Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*

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The Supreme Court's decision in Texas Department of Community Affairs v. Burdine, which adopted a formula for shifting evidentiary burdens between the parties, has seriously affected the way individual disparate treatment cases under Title VII are litigated. The Court failed to recognize this effect in NLRB v. Transportation Management, when it distinguished Title VII cases from section 8(a)(3) cases. Under section 8(a)(3), when discrimination is shown to be a motivating factor, the employer bears the burden of proving that a legitimate reason nevertheless prompted the employment decision in question. The author argues that when a Title VII plaintiff meets a similar standard, the burden of proof should shift in the same way as it does in section 8(a)(3) cases.

INTRODUCTION

Discrimination in employment is the focus of both the National Labor Relations Act¹ (NLRA) and Title VII of the Civil Rights Act of 1964² (Title VII). The NLRA forbids an employer from discriminating against employees because of their participation in "protected activities."³ These activities include "concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁴ The employer's intent or motive to discriminate on this basis is a critical ele-

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4. Id.
ment in proving a violation of section 8(a)(3) of the NLRA. Section 8(a)(3) makes it an unfair labor practice for an employer:

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Similarly, Title VII outlaws discrimination in employment. The unlawful discrimination in Title VII, however, generally arises from the protected class status of the discriminatee, rather than any activity in which the individual is engaged. Title VII outlaws discrimination in employment based upon race, religion, national origin or sex.

Where intent or motive is the issue, as it is in some NLRA and Title VII cases, the allocation of the burdens of proof may be the decisive factor in the litigation, and may even affect which cases are litigated. Battles have been vigorously fought over the kinds of evidence admissible and the amount of evidence necessary to prove intent to discriminate under Title VII and the NLRA. Where the stakes are high, tenacious struggles are not surprising.

Deciphering intent is a complex problem. The Supreme Court developed a formula to assist Title VII plaintiffs, who must show the employer's intent. The Court, however, has become so enamored of the formula that it has disregarded the product of the formula: the issue of intent.

In *NLRB v. Transportation Management*, the Supreme Court validated the position of the National Labor Relations Board (NLRB or the Board) that the allocation of burdens in cases under section 8(a)(3) of the NLRA differs from the allocation in individual intentional dis-

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7. The exception to this is discrimination based upon civil rights activity or in retaliation for complaining of alleged violations of Title VII. See 42 U.S.C. § 2000e-3 (1976).
9. There are several methods of proving discrimination under Title VII. The most common methods are disparate impact and disparate treatment. Disparate impact cases require the plaintiff to demonstrate that a neutral rule has a substantial adverse impact on a protected class. Actual intent to discriminate is not prerequisite to a finding of illegal discrimination under the disparate impact theory. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). This contrasts with disparate treatment cases in which intentional, but covert, discrimination is alleged. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973). Disparate treatment cases can be divided into three categories: (1) individual disparate treatment cases, such as McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), (2) private class action disparate treatment cases, such as Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); and (3) pattern or practice cases brought by the government, such as International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). In addition to disparate treatment and disparate impact cases, there are cases in which discrimination is not controverted, but the defendant claims the discrimination is statutorily excused. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 332-33 (1977).
DISPARATE TREATMENT CASES

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Treatment cases brought under Title VII. This Article does not challenge the Court’s decision (i.e., that after the General Counsel shows discrimination to have been a motivating factor, the burden of proof shifts to the employer). Nevertheless, Transportation Management illustrates the Court’s formalistic view of Title VII individual disparate treatment cases.

The Supreme Court’s decision in Texas Department of Community Affairs v. Burdine, a disparate treatment case, has profoundly affected the shape of Title VII litigation by forcing the plaintiff to prove more than previously required under the formula. Few courts have recognized this effect, which makes the use of the disparate treatment formula a preliminary step to the real question of the employer’s intent to discriminate. The thesis of this Article is that Title VII disparate treatment cases will move away from the formalistic approach and towards reliance on more direct evidence of discrimination. As this movement occurs, the relative responsibilities of the plaintiffs and defendants in disparate treatment cases must be reassessed. This reassessment may be assisted by an understanding of the responsibilities of the General Counsel and defendant in section 8(a)(3) cases under the NLRA, where intent to discriminate in employment is also the issue. Recognition of the underlying similarity in section 8(a)(3) cases and disparate treatment cases is instructive. As the Burdine effect on disparate treatment litigation is recognized, the Supreme Court will be called upon to analyze and correct the allocation of burdens in Title VII suits. The Court may in fact have an opportunity to begin reworking the allocation of burdens in Title VII disparate treatment cases in Westinghouse Electric Corp. v. Vaughn, where the use of the disparate treatment formula by the Eighth Circuit Court of Appeals is in issue.

Part I of this Article describes the development of the allocation of burdens in Title VII disparate treatment cases through Burdine, Part II discusses the Board’s standard in cases under section 8(a)(3), and Part III analyzes the attempt in Transportation Management to distinguish between the allocation of burdens in Title VII disparate treatment cases and section 8(a)(3) cases. Parts IV, V, and VI examine the validity of the Court’s reasoning in light of Burdine’s effect on Title VII disparate treatment cases, argue that this effect requires a reassessment of the burdens in such cases, and suggest a framework and some boundaries for the reassessment.

11. Id. at 2475.
Several methods are available to prove a violation of Title VII. This Article focuses on individual disparate treatment cases, in which the employer's intent to discriminate is central. In such a case, the plaintiff attempts to prove that the employer treated him differently than other individuals because of his protected class status. Recognizing that employers will seldom directly tell employees that they are being treated adversely for a statutorily forbidden reason, the Court produced a simple four-step formula for establishing a prima facie case of disparate treatment under Title VII. In *McDonnell Douglas v. Green* the Court described the four steps as requiring the plaintiff to show:

(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.

This formula permits the plaintiff to establish a prima facie case by submitting evidence which is most available to him. As the formula indicates, such evidence is circumstantial in nature. The Court stated that this was not a rigid formula, but one that could vary as did the facts of each case. If the plaintiff made this demonstration, the "burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection." The plaintiff then has an opportunity to show that the employer's alleged reason is "in fact pretext." This simple picture of the allocation of burdens became complicated both by lower court interpretations and by Supreme Court attempts to expound on it without clarifying it. Some lower courts interpreted the *McDonnell Douglas* standard to require the employer to prove that he had a legitimate nondiscriminatory reason for his behav-

14. See *supra* note 9 and accompanying text.
16. *Id.* at 800-02.
17. *Id.* at 802.
18. *Id.* at 802 n.13.
19. *Id.* at 802.
20. *Id.* at 804.
ior. This interpretation can be attributed at least in part to the Supreme Court's carelessness in using the term "proof" in describing the defendant's burden in a disparate treatment case.

In *Burdine*, the Court clarified the burden of the defendant when the plaintiff had established a prime facie case of individual disparate treatment. The Court stated that the ultimate burden of persuasion "that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." The plaintiff's prima facie case under the *McDonnell Douglas* formula creates a rebuttable presumption of discrimination. Analyzing the defendant's intermediate burden in response to this presumption, the Court held that the employer need only produce evidence of a legitimate nondiscriminatory reason to explain the challenged act. He need not prove that he was motivated by that reason. For example, if the employer claims that he did not hire the plaintiff because the plaintiff was less qualified than some other candidate, he need only submit evidence in support of this assertion. The defendant will overcome the presumption of unlawful discrimination established by the plaintiff's prima facie case if his evidence raises "an issue of fact as to whether [the employer] discriminated against the plaintiff." If the defendant produces sufficient evidence to do this, the plaintiff then must prove that the defendant's reason is a pretext for discriminatory conduct.

In summary, the Court first required little of the plaintiff to establish a prima facie case and then required little of the defendant to eliminate the effect of the plaintiff's case. As a result of this development, disparate treatment cases are won or lost on the pretext issue, unless defendants are unable to produce any evidence of a legitimate reason.

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24. For example, in *McDonnell Douglas* the Court stated that the employer's explanation "suffice[d] to discharge [employer's] burden of proof." 411 U.S. at 803. In *Furnco* the Court said: [T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal and allow him to consider the most employment applications.
26. *Id.* at 252 & n.4.
27. *Id.* at 253.
28. *Id.* at 254.
29. *Id.*
30. *Id.*
31. *Id.* at 254-55.
32. *Id.* at 256.
for their behavior.  

II

NLRB'S STANDARD IN CASES UNDER SECTION 8(a)(3)

In a section 8(a)(3) case, the General Counsel of the NLRB must show that the employer treated the complaining party adversely because of his participation in protected activity. In other words, the employer's anti-union motive explains the challenged treatment. Because it is difficult in section 8(a)(3) cases, as it is under Title VII, to demonstrate the employer's motive directly, the Board for many years asserted that if an anti-union motive played "any part" in the treatment, section 8(a)(3) was violated. As a result of this "in part" or "any part" standard, these section 8(a)(3) cases were referred to as "dual motive" or "mixed motive" cases. The "in part" standard met with judicial dissatisfaction in the courts of appeals. The Board acceded to this dissatisfaction in its 1980 Wright Line decision. Wright Line produced two results. First, the Board moved away from the "in part" standard to a "motivating factor" standard in section 8(a)(3) cases. The General Counsel showed a section 8(a)(3) violation if the employer's anti-union response to the protected activity was a motivating factor. Second, Wright Line imposed a burden of proof on the employer once the General Counsel demonstrated that anti-union animus

34. See infra note 79 and accompanying text.

35. This summary simplifies the problem in § 8(a)(3) cases. The first part of this provision of the NLRA has an apparently limitless potential for interpretive problems. The major controversy surrounds the requirement of a demonstration of both discrimination and an intent to discourage or encourage union activity. See, e.g., Radio Officers' Union v. NLRB, 347 U.S. 17, 44-45, 50-52 (1954). Many authors have examined whether two distinct intentional elements are required in a § 8(a)(3) case and, if so, how they may be shown. E.g., Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968); Jackson & Heller, The Irrelevance of the Wright Line Debate: Returning to the Realism of Erie Resistor in Unfair Labor Practice Cases, 77 Nw. U.L. Rev. 737, 755-75 (1983); Janofsky, New Concepts of Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers, 70 Colum. L. Rev. 81 (1970); Oberer, The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motives, Dogs and Tails, 52 Cornell L.Q. 491 (1967); Sheiber & Moore, Section 8(a)(3) of the National Labor Relations Act: A Rationale—Part II, 33 La. L. Rev. 1 (1972).


40. Id. at 1086-87.
was a motivating factor. The employer must then prove that "the same action would have taken place even in the absence of protected conduct." The Wright Line case received mixed reviews among the courts of appeals, as well as among commentators. The principal disagreement with the Board was over the allocation of the burden of proof to the defendant once the General Counsel showed that discrimination was a motivating factor. The Supreme Court resolved the controversy over the applicable standard in section 8(a)(3) cases in NLRB v. Transportation Management.

III
SUPREME COURT'S RESOLUTION OF THE TITLE VII ISSUES RAISED IN TRANSPORTATION MANAGEMENT

In Transportation Management, the Court recognized that the unpopularity of the Board's pre-Wright Line analysis in "dual-motive" cases (i.e., the "in any part" motive test for a section 8(a)(3) violation) provoked the Board's attempt in Wright Line to placate the courts of appeals. The Court deferred to the Board and upheld the Board's imposition of a burden of proof on the employer sued under section 8(a)(3) as consistent with the NLRA. Viewed exclusively in the context of the NLRA and the Board's power to interpret the statute, Transportation Management has the salutary effect of underscoring judicial confidence in the Board. The Court found that the allocation of a burden of proof to the defendant was an acceptable interpretation of the statute, not the only permissible interpretation.

41. Id. at 1089.
42. Id. Wright Line borrows heavily from the Supreme Court's analysis of the allocation of burdens in Mount Healthy School Board of Education v. Doyle—a case involving a constitutionally-based employment claim. 429 U.S. 274 (1977). See also Jackson & Heller, supra note 35, at 746-54.
43. 103 S. Ct. at 2472 n.3.
45. See Jackson & Heller, supra note 35, at 739.
46. 103 S. Ct. at 2469.
47. Id. at 2473.
48. Id. at 2474. A basic theme of Transportation Management is deference to Board interpretation of the National Labor Relations Act, at least with respect to burdens of proof. Id. at 2473. In vindicating the Board's Wright Line analysis, the Court states:

The Board has ... chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act. [T]he Board's construction here, while it may not be required by the Act, is at least permissible under it ... ', and in these circumstances its position is entitled to deference.

Id. at 2475.
The lower courts, however, had rejected the Board's imposition of a burden of proof on the defendant and had substituted the Title VII standard in disparate treatment cases described in *Burdine*.49 This required the defendant to introduce evidence of a legitimate reason for his behavior, but did not require him to prove that the legitimate reason was in fact the "but for" cause of the challenged act.50

Superficially, the issues to be resolved in disparate treatment cases under Title VII and section 8(a)(3) are similar. The employer's intent or motive to discriminate is central to resolving the dispute in both.51 In both cases, the employer's response is cast in terms of a legitimate reason which explains his behavior.52 Some circuit courts and commentators felt that the *Burdine* burden of producing evidence of a legitimate reason was more appropriate to section 8(a)(3) cases than the *Wright Line* burden of proving that reason.53 The dispute over which standard should apply centered around the distinct legislative history of the *NLRA*54 and the alleged differences in the showing of intent made by the General Counsel in section 8(a)(3) cases as compared to the plaintiff's showing in disparate treatment cases.55

In *Transportation Management*, the Supreme Court made only a passing reference to the potential relevance of the Title VII standard.56 Despite the considerable discussion in the brief57 and the fact that the circuit courts which rejected the *Wright Line* analysis in section 8(a)(3) cases did so in favor in the *Burdine* standard,58 the Court dismissed *Burdine* in a short but troublesome footnote.59 Instead of linking its rejection of the *Burdine* standard to its deference to Board interpretation of the *NLRA*,60 the Court made an unrelated effort to exorcise the

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50. See supra notes 29-31 and accompanying text.

51. See supra notes 15-32 and 35-49 and accompanying text.


53. See supra authorities cited in notes 43-49.

54. See Jackson & Heller, supra note 35, at 753-54, 755-56; Kilgore, supra note 44, at 282-84; Lederer, supra note 44, at 74-75.

55. See Jackson & Heller, supra note 35, at 757-58.

56. 103 S. Ct. at 2474.

57. E.g., Brief for Respondent at 15-17, NLRB v. Transportation Management, 103 S. Ct. at 2469; New England Found. and Associated Gen. Contractors of Massachusetts Brief of Amici Curiae at 23-33, NLRB v. Transportation Management, 103 S. Ct. at 2468; Brief for the Council of Labor Law Equality as Amicus Curiae at 36-50, NLRB v. Transportation Management, 103 S. Ct. at 2469; Brief for the NLRB at 38-43, NLRB v. Transportation Management, 103 S. Ct. at 2469; Reply Brief for the NLRB at 45 n.6; NLRB v. Transportation Management, 103 S. Ct. at 2469.

58. See supra authorities cited in note 49.

59. 103 S. Ct. at 2473 n.5.

60. Id. at 2473-75.
Title VII demon which possessed so much of the pre-Supreme Court history of the Wright Line standard. The Court's footnote stated:

The Board has not purported to shift the burden of persuasion on the question of whether the employer fired [the employee] . . . because he engaged in protected activities. The General Counsel satisfied his burden in this respect and no one disputes it. Thus, . . . Burdine is inapposite. In that case, which involved a claim of racial [sic] discrimination in violation of Title VII of the Civil Rights Act of 1964 . . . the question was who had ‘[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. . . .’ The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the ‘true’ motives behind the decision. It thus addressed the pretext case.6

One can decipher two reasons in the footnote for disregarding Burdine. First, the issue in Burdine was who had the ultimate burden of persuasion on the question of intent to discriminate, an issue not in dispute in Transportation Management. Second, Transportation Management was a “dual motive” case and Burdine was a “true motive” case or a “pretext” case. Although these reasons have superficial appeal, both confuse the analysis of disparate treatment cases. The Court’s attempt to deal with Burdine is flawed in several respects and reflects the Court’s failure to analyze individual disparate treatment cases in depth. This failure must be corrected in order for a proper reassessment of the allocation of burdens in disparate treatment cases.

IV
TRANSPORTATION MANAGEMENT AND TITLE VII: BURDINE DOES NOT APPLY

Burdine has changed the course of Title VII disparate treatment litigation by forcing the plaintiff to demonstrate the employer’s discriminatory motive by direct evidence, rather than relying on the inference established by the McDonnell Douglas formula. This change raises questions similar to those raised in Transportation Management. First, how much direct evidence of employer motive to discriminate must the plaintiff show to shift the burden to the defendant? Second, is the burden to be shifted a burden of proof or a burden of production? Transportation Management dismisses Burdine without recognizing the Burdine itself has created the same controversies in Title VII disparate treatment cases that Transportation Management laid to rest in section 8(a)(3) cases.

61. Id. at 2473 n.5. Burdine was a sex discrimination case, not a case of racial discrimination. As the Court stated in Burdine: “She alleged that the failure to promote and the subsequent decision to terminate her had been predicated on gender discrimination in violation of Title VII.” 450 U.S. at 251.
A. Title VII Disparate Treatment and Section 8(a)(3)—the Strength of the Moving Party’s Evidence

The Court began its treatment of Burdine in Transportation Management by stating:

The Board has not purported to shift the burden of persuasion [that the employer fired the employee at least in part for his protected activities] . . . The General Counsel satisfied his burden in this respect and no one disputes it. Thus, . . . Burdine is inapposite. In that case, the question was who had '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff'.

Burdine did make it clear that the plaintiff retained the ultimate burden of persuasion of intentional discrimination in a Title VII disparate treatment case. The Board did not shift the burden of persuasion to the employer in Transportation Management. Yet the fact that the ultimate burden of persuasion was an issue in Burdine, though not in Transportation Management, would not necessarily make Burdine inapplicable to the question of the nature of the “intermediate burdens” which were in controversy in both cases. In fact, much of Burdine focuses on the defendant’s intermediate burden in light of the plaintiff’s ultimate burden of persuasion, and concludes that it is a burden of production of evidence, not a burden of proof. Because the question of who bears the ultimate burden of persuasion of intentional discrimination was an issue, but not the sole issue in Burdine, that opinion’s impact on the intermediate burden of the defendant cannot be eliminated by concluding that Burdine is “inapposite” on this ground. This was exactly the issue in Transportation Management. The Board assigned the defendant a burden of proof, the court of appeals replaced it with a burden of production.

Since this stated reason is insufficient to explain its decision to disregard Burdine, perhaps the distinction the Court tried to draw on the ultimate burden of persuasion point is an allusion to a difference between the strength of the evidence used by the moving party in section 8(a)(3) cases and individual disparate treatment cases under Title VII. The hypothesis is that in making a section 8(a)(3) case the General Counsel in fact proves that “the employee’s conduct protected by § 7 was a substantial or a motivating factor in the discharge.” This contrasts with the plaintiff’s demonstration of sufficient facts from which a rebuttable presumption of discrimination may be inferred in Title VII

62. 103 S. Ct. at 2473 n.5.
63. 450 U.S. at 253, 256.
64. Id. at 253, 254-59.
65. 103 S. Ct. at 2473.
individual disparate treatment cases.66

The Board based its position in Transportation Management on this contrast.67 According to the Board, the General Counsel's case under section 8(a)(3) requires proof by a preponderance of the evidence that the discrimination was a motivating factor in challenged action.68 The Board distinguished this from a disparate treatment case under Title VII, in which the prima facie case creates only an inference of discrimination established by meeting a few basic criteria.69 The Board suggested that the General Counsel's showing in a section 8(a)(3) case is the equivalent of establishing both the prima facie case and pretext made by a successful disparate treatment plaintiff.70 Therefore, the defendant in a section 8(a)(3) discrimination case should bear a burden of proof analogous to that borne by a defendant in a Title VII action after liability is fixed and the appropriate remedy is at issue.71

The theory that the strength of the evidence used by the moving party in disparate treatment cases and section 8(a)(3) cases is significantly different, though aimed at the same goal (deciphering the employer's motive), may support the Court's otherwise unconvincing remarks about the burden of persuasion in disparate treatment and section 8(a)(3) cases. This theory, however, is only superficially persuasive.

In both section 8(a)(3) and Title VII individual disparate treatment cases, the employer is unlikely to state that he is acting for a discriminatory reason, and circumstances surrounding the act are presented as evidence of the employer's motive. When creating a formula for inferring illegal discrimination under Title VII, the Court focused on simple objective facts easily within the plaintiff's grasp, such

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66. See supra notes 17-32 and accompanying text.
67. Brief for NLRB at 38-44, NLRB v. Transportation Management, 103 S. Ct. at 2469.
68. Id. at 40.
69. Id. at 39-44.
70. Id. at 40-42.
71. Id. at 40-44. The Board relied on several Title VII class action disparate treatment cases to support the analogy. Id. at 42-43. Because Transportation Management was an individual discrimination case under § 8(a)(3), the analogy to class action disparate treatment cases under Title VII is inapposite. The class action, or pattern and practice disparate treatment cases, attempts to establish an overall pattern of discrimination by the employer. 431 U.S. at 336, 359-60. If the plaintiff class, or the government, establishes that pattern and it is not overcome by an appropriate excuse by the defendant, liability attaches. Id. at 361. At the remedial stage the defendant may prove that particular members of the class are not entitled to a remedy because they were not in fact discriminated against—for example, they were not qualified for the job, no jobs were available. Id. at 361-62. This class-wide method of proving an unlawful practice under Title VII does not mesh with the § 8(a)(3) discrimination case under the NLRA. In fact, the defendant's in Teamster's mistakenly relied on the individual disparate treatment case model as controlling. The Court expressly rejected this reasoning. Id. at 358-60. The contrast between "proving" discrimination under § 8(a)(3) and "inferring" it under Title VII is only useful as a point of difference if the kind of evidence used in each case is compared.
as his own job qualifications, the availability of a job, or his application for the job. The Court did not preclude other methods of establishing discriminatory intent in Title VII cases. It did establish a formula which would, without more, create a prima facie case of disparate treatment under Title VII. Evidence which arguably goes more directly to the employer’s motive, such as racially derogatory remarks, was not included as a necessary ingredient in the prima facie case formula.

In contrast, the evidence used to establish the General Counsel’s section 8(a)(3) case goes more directly to the employer’s motive. For example, according to the evidence in Transportation Management, the supervisor remarked that an employee engaged in union activities was “two-faced,” vowed that he would “get even with” the employee, asked what the employee’s relationship to the union was, said that he took the employee’s action “personally,” and asserted that he would remember it the next time the employee “asked for a favor.”

In that sense, the moving party’s evidence in section 8(a)(3) and in formula disparate treatment cases under Title VII is different. In section 8(a)(3) cases the General Counsel’s evidence consists of circumstantial evidence of motive which requires fewer inferences before the illegal motive conclusion can be drawn than the evidence used in formula Title VII disparate treatment cases. A closer examination of this theory will demonstrate its flaws. As a result, section 8(a)(3) analysis may be of greater moment to Title VII disparate treatment cases than the Burdine standard itself.

B. Supreme Court’s View of the Plaintiff’s Showing in Title VII Individual Disparate Treatment Cases—Formula Over Substance

Despite its repeated statements that the formalistic method of showing intent was not to be rigidly adhered to, the Court has shown no sensitivity to this fact in any of its Title VII individual disparate treatment opinions. Therefore, the fact that all disparate treatment cases are not created equal under Title VII did not occur to the Court as relevant in its dismissal of Burdine as inapposite to the section

72. See supra notes 15-18 and accompanying text.
73. See supra note 18 and accompanying text.
74. 103 S. Ct. at 2471.
75. Id.
76. Id.
77. Id.
78. McDonnell Douglas v. Green, 411 U.S. 792, 802 n.13. See also Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1977) (“The method suggested in McDonnell Douglas for pursuing this inquiry was never intended to be rigid, mechanized or ritualistic.”); Teamsters v. United States, 431 U.S. 324, 358 (1977) (“Our decision in that case . . . did not purport to create an inflexible formulation.”).
8(a)(3) analysis in *Transportation Management*. The Court's formalistic view of individual disparate treatment cases causes greater concern when one realizes that the *Burdine* opinion itself is changing the shape of disparate treatment litigation. The Court has either failed to recognize the change, or chosen to disregard it in order to effectuate a hidden agenda of discouraging Title VII claims.

To understand the nature of the Court's failure, one must first examine the practical effect of *Burdine* on disparate treatment cases under Title VII. *Burdine* revolutionized the focal point in disparate treatment cases by minimizing the defendant's response to producing sufficient evidence to raise a doubt that he acted on the basis of illegitimate discrimination. If the plaintiff chooses to rely solely on the four part *McDonnell Douglas* formula, the plaintiff will invariably lose unless the defendant cannot produce evidence of any other explanation which might raise a question as to his intent to discriminate.\(^7^9\) The focus of the litigation then shifts to what the Court has labelled as "pretext."\(^8^0\) The concept behind the "pretext" label is that the employee brings the actual intent of the employer into question.\(^8^1\) After the preliminary

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\(^7^9\) Plaintiffs can no longer afford to rest solely on a *McDonnell Douglas* formula prima facie case. As evidenced by several lower court decisions, the results can be disastrous. In a Seventh Circuit opinion where plaintiff failed to establish a prima facie case, the court, in dictum, noted that even if plaintiff had made a prima facie showing, no rebuttal evidence was presented on the pretext issue and the evidence introduced by plaintiff's case-in-chief was not sufficient to overcome defendant's legitimate reason. Lee v. National Can Co., 699 F.2d 932, 937 (7th Cir.), cert. denied, 104 S. Ct. 148 (1983). See also Brady v. Allstate Ins., 683 F.2d 86, 89 (4th Cir. 1982), cert. denied, 103 S. Ct. 452 (1983) (based only on prima facie evidence without any additional evidence of pretext, the defendant should have been granted a directed verdict); Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981) (plaintiff who attempted rebuttal based on the "meager" prima facie evidence failed to show pretext).

Rarely, however, the employer fails to come forward with some legitimate explanation for his actions, and the plaintiff prevails on a *McDonnell Douglas* prima facie case. The Ninth Circuit in Nanty v. Barrows, 660 F.2d 1327, 1332 (9th Cir. 1981), found that defendant failed to articulate a reason for its employment action, thus remaining "silent in the face of the presumption" created by Nanty's prima facie case (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254). Thus, Nanty's prima facie showing was sufficient to meet his ultimate burden of proving unlawful discrimination under *McDonnell Douglas*.\(^6^6^0\) F.2d at 1332.


81. The employee retains "the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing
skirmishes into prima facie case and legitimate reasons, both of which are easily established, the major battle is fought over whether the plaintiff can produce sufficient evidence of discrimination to prove that discriminatory intent produced the complained of treatment. At this point in disparate treatment litigation, determining how much a part the discriminatory reason played in the defendant’s decision-making process is crucial. This determination is hard to distinguish from the issue resolved by the Board in Wright Line.

Another question is what must the defendant do after the plaintiff has shown “pretext” in response to the defendant’s claim of a legitimate nondiscriminatory reason. The Court has not addressed this question directly in its Title VII disparate treatment decisions. Perhaps the Court’s silence means that the defendant may not respond to the plaintiff’s new evidence of discrimination. Probably, however, the Court’s silence indicates only that it has disregarded the implications of its decisions in this area. Yet Burdine makes the plaintiff’s showing of

that the employer’s proffered explanation is unworthy of credence.” 450 U.S. 248, 256. Because evidence of employers’ state of mind is rare, the majority of plaintiffs will attempt to discredit defendant’s articulated reasons. See Griffin v. George B. Buck Consulting Actuaries, 551 F. Supp. 1385 (S.D.N.Y. 1982). For a breakdown and discussion of the two types of evidence introduced on the question of employer motivation, see Timper v. Board of Regents of Univ. of Wis., 512 F. Supp. 384, 395-98 (W.D. Wis. 1981).

82. In Burdine, the Court made it clear that plaintiff’s burden in a Title VII disparate treatment case is not onerous, and similarly defendant’s burden is merely one of “explaining clearly the non-discriminatory reason for its actions.” 450 U.S. at 256. Because the defendant’s burden is cast in terms of production not persuasion, it has been characterized by one court as “exceedingly light.” Perryman v. Johnson Prods. Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

83. As a result of the Burdine opinion, and the ease with which the defendants can successfully articulate legitimate reasons for their actions, plaintiffs can no longer rely on the bare prima facie showing to prove intent to discriminate. Instead plaintiffs are forced to introduce evidence that focuses on employer motivation. The more direct proof includes evidence of employer’s general employment policy and practice, less favorable treatment of employees in the protected class, and discriminatory attitudes or biases against the protected class. The more indirect proofs focus on the employer’s articulated reasons in an attempt to discredit them. See Timper v. Board of Educ., 512 F. Supp. 384 (W.D. Wis. 1981).

84. The Supreme Court alluded to a “but for” test in McDonald v. Sante Fe Trail Transp., 427 U.S. 273, 282 n.10 (1976), and some lower courts have already ventured into this area of inquiry. See, e.g., Toney v. Block, 705 F.2d 1364, 1372 (D.C. Cir. 1983) (“the best view is that proof of unlawful discrimination requires merely proof that discrimination was a factor in the employment decision” (emphasis in original); Lincoln v. Board of Regents of Univ. Sys., 697 F.2d 928, 938 (11th Cir.), cert. denied, 104 S. Ct. 97 (1983) (significant factor and “but for” cause); Lee v. Russell County Board of Educ., 684 F.2d 769, 774 (11th Cir. 1982), cert. denied, 104 S. Ct. 148 (significant or substantial factor); Jackson v. City of Killeen, 654 F.2d 1181, 1186 (“but for” cause determining factor); Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950, 956 (5th Cir. 1981) (significant factor); Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1982) (significant factor). See also Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective., 82 COLUM. L. REV. 292, 308-09.

85. The Board in Wright Line rejected the “in part” and “dominant motive” tests in favor of the test proposed by the Supreme Court in Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (substantial or motivating factor). This issue may deserve a different resolution in the Title VII context. See Brodin, supra note 84, at 310-11 n.80.
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discrimination critical, whether labelled a showing of pretext as applied to the defendant's legitimate reason or a showing of actual evidence of the employer's discriminatory intent. Unless the Court intends to leave the employer resourceless in responding to the plaintiff's showing of discrimination, the question becomes what burden falls to the defendant after the plaintiff has in fact shown "pretext." 86

The above analysis takes a two-tiered and somewhat artificially structured approach to disparate treatment cases. It views the first tier as preliminary to the real clash over plaintiff's showing of actual intent to discriminate. Once the plaintiff has shown that the discriminatory intent played a sufficient part in the defendant's action to establish "pretext," what is the defendant's burden? Is it the same as the response at the first tier to the inference created by the plaintiff's prima facie case—to articulate a legitimate nondiscriminatory reason for his behavior?

Although some lower courts have disregarded the issue, 87 the Eleventh Circuit has suggested that the McDonnell Douglas standard is not applicable when the plaintiff shows direct evidence of discrimination at the second stage. 88 It has expressly adopted the Mount Healthy

86. See infra authorities cited in notes 87-91. This question has repeatedly been addressed in the remedial context. Once intentional discrimination is "proven," the defendant bears the burden of proving by clear and convincing evidence that even absent the discrimination, the same employment action would have been taken. See Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976). This principle originated and has been applied in cases involving federal employers. See, e.g., Milton v. Weinberger, 696 F.2d 94, 98-100 (D.C. Cir. 1982); Muntin v. State of Cal. Parks and Recreation Dep't, 671 F.2d 360, 363 (9th Cir. 1982); LULAC v. City of Salinas Fire Dep't, 654 F.2d 557, 558 (9th Cir. 1981).

Except for the Eleventh Circuit opinions discussed in note 88 infra, courts have not addressed the issue of what burden the defendant bears after pretext has been established at the liability stage. Perhaps this reflects an unwillingness to allow any response to plaintiffs' direct evidence of intent to discriminate, which in turn might presuppose an assessment of how much a part the discrimination played in the employment decision. The Eleventh Circuit has adopted a Mount Healthy analysis; but no other circuit has yet addressed these liability questions. Glossing over this issue into the remedial stage presupposes a resolution of the questions posed in the text.

87. Brodin, supra note 84, at 310-11 n.80.

88. Whether evidence was introduced initially at the prima facie stage or at the second level is often hard to determine. When the plaintiff goes beyond the McDonnell Douglas prima facie showing by introducing direct evidence of discriminatory motive, the inference created by the four-part test is no longer necessary. Consequently, the rebuttal burden on the defendant should not be the "intermediate" one of articulating a legitimate nondiscriminatory reason. Once the plaintiff has introduced direct evidence of discriminatory motive and the trier of fact credits this evidence, discrimination has already been shown. The burden on the defendant is then one of proving that the action would have been taken despite the discrimination. The Eleventh Circuit has confronted this issue in three cases: Bell v. Birmingham Linen Serv., 715 F.2d 1552 (11th Cir. 1983); Perryman v. Johnson Prods. Co., Inc., 698 F.2d 1138 (11th Cir. 1983); and Lee v. Russell Bd. of Educ., 684 F.2d 769 (11th Cir. 1982). Adopting a standard borrowed from the Mount Healthy decision, the court held in Lee that the defendant must prove that the adverse action would have been taken even in the absence of discriminatory intent. The "but for" rebuttal burden was reaffirmed in Perryman. The Eleventh Circuit correctly recognizes the impropriety of
standard at this point in the litigation. This was the standard used by the Board in the Wright Line decision. Plaintiff must show that discriminatory intent was a motivating factor; and, if he does, the defendant's response is cast as a burden of proving another "but for" cause of the challenged activity. For the Eleventh Circuit, therefore, Title VII disparate treatment cases are analogous to the section 8(a)(3) cases.

In Transportation Management, the Supreme Court missed the opportunity to examine this phenomenon, a natural outgrowth of Burdine, and neglected to recognize the similarity between Title VII disparate treatment cases and section 8(a)(3) cases.

Burdine may profoundly change the substance of the plaintiff's showing in a Title VII case. No longer will it be the "rare" case in which the plaintiff submits evidence of discriminatory acts or statements by the employer instead of, or in addition to, the four-part McDonnell Douglas formula. Using this evidence of intent is the allowing the defendant to escape plaintiff's strong showing of direct evidence merely by articulating reasons for the action.

89. 698 F.2d at 1142; 684 F.2d at 774.
90. 251 N.L.R.B. at 1088-89.
91. In Lee, the court adopted a "significant or substantial" factor test as the level of discriminatory motive plaintiffs were required to prove. As discussed more fully in supra note 83 and accompanying text, other courts have used similar tests to gauge the level of motivation necessary to plaintiff's case of disparate treatment.
92. The Mount Healthy decision contributed not only to resolving the question of the level of motivation required, but also to assessing defendant's burden once the discriminatory motive is proven. Borrowing again from the Mount Healthy decision, the Eleventh Circuit in both Lee and Perryman, adopted the "but for" cause requirement of proof on defendant in response to plaintiff's direct showing of discriminatory intent. In Bell v. Birmingham Linen Serv., however, the court noted this issue might deserve a different resolution in the Title VII context. 715 F.2d at 1555.

The Lee/Perryman formulation was followed in a lower court opinion. There, direct evidence of sexually discriminatory remarks was offered and accepted as true; but in the face of this strong showing of intent to discriminate, the defendant succeeded in proving, by a "preponderance of the evidence," that even in the absence of the discrimination, plaintiff would have been discharged. Humphries v. Tenneco Retail Serv. Co., 31 Fair Empl. Prac. Cas. (NBA) 855, 858 (N.D. Ga. 1983).
93. Perryman v. Johnson Prods. Co., Inc, 698 F.2d at 1143. After a careful and extensive survey of both district and appellate court decisions, the following patterns in post-Burdine Title VII disparate treatment cases have emerged. Plaintiffs will now either introduce additional evidence in their case-in-chief or at the rebuttal stage in order to prove discrimination. In appellate court opinions, distinguishing evidence introduced at the prima facie stage from evidence saved for rebuttal is often difficult. Nevertheless, the plaintiff may rely on the same evidence at both stages of the litigation. See, e.g., Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 96-97 (6th Cir. 1982) (evidence of racial slurs could be considered both to strengthen plaintiff's prima facie case and, should defendant rebut, to show pretext); EEOC v. Minn. Elec. Steel Casting Co., 552 F. Supp. 957, 964 (D. Minn. 1982) (evidence introduced at the prima facie stage, of employer's unequal enforcement of safety policy, was sufficient to rebut defendant's stated reason for discharge).

In failure to hire cases, plaintiffs will attempt to show discriminatory motive on the part of the interviewer. Because the adverse employment action is taken prior to hiring, the prospective applicant very often has no recourse other than to focus on what transpired during the interview.
inevitable result of Burdine’s minimization of the defendant’s burden and the increased focus on “pretext.” Unless plaintiffs adhere strictly to the Burdine formula, they are likely to realize that evidence of intent to discriminate which focuses on the employer’s behavior will be critical to their success, and they will use it initially to establish their case. The “two-tiered” approach in disparate treatment cases thus collapses to a single level and presents a much more realistic view of the way cases are in fact litigated. The approach requires an assessment of how great a part the discriminatory motive must be shown to have played for the plaintiff to carry his burden of persuasion and what kind of response the defendant is held to—producing evidence which raises a question of fact as to his motive, or proof that he had another “but for” cause for his challenged behavior. In some post-Burdine decisions, courts confronting this problem have adopted the Mount Healthy standard and expressly discarded McDonnell Douglas and Burdine.\footnote{See supra authorities cited in note 89. It may be argued that the actual level of motivation required before the plaintiff proves intentional discrimination should be less under Title VII than under § 8(a)(3). See Brodin, supra note 84, at 310 n.80. If so, the approach used by these lower courts is incorrect, at least on the issue of how much motive the plaintiff must show. See Bell v. Birmingham Linen Serv., 715 F.2d at 1558 n.4.}

These decisions show that many individual disparate treatment cases do not fit the formula the Supreme Court created in McDonnell Douglas. In fact, Burdine contained the seeds of the formula’s destruction in its degradation of the defendant’s burden.

The Court’s glossing over of this fact in Transportation Manage-
ment was short-sighted, because it perpetuated the myth that individual disparate treatment cases are simple formula cases, and therefore "inapposite" to section 8(a)(3) cases. Although disparate treatment plaintiffs may show as little as the four-part McDonnell Douglas formula, the post-Burdine reality is that except in very limited circumstances, plaintiffs must show more than the formula: they must show evidence of intent to discriminate, just as the General Counsel must show that evidence in section 8(a)(3) cases.

Perhaps it is too much to expect the Court to resolve the question whether the plaintiff's showing and the employer's response in disparate treatment cases should follow the pattern established by the Board, and now sanctioned by the Court, in section 8(a)(3) cases. Yet the Court's premise in avoiding Burdine is flawed because it fails to recognize that the issue in disparate treatment cases after Burdine may be whether the plaintiff carries the burden of persuasion to show that the challenged act took place because of the employee's protected class status, as demonstrated by actual evidence of discriminatory intent. This question requires resolution of the same issues in section 8(a)(3) cases. The Court should consider, first, how much a part the discrimination must play in the challenged act. Should "any part" be enough, or must it be "a motivating factor," or a "but for cause," or a "dominant factor"? Second, the nature of the defendant's response must be resolved, either in favor of a burden of producing evidence or a burden of proof. Third, assuming the burden is one of proof, the Court must then decide whether the defendant must prove another "but for" cause for the challenged act, or whether the defendant must completely disprove any discriminatory motivation.

Continued adherence to a formalistic approach will demonstrate disregard for the realities of the development of Title VII, and a reluctance to deal with the subtle similarities section 8(a)(3) and disparate treatment cases.

Even without a full examination of which standards should apply to disparate treatment cases falling outside the formula, recognition of the questions these cases raise would at least signal to the lower courts confronting them that the Court is aware of the path cut by Burdine. The Court's failure to appraise the similarities between section 8(a)(3) and Title VII disparate treatment cases retards the use of section 8(a)(3) cases in deciphering the dilemma caused by Burdine.

This unwillingness to look at the goals to be served by the disparate treatment formula is apparent not only in the Court's failure to note that disparate treatment cases may not be contained by a formula, but also in its perplexing attempt to categorize disparate treatment cases under the labels "illegal or legal motive," "true motive" or "pre-
text.” This confusing use of terminology masks a reluctance to consider the appropriateness of the labels used to refer to the disparate treatment concept.

V

ARE DISPARATE TREATMENT CASES “SOLE” OR “TRUE” MOTIVE CASES?

In Transportation Management, the Court described Burdine as a case in which “[t]he Court discussed only the situation in which the issue is whether illegal or legal motives, but not both, were the ‘true’ motives behind the decision. It thus addressed the pretext case.” 95 This statement is symptomatic of the Court’s formalistic approach to disparate treatment analysis. Title VII was not thought to require a demonstration that the employer was actuated solely by illegal motives. 96 While the question of how much illegal motive the plaintiff must demonstrate for liability to attach is a matter of controversy and inquiry beyond the scope of this Article, 97 there appears to be no support for the suggestion first made in Transportation Management that the Title VII litigant is bound to persuade the court that the employer was solely motivated by an illegal reason. 98

Yet the Court’s manipulation of the McDonnell Douglas formula out of its original context could produce such a result. The McDonnell Douglas prima facie formula was designed to create an inference, or a rebuttable presumption, of “discrimination” by “eliminat[ing] the most common nondiscriminatory reasons for the plaintiff’s rejection,” 99 such as lack of the proper qualifications for the position, failure to apply for the job, and unavailability of a position. The formula appears to make individual disparate treatment cases either/or propositions; the employer was motivated either by bad reasons or by good reasons, but not both. This implication is probably an inadvertent result of the Court’s simplification of the plaintiff’s burden in disparate treatment cases, rather than an attempt to limit disparate treatment cases to situations in which the plaintiff could demonstrate that the defendant was motivated solely by discriminatory reasons. The Court simply held that satisfying the formula suggests “discrimination.” 100 It did not define “discrimination” as conduct resulting solely from discriminatory motive.

95. 103 S. Ct. at 2473 n.5.
96. See Brodin, supra note 84, at 296-97. See also Toney v. Block, 705 F.2d 1364, 1372 (1983) (“It is at least clear that the Title VII plaintiff need not prove that the discriminatory factor was the sole factor in the employment decision”).
97. See generally Brodin, supra note 84.
98. Id. at 296-297, 308-22.
99. 450 U.S. at 254.
100. 411 U.S. at 802-03.
McDonnell Douglas was a formalistic approach to a complex problem—demonstrating employer intent to discriminate. Formalistic solutions to complex issues seldom resolve them and are subject to misuse. McDonnell Douglas does not indicate that the Court devised the formula to force the plaintiff to prove that the employer was solely actuated by illegal motives. The task of proving that a person was solely motivated by a discriminatory reason would be overwhelming. How can a plaintiff prove what was not in defendant’s mind? Proving a negative is always very difficult. Proving a negative in this context—the absence of discriminatory intent—is impossible when plaintiff must address someone else’s intent. The formula is not aimed at that goal. The Court can describe Burdine as a “true” motive case only because the Court has manipulated the McDonnell Douglas formula in isolation from its original purpose. That the Court created an inference of discrimination for disparate treatment cases based on a formula which it believed eliminated legitimate reasons for employer behavior does not mandate a conclusion that such cases require the plaintiff to persuade the court that the employer had no legitimate reasons for his behavior. There is a critical difference between using the inference of “solely discriminatory” behavior as a tool to establish employer intent and viewing the inference as controlling the degree of illegal motive which must be shown to establish discrimination. The existence of a one dimensional inference to support a finding of discrimination should not be used as a means of limiting successful disparate treatment cases to those in which only “illegal motives” played a part.

The Court misinterpreted and recast McDonnell Douglas in the direction of requiring plaintiffs to show a “sole” discriminatory motive in Furnco Construction Corp. v. Waters. In Furnco the Court stated that the inference created by the McDonnell Douglas formula results:

Only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissi-

101. See Brodin, supra note 84, at 296-97.
102. At least one federal court has moved to a “but for” standard. See Lewis v. University of Pittsburgh, 725 F.2d 910, 918 (1983). The dissent strongly criticizes this as amounting to a “sole basis” test which finds little or no support in case law or legislative history of Title VII. Id. at 921-22 (Adams, J., dissenting).
It is a small, but critical, leap from recognizing the one-dimensional focus of the *McDonnell Douglas* formula to assuming that the plaintiff in a disparate treatment case *must* show that the defendant was motivated *only* by illegal reasons. The Court's analysis in *Furnco* of the nature of the inference drawn when plaintiff presents a prima facie case seems less dangerous for the plaintiff when read in the context of its description of the response which the defendant must make to the plaintiff's case.

When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race.

This might be interpreted as requiring the employer to prove that he acted solely for a legitimate reason and that the illegitimate one played no part in the decision making process. In other words, the defendant's burden is to prove he was solely actuated by nondiscriminatory reasons.

*Burdine* destroyed this interpretation of the defendant's responsibility, since it required only that the defendant produce enough evidence of a legitimate reason to raise a doubt in the mind of the trier of fact about the illegal motive. Apparently, *Burdine* sanctified the critical leap made in *Furnco*. Since the *McDonnell Douglas* formula "eliminates the most common reasons for the plaintiff's rejection," and is designed to show true or sole motive, the plaintiff's burden is to persuade the court that the defendant was motivated solely by discriminatory reasons. The Supreme Court's statement in *Transportation Management* that "[t]he [Burdine] Court discussed only the situation in which the issue is whether illegal or legal motives, but not both, were the 'true motives' behind the decision" is accurate only to the extent that the Court adopts the view that Title VII disparate treatment cases, at least those in which the *McDonnell Douglas* formula is used to establish a prima facie case, require the plaintiff to show that the employer acted solely for a discriminatory reason. As the above analysis demonstrates, this was not understood to be a requirement under Title VII. The *McDonnell Douglas* test allowed the plaintiff a simple method of using facts within his grasp to establish a rebuttable presumption of

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104. *Id.* at 577.

105. For an example of a lower court's use of this standard, see Banerjee v. Board of Trustees of Smith College, 648 F.2d at 63.

106. 438 U.S. at 577.

107. 450 U.S. at 254.

108. 103 S. Ct. at 2473 n.5.
discrimination. The Court in *McDonnell Douglas* did not contemplate that the inference created by such a showing (that the employer acted out of discriminatory motives) would be turned against the plaintiff and interpreted in later cases as a *requirement* that the plaintiff prove that the defendant was acting *only* for a discriminatory reason.

If the Court seriously means that *Burdine* is a “true motive” case, the plaintiff must show the defendant was motivated only by an “illegal” motive. To show that both legal and illegal motives played a part in the defendant’s decision will not be sufficient, and plaintiffs alleging disparate treatment will face a hopeless task. If this statement is further evidence of the Court’s formalistic view of the nature of disparate treatment cases, a few additional observations on the labels the Court incorrectly applied to categorize section 8(a)(3) and disparate treatment cases may clarify the problem.

VI

**Two Uses of the “Dual Motive” or “Mixed Motive” Label**

The Court’s use of the “dual motive” or “mixed motive” label to eliminate the need for examining *Burdine* as an aid in section 8(a)(3) cases requires an examination of the “dual motive” concept. The term “dual motive” or “mixed motive” suggests that behavior results from more than one cause. Careful analysis indicates that the “dual motive” label may be used in two very distinct ways, only one of which is superficially helpful in distinguishing a section 8(a)(3) case from a *McDonnell Douglas* formula disparate treatment case. Failure to properly identify the concept behind the “dual motive” label produces confusion.

A. “Dual Motive” or “Mixed Motive” Label as an Assessment of the Strength of the Moving Party’s Case

The “dual motive” or “mixed motive” label may be used as an assessment of the strength of the moving party’s case, without assessing the credibility of the defendant’s response to that case. In that sense, “mixed motive” means that the plaintiff’s showing of illegal motive is sufficiently strong that it convinces the trier of fact that the defendant was at least acting out of two (or more) motives, one of which was illegal. As an assessment of the moving party’s case, it does not mean that the moving party proved two or more motives existed. The moving party obviously concentrated on proving the illegal motive. When the moving party’s showing of illegal motive is convincing, the attachment of the label “dual motive” to the case signifies the trier of fact’s belief that at least the illegal motive existed. The defendant’s only
hope for escaping liability is then to establish that another, legitimate motive existed as well, and to show that the legal motive contributed so significantly ("but for cause" or "dominant motive") that liability should not attach.

As described earlier, the General Counsel’s showing in a section 8(a)(3) case should consist of strong circumstantial evidence of the existence of an illegal motive.\(^{109}\) If the General Counsel sustains his burden of proof of the existence of an illegal motive, the label "dual motive" should attach at that point in time. If it is used as an assessment of the moving party’s case, it signals the fact that, at a minimum, mixed motives, one of which is illegal, explain the employer’s act.

In contrast, when the plaintiff in a disparate treatment case makes a prima facie case under *McDonnell Douglas*, the conclusion that, at a minimum, an illegal motive played some part in the defendant’s act cannot yet be reached. Because the plaintiff’s demonstration of the *McDonnell Douglas* formula alone is not sufficient to convince the trier of fact that an illegal motive played any part in the defendant’s behavior, the formula disparate treatment case cannot be labelled a "dual motive" case when the plaintiff has established merely a prima facie case of discrimination.

Thus, the formula disparate treatment case is distinguishable from the section 8(a)(3) case. The "dual motive" or "mixed motive" assessment can be made at the close of the General Counsel’s case in section 8(a)(3) litigation; that assessment cannot be made after the four-part *McDonnell Douglas* showing.

The distinction between the two kinds of cases is flawed because of assumptions made about the plaintiff’s showing of disparate treatment, which may go beyond the *McDonnell Douglas* formula to more direct evidence of motive.\(^{110}\) If this occurs, then the same dual motive assessment can be made in a disparate treatment case at the close of the plaintiff’s initial presentation. In addition, the plaintiff’s response to the defendant’s offer of a legitimate, nondiscriminatory reason will turn a formula disparate treatment Title VII case into a "dual" or "mixed motive" case.\(^{111}\)

B. "Dual Motive," "Mixed Motive," and "Pretext" Labels as Assessments of the Defendant's Response to the Moving Party's Case

In addition to its use as an assessment of the moving party’s case, the "dual motive" or "mixed motive" label may also be an assessment

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109. See supra note 68-77 and accompanying text.
110. See authorities cited supra note 93.
111. See supra notes 80-94 and accompanying text.
of the defendant's response to the moving party's initial case. Labeling a case as "dual motive" or "mixed motive" case at that time recognizes the validity of the defendant's explanation, at least to the extent of admitting that a legitimate motive played some part in his behavior. As an assessment of the defendant's response to the moving party's case, "dual motive" contrasts with the "pretext" label. If the trier of fact does not credit the defendant's explanation with playing a part in the challenged activity, it labels his explanation a "pretext."112 A case which could be identified as a "dual motive" case at the conclusion of the moving party's evidence may be a "pretext" case after the defendant's response is evaluated because the defendant's response is not credited by the trier of fact. Yet in contrast to the "dual motive" assessment which may be made both at the conclusion of the moving party's case and at the conclusion of the defendant's response to the moving party's case, the "pretext" label is meaningless until the defendants evidence is assessed. In that sense, even Burdine was not a "pretext" case because no assessment was made of the credibility of the defendant's response to the plaintiff's prima facie case.113

The terms "pretext" and "dual motive" are confusing. The NLRB devoted a section in its Wright Line opinion to distinguishing the two in the following manner:

Examination of the evidence may reveal, however, 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. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.114

The Board distinguishes this "pretext" situation from a "dual motive" case:

The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation.115

It all seems so clear. A footnote, however, demonstrates that these differences are more abstract than real.

112. See Behring Int'l, Inc. v. NLRB, 675 F.2d 83, 86 n.3 (3rd Cir. 1982).
113. 450 U.S. at 256-60.
114. 251 N.L.R.B. at 1084.
115. Id.
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. 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. 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. Treating the employer's plea of legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases.116

The question of what burden falls to the employer in response to the General Counsel's case should be answered before the defendant produces his evidence. That decision must, therefore, rest on an assessment of the General Counsel's case, not on the defendant's response. The Board's analysis in essence states that "pretext" cases cannot be distinguished from "dual motive" cases until the sufficiency of the employer's explanation is assessed in comparison with the strength of the General Counsel's showing. The Board misses the twofold use of the "dual motive" label. In the Board's view, treating the employer's response as an affirmative defense eliminates much of the problem with the distinction between the two types of cases.117

The Supreme Court's attempt to gloss over Burdine as a "true" motive, "sole" motive, or "pretext" case in comparison to the section 8(a)(3) "dual motive" case is unsatisfactory because (a) it transforms the McDonnell Douglas formula (which was designed to indicate only a probability) into a finding that an illegal motive existed and (b) it misperceives the two dimensions of the "dual motive" label, which functions both as an assessment of the strength of the moving party's showing of illegal motive and as an assessment of the credibility of the defendant's explanation of his behavior.

These misperceptions allow the Court to dismiss Burdine as a "pretext" case, in contrast to a section 8(a)(3) "dual motive" case, on the rationale that the "pretext" judgment cannot be made until after the defendant's response to the moving party's case, while the "dual motive" label in section 8(a)(3) cases should be used in the context of

116. Id. at n.5.
117. Id. In fact, the Board did try to distinguish pretext cases from dual motive cases after Wright Line when it encountered resistance to its allocation of a burden of proof to the employer. See, e.g., TRW v. NLRB, 654 F.2d 307, 311-12 (5th Cir. 1982). This attempt to evade the burden of proof controversy by asserting that labeling employer reasons "pretexts" minimized the importance of the burden placed on the employer in a particular case was criticized by the courts. See, e.g., id. For a full analysis, see Jackson & Heller, supra note 35, at 756-57.
allocating the burden of proof as an assessment of the General Counsel's case.

CONCLUSION

The effect of *Burdine* must be recognized by the federal courts. Recognition requires a reassessment of the universality of the *McDonnell Douglas* formula. In non-formula cases, a different set of rules must be developed and applied. In simple terms, the quantum of the defendant's response must relate to the strength of the plaintiff's disparate treatment case. *Burdine* sets the standard when the plaintiff relies on the *McDonnell Douglas* formula alone. The defendant need only produce evidence of a legitimate reason for his behavior. But *Burdine* forces plaintiffs to produce more direct evidence of discrimination. The impetus towards more direct evidence of discrimination requires a recognition that the defendant must bear a burden of proof when the plaintiff has shown sufficient direct evidence of intent to discriminate. The initial burden of proof which should be required of plaintiffs who seek to show unlawful employer discrimination is unclear. The possibilities range from proving that the discriminatory motive was the sole factor in the challenged employment decision to requiring only that the plaintiff prove that an unlawful motive played some part in the challenged decision.

The "motivating factor" standard ultimately adopted in section 8(a)(3) cases and validated in *Transportation Management* might be the proper standard. Certainly, no greater burden than showing that the discrimination was a "motivating factor" should be placed on the Title VII claimant. Arguably, a lesser burden should be placed on the Title VII claimant, given the policy concerns involved. Demanding more from the claimant than proof of an illegitimate "motivating factor," whether a "but for cause" or a "sole motive," would create a substantial barrier to Title VII claims and would fail to fulfill the legislative mandate to make victims of past discrimination whole and to prevent future discrimination.

When discrimination is shown to be a motivating factor, the employer must bear the burden of proving that the legitimate reason caused the employment decision in question. The mere production of evidence of a legitimate reason would not rebut the plaintiff's case.

As noted earlier, the Eleventh Circuit has directly addressed the issue of the defendant's burden in non-formula disparate treatment cases. It recognizes that where a case of discrimination is proved by
direct evidence, it is incorrect to rely on a *McDonnell Douglas* rebuttal. If the trier of fact credits the direct evidence, discrimination is proved, and the defendant's response cannot be framed in terms of "mere articulation of other reasons." The Eleventh Circuit requires the defendant to prove "by a preponderance of the evidence that the same decision would have been reached" absent the discrimination. It attributes this standard to the Supreme Court's *Mount Healthy* decision, which is the same standard adopted by the Board in *Wright Line* and approved by the Supreme Court in *Transportation Management* for use in section 8(a)(3) cases.

As the Eleventh Circuit interprets this standard, unless the trier of fact concludes that discrimination "had no relation whatsoever" to the employment decision, the defendant "must establish by a preponderance of the evidence that it would have made the same decision in the absence of the illegal factor." The circuit relegates the articulation of production of evidence response to the formula case. When direct evidence of discrimination is presented, the focus changes; and the question becomes whether or not discrimination is proved.

The Eleventh Circuit's explicit recognition of the distinction between formula disparate treatment cases and those in which direct evidence of discrimination is introduced is refreshing. Imposing a burden of persuasion on the employer in such cases is fair and logical. The Eleventh Circuit, however, has not fully addressed the question of how much the plaintiff must show before the defendant has the burden of proof. It has stated that once an illegal "motive is proved to have been a significant or substantial factor," the employer has the burden of proof. Nevertheless, it has also stated that unless the district court concludes that the employer's illegal "bias had no relation whatsoever to his employment decision," the employer must bear the burden of proof. These are different standards. The court recognized the difficulty of determining how large a part the discrimination must play in the challenged decision before a Title VII violation occurs, but did not feel compelled to resolve that issue in the case before it.

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118. See *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1556 (11th Cir. 1983).
119. *Id.* at 1557 (citing *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982)).
120. *Id.* at 1558 (quoting *Lee v. Russell County Bd. of Educ.*, 684 F.2d at 774).
121. *Id.*
122. *Id.* at 1558.
123. *Id.* at 1557 (quoting *Lee v. Russell County Bd. of Educ.*, 684 F.2d at 774).
124. *Id.* at 1558.
125. *Id.* at 1558 n.9.
legitimate reason rebuts the formula disparate treatment case. As the plaintiff moves away from the formula, the defendant's burden must change proportionately. The Eleventh Circuit has taken a significant step in this direction.