discretion. Allowing the jury to make a decision based on its own common-sense criteria is essential if the right to a jury trial is to be meaningful.

121. *Id.* at 317.
122. The circuit court reversed the trial court because its instruction stated that a plaintiff could not be discharged "merely" because of his age. The circuit court held that the trial court must make it clear to the jury that even if there were several reasons for the discharge, the plaintiff is entitled to recover if one factor was age and age made a difference in the decision to retain or discharge the plaintiff. *Id.*
One reason given by the Sixth Circuit for refusing to apply *McDonnell Douglas* to age discrimination cases was the difficulty of adapting it to a jury trial. The foregoing analysis of *Loeb* supports the Sixth Circuit’s position. The primary virtue of the Sixth Circuit’s approach is its simplicity. If *Laugesen* is followed, the basic jury instruction should be the same in every ADEA jury trial. In addition, the *Laugesen* approach is easily administered and does not create the necessity for further litigation to clarify applicability of the prima facie case approach.

V

Conclusion

The prima facie case approach was formulated by the Supreme Court in *McDonnell Douglas* for application in Title VII litigation. Although some courts administered the prima facie case approach to impose a stringent burden of proof on employers, the Court in *Sweeney* reduced this burden considerably. Even prior to *Sweeney*, many courts imposed a lesser burden on defendants in ADEA cases and otherwise modified the prima facie case approach to give employers greater immunity from ADEA claims than from Title VII claims.

Although some may argue that eliminating age discrimination is a lower social priority than ending sex and race discrimination, there is no indication that Congress intended for the courts to apply different standards of proof to the ADEA and Title VII. Both Acts should be enforced vigorously; both Title VII and ADEA plaintiffs should receive the procedural protections laid down in *McDonnell Douglas* before *Sweeney* altered the scheme. In ADEA judge trials, this means applying the prima facie case approach to the ADEA with the same rigor that is applied to Title VII.

ADEA jury trials, however, are different in many respects. A jury trial is itself a procedural protection akin to the prima facie case approach. Moreover, a jury trial involves numerous procedural complications that make the application of the prima facie case approach difficult. Abandoning the prima facie case approach in ADEA jury trials would ease the administrative burden on trial judges and promote the factfinding process. The prima facie case approach is an unnecessary appendage to an ADEA jury trial and should be limited to discrimination cases tried without a jury.

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124. 510 F.2d at 313. *Accord*, Cleverly v. Western Elec. Co., 594 F.2d 638, 641 (8th Cir. 1979). This standard requires the court to look at all the evidence in favor of the jury’s verdict. 594 F.2d at 641.