No. 99-536

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

Roger Reeves,

Petitioner,

v.

Sanderson Plumbing Products, Inc.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 140,000 companies and several thousand other

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with this brief with the Clerk of Court.

organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations and employment litigation.[2]

[2] *See, e.g., Kolstad v. American Dental Ass'n,* ___ U.S. ___, 119 S. Ct. 2118 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1995)*; NLRB v. Town & Country Elec., Inc.,* 516 U.S. 85, 116 S. Ct. 450 (1995); *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068 (1994); *ABF Freight Sys., Inc. v. NLRB,* 510 U.S. 317, 114 S. Ct. 835 (1994); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1707 (1993).

According to the United States Department of Justice, Bureau of Justice Statistics, job bias lawsuits filed in United States District Courts soared from 6,936 in 1990 to 21,540 in 1998. Civil rights complaints of all varieties more than doubled from 1990 to 1998 from 18,793 to 42,354. Employment cases alleging discrimination in hiring, promotion, firing, pay, or privileges because of an employee's race, color, religion, sex, national origin, age, or exercise of rights under Title VII accounted for 65% of the overall increase in civil rights cases.[3] Given this explosion in employment litigation, it is imperative for this Court to act as "guardian of the gate" and reaffirm the standard of proof that a disgruntled employee must offer in a discrimination case to survive a motion for summary judgment or judgment as a matter of law. Otherwise, the district and appellate courts will find themselves entangled in every personality conflict, workplace squabble, and adverse employment action, with the resulting trivialization of the laws enacted to eradicate discrimination under Title VII.[4]

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[3] *See* Marika F. X. Litras, Ph.D., *Civil Rights Complaints in U.S. District Courts, 1990-98*, Bureau of Justice Statistics Special Report (Jan. 2000).

[4] *See*, *e.g., Keegan v. Dalton*, 899 F. Supp. 1503 (E.D. Va. 1995). In *Keegan*, the court, in granting summary judgment for the defendant, chastized plaintiff for being yet another entrant in a tiresome parade of meritless discrimination cases. In doing so, the court also entreatied the legal community as a whole "to pause and reflect during their prefiling inquiry and continually as they nurse the case to maturity, whether they can identify any tenable basis for a claim of discrimination other than their client's skin color, age, religion, or gender." 899 F.Supp. at 1515. The court also noted that the legal community's failure to do so would foster a "culture of victims," stating:

> This Court does not have the power to prevent the rain from falling into anyone's life, and is not about to intercede in every work-place squabble. Where, as here, the law offers no remedy, the responsibility for recovering from the occasional affronts of office life falls at the feet of the complainant. Thus, a person who clings steadfastly to the belief that she has been unjustly wronged, when all the evidence suggests otherwise, risks more than a judicial defeat. She also imperils her own

> ability to rise above the normal setbacks of life and renders herself ill-prepared to face the next inevitable pitfall. And this self-inflicted wound is far more damaging.
>
> To those souls who still labor under the heavy hand of illegal work-place discrimination, the doors of this Court will remain ever open. The pretenders, though, must learn to wrest control of their own lives from deleterious circumstances without seeking recourse from the courts.

Id.

This case presents the Court with the opportunity to reaffirm its longstanding rule, most recently pronounced in *St. Mary's Honor Ctr. v. Hicks,* that a plaintiff alleging employment discrimination bears the burden of proving discrimination. It is not enough for a plaintiff merely to present evidence or even to prove the lesser fact that the employer's proffered reason for its conduct is not credible. Rather, the plaintiff must prove, based upon the totality of the evidence, that discrimination is the real reason for the employer's conduct.

The present case is an attack on this longstanding rule. Both the Petitioner and the *amici* supporting his position make it very clear that their goal is to reduce the burden on plaintiffs so that they do not have to prove discrimination. They propose a standard wherein a plaintiff can avoid summary judgment or prevail before the jury with claims that do nothing more than challenge the employer's reason for its conduct. Their standard, however, is not grounded in this Court's precedent, nor in any sound policy designed to root out employment discrimination.

SUMMARY OF THE CASE

Petitioner, Roger Reeves ("Reeves"), worked for Respondent, Sanderson Plumbing Products, Inc. ("Sanderson"), for forty years. Sanderson discharged Reeves for poor performance and record-keeping improprieties. Reeves filed suit claiming age discrimination. The jury found in favor of Reeves, and the district court denied Sanderson's motion for judgment as a matter of law or, in the alternative, for a new trial.

On appeal, the United States Court of Appeals for the Fifth Circuit concluded that Reeves did not prove a violation of the ADEA by a preponderance of the evidence. Specifically, the appellate court found that although a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual, the jury could not

determine that Reeves presented sufficient evidence that his age motivated Sanderson's employment decision. Accordingly, the Fifth Circuit reversed the district court's order and rendered judgment in favor of Sanderson. In so doing, the Fifth Circuit stated:

> . . . whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether

> Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

Op. at 8(a).[5]

SUMMARY OF THE ARGUMENT

From *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), to *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 125 L.Ed. 2d 407, 113 S.Ct. 2742 (1993), this Court's repeated instruction has been that the plaintiff must prove that he has been the victim of intentional discrimination. Some courts, however, have disregarded the Court's clear guidance and have instead allowed plaintiffs to proceed to the jury with evidence that does no more than discredit the employer's reason for its conduct. Thus, in applying the *McDonnell Douglas* framework, these courts have allowed plaintiffs to succeed by showing that an employer's defense was merely pretextual, and without showing that the pretext was a cover for discriminatory motivation and action; and they have been labeled "pretext-only" courts, while those requiring a showing of both falsity and discrimination have been labeled "pretext-plus."[6] The nomenclature, however, is highly misleading and only serves to obscure the focus of the issue. That focus is on the question of whether a plaintiff may prevail merely by challenging the employer's reason (Rule 56 summary judgment stage) or establishing the falsity of the employer's reason (Rule 50 judgment as a matter of law stage).

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[5] References to the Court of Appeals' opinion below are to the page numbers in the Petitioner's Appendix.

[6] In an unhelpful addition to this semantical debate, the *Amicus Curiae*

Hispanic National Bar Association discusses "permissive pretext." *See* Brief, pp. 2, 3, 6-7.

Those courts that have responded affirmatively to the latter question, and thereby have allowed plaintiffs to prevail in employment discrimination cases, erroneously have circumvented the teaching and principle of *McDonnell Douglas* and *St. Mary's*. The positions of such courts cannot be sustained either reasonably or logically. Further, the terms "pretext only" and "pretext plus" that some courts use when considering discrimination cases are inappropriate labels that have no place in the application of the *McDonnell Douglas–St. Mary's* standard.

In the case before the Court, the Fifth Circuit applied the *McDonnell Douglas–St. Mary's* framework correctly, thereby reversing the district court's judgment, and properly dismissed the Petitioner's complaint. In so doing, the appellate court reviewed all the evidence and stated that, although the reason advanced by the Petitioner's employer to justify the Petitioner's discharge arguably could be false, nevertheless the Petitioner had not presented sufficient evidence to establish that the Petitioner was discriminatorily discharged because of his age.

ARGUMENT

I. The Supreme Court Should Not Alter The Established Rule That A Plaintiff Has The Ultimate Burden Of Proving He Is The Victim Of Intentional Discrimination.

In *St. Mary's*, the Court reaffirmed its longstanding approach to employment discrimination cases. Recognizing that a plaintiff will rarely have access to direct evidence of discrimination, the Court held that he may avail himself of the shifting burdens framework established by the Court in *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed.2d 207, 101 S. Ct. 1089 (1981).

Under this approach, a plaintiff must first prove his *prima facie* case by a preponderance of the evidence. *St. Mary's*, 509 U.S. at 506. The *prima facie* case then

creates a presumption of discrimination which places the burden on the employer to come forward with a "legitimate, nondiscriminatory reason" for its conduct. *Id*. at 507. This burden on the employer, however, is only one of production of admissible evidence. *Id*. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id*. (quoting *Burdine*, 450 U.S. at 253).[7] Once the employer articulates its legitimate, nondiscriminatory reason, the "shifted burden of production [becomes] irrelevant." *St. Mary's*, 509 U.S. at 507. The plaintiff then must prove that he was the victim of intentional discrimination:

> The plaintiff then has the "full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," [*Burdine*] at 256, 67 L.Ed.2d 207, 101 S. Ct. 1089, *and* that race was. He retains that "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination."

St. Mary's, 509 U.S. at 507-508 (emphasis supplied).[8]

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[7] The Solicitor General's brief takes the completely unsupportable position that when confronted by a *prima facie* case, there are only two plausible responses -- discrimination or a proffered legitimate, nondiscriminatory reason. Hence, a false or incorrect proffered reason must be discrimination. *See* Brief, pp. 19-20. This faulty rationale would clearly change the employer's burden of production -- to articulate a legitimate, nondiscriminatory reason for its conduct -- to one of persuasion.

[8] The Solicitor General also places too much evidentiary value on the *prima facie* case. *See* Brief, p. 16. Thus, the Solicitor General's position relies on the erroneous assumption that if the evidence supporting the *prima facie* case is sufficient to support a presumption, then it must be sufficient to support a judgment of discrimination. On that premise, the Solicitor General makes the easy, but incorrect next step that because a plaintiff is already armed with sufficient evidence to support his case, when he then proves the falsity of the employer's stated reason for its conduct, he is entitled to a judgment. But the Solicitor General's assumption is directly contrary to the evidentiary purpose of a presumption as stated in Federal Rule of Evidence 301 ("a presumption imposes . . . the burden of going forward with evidence. . . but does not shift to such party the burden of proof. . ."). Moreover, this Court has recognized that absent the presumption derived from this elemental portion of the case, the *prima facie* case in an employment discrimination action has little evidentiary value and "is infinitely less than what a directed verdict

demands." *St. Mary's*, 509 U.S. at 515. Many courts have recognized how easy it is to establish a *prima facie* case. *See, e.g., Hodgens v. General Dynamics Corp.,* 144 F.3d 151, 165 (1st Cir. 1998); *Evans v. Technologies Applications & Service Co.,* 80 F.3d 954, 960 (4th Cir. 1996); *Kahn v. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); and *Villanueva v. Wellesley College*, 930 F.2d 124, 127 (1st Cir. 1991). Therefore, the Solicitor General's bootstrapping argument that continues to rely on the strength of a presumption which eventually drops from the case is faulty, and provides a wholly insufficient basis for the conclusion that the plaintiff should be entitled to a judgment.

Recognizing the above-outlined burdens on the parties, the issue arises over what happens when the plaintiff comes forward with evidence and proves that the employer's articulated reason is not the true reason. *St. Mary's* makes it clear that, "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false and that discrimination was the real reason." *St. Mary's*, 509 U.S. at 517 (Court's emphasis). It is true that the Court in *St. Mary's* stated that the elements of the *prima facie* case and falsity *may* be sufficient to demonstra*te intenti*onal discrimination. *Id.* At 511.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.

However, as the Court further noted, "*there must be a finding of discrimination*." *Id.* at 511 n.4 (Court's emphasis). In other words, there may be cases in which the quantum and quality of evidence of the *prima facie* case (not the presumption), together with the evidence of falsity, will support a finding of discrimination. But, there also may be cases in which this evidence, in the context of the whole case, is not sufficient to sustain the plaintiff's ultimate burden.[9]

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[9] Given this Court's clear requirement that a plaintiff must prove both falsity and real discrimination to show pretext, it is disingenuous for some courts to latch on to the above-quoted language as an excuse to reduce plaintiff's burden to one that only requires

him to show the falsity of the employer's articulated reason. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996) (*en banc*). However, although highly critical of the requirement that a plaintiff prove discrimination in addition to falsity, even the Third Circuit appears to recognize that a given case may present evidence in the *prima facie* case and of falsity that is strong enough "to support a verdict of discrimination." *Id*. at 1069. Therefore, even though the Third Circuit is labeled as a "pretext-only" court, principally because of its vehement rejection of the "pretext-plus" approach, the court seems to follow the *St. Mary's* instruction of examining all the evidence to determine if the evidence will support a finding of discrimination.

The holding in *St. Mary's* rests on the solid foundation that the plaintiff's ultimate burden is to prove intentional discrimination. Accordingly, a lesser showing of only the falsity of the employer's reason is not sufficient to carry the day. *St. Mary's*, 509 U.S. at 512-514. Thus, a court is without authority to impose liability without a positive finding of actual employment discrimination. As this Court stated:

> But nothing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id. at 514-515.

Clearly, it is "absurd" to argue that requiring a finding of actual discrimination in addition to the falsity of the proffered explanation will protect dissembling employers. *Id*. at 521.[10] First, it does not necessarily follow that parties who may not be believed on one

[10] Several of the *amici curiae* briefs contend that this Court's requirement that plaintiffs prove both the falsity of a proffered explanatory reason and actual discrimination will have the effect of encouraging defendant employers to avoid liability by deliberately lying. *See* Brief of the Hispanic National Bar Association, pp. 16-17; Brief of Lawyers' Committee for Civil Rights Under Law, *et al.*, pp. 14-15; Solicitor General's Brief, p. 19. But this argument is neither novel, nor is it compelling. Simply put, the same issue was raised by the dissent in *St. Mary's* and was effectively rebutted by the Court majority. *See St. Mary's*, 509 U.S. at 520-521. And one may not reasonably assume that the only inference that may be drawn from a successful challenge to the proferred reason is a finding of discriminatory motive.

issue are "liars and perjurers" on all issues. *Id.* at 520. Were the rule otherwise, then every civil trial should be followed by the loser's trial for perjury.

Second, as this Court has recognized, where the employer is a company required to present evidence concerning the states of mind of a group of individuals, it simply does not make sense to incorporate concepts of perjury; and even if the employer engages in a deliberate lie, this would be insufficient to establish liability, for as the Court has pointed

out, "Title VII is not a cause of action for perjury." *Id*. at 520, 521. In *Fisher v. Vassar College*, 114 F.3d 1332, 1346 (2nd Cir. 1997), the *en banc* Second Circuit also considered and rejected this very argument, aptly stating:

> But factfinding (and review for clear error) are not moral judgments; they are exercises in logic as applied to the observation of human behavior. The issue is not whether we disapprove of the defendant's lack of candor; it is whether the plaintiff has proven discrimination. If a party's conduct fails to give logical support to the finding of a fact in issue, that fact may not be found merely because we disapprove of the conduct. A court should not enter judgments for unproved, nonexistent discrimination to express its disapproval of a party's giving inaccurate explanations in court.

Third, to single out one employer falsehood -- that offering an explanation for its conduct -- as entitled to decisive weight just makes no sense. This Court itself took cognizance of the matter in the context of lying plaintiffs and noted that "... the plaintiff is permitted to lie about absolutely *everything* without losing a verdict he otherwise deserves." *St. Mary's*, 509 U.S. at 521 (Court's emphasis).

Finally, *St. Mary's* does not require that the plaintiff present direct evidence of discrimination. 509 U.S. at 518-519. For a plaintiff must only produce evidence of intentional discrimination sufficient to sustain a verdict in his favor. Obviously, the whole point of the *McDonnell Douglas* framework is that the plaintiff may not have direct evidence of discrimination. Nonetheless, it has never been suggested that he should be foreclosed from court relief on this basis. To the contrary, the plaintiff has the whole spectrum of circumstantial evidence and statistical evidence from which to draw and thus satisfy the burden of proof placed upon him.

In sum, *St. Mary's* merely established an elementary rule that a plaintiff, to succeed, must prove intentional discrimination. If his evidence in developing a *prima facie* case is strong enough, he may rely on it in addition to evidence that the employer's proffered

reason is false. However, if the *prima facie* case is weak, or if the proof of falsity is itself conjectural, then the plaintiff may not prevail on this evidence alone. Accordingly, we respectfully submit that the Court should now reaffirm this basic premise of employment discrimination law, and should reject the rationale of those courts that would allow a plaintiff to prevail merely because he succeeds in proving the employer's reason to be false.

The Fifth Circuit, we further submit, applied the correct standard in the present case. The Company maintained that Reeves was terminated for poor record keeping. The appellate court concluded, however, that Reeves was able to present sufficient evidence to cast doubt on that reason. Nonetheless, Reeves did not prevail because he did not offer the quantum and quality of evidence necessary to prove that the real reason for his termination was age discrimination. Op. at 9(a)-10(a).[11] Thus, the appellate court reasoned that age-related comments by one of three decision makers were not made in the context of the termination, and that the other two decision makers, who were not tainted by such comments, were themselves both over age 50. Further, the court noted that two other employees were also accused of improper record keeping and one was only age 35. Finally, the evidence established that numerous company managers who were not terminated were over age 50, including several over age 60.[12] In this posture of the

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[11] *See supra* note 5.

[12] The *Amicus Curiae* National Employment Lawyers Association criticizes courts for using what it terms "logically dubious counter-inferences." *See* Brief, pp. 24-29. NELA is thereby referring to employer defenses which have been recognized in virtually every circuit - defenses such as the "same actor defense" and the "same group defense." NELA's position is that because plaintiffs have difficulty winning cases, the court should change, and lessen, their burden of showing pretext without having to show discrimination. NELA would further strengthen the plaintiff's position by eliminating employer defenses. Contrary to NELA's characterizations, these defenses are not "silver bullets." They are simply logical inferences which, while strong if unrebutted, are easily rebutted with sufficient, relevant evidence. Plaintiffs often lack this evidence, not because they cannot obtain it, but because it does not exist. Nonetheless, merely because a plaintiff does not

case, the trial court was properly reversed, and the Fifth Circuit properly held that the plaintiff had not presented sufficient evidence to prove intentional discrimination.[13]

II. The Supreme Court Should Reject The Erroneous Distinction Between Pretext-only And Pretext-plus Courts.

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have evidence to rebut a proffered defense is certainly not a sufficient reason to deny the employer the opportunity to use that defense, or not to accord it its logical weight under the particular circumstances of the case.

[13] The Solicitor General contends that the Fifth Circuit acted improperly because it overruled a jury verdict in favor of Reeves. *See* Brief, pp. 26-30. The contention, of course, is untenable. Were the Solicitor General's argument in this respect given weight, the effect necessarily would be to undermine, if not eliminate entirely, explicit powers given to courts of appeals by Rule 50(b) of the Federal Rules of Civil Procedure -- *i.e.*, the powers, under the Rule's paragraphs (1)(B) and (C), to order a new trial or to direct entry of judgment as a matter of law "*if a verdict was returned* (emphasis supplied)".

Petitioner in the present case argues that there is a split in the circuits on the issue of pretext-plus or pretext-only. Commentators have written extensively on the subject.[14] The circuits do seem to fall into at least two camps on the issue -- often labeling themselves as one or the other.[15] There is even now a third group, calling itself "hybrid-pretext."[16] Nonetheless, neither the distinction between these terms, nor the premise that underlies them, is well founded and should be rejected by the Court.

There is only one appropriate term that captures the applicable rule -- *i.e.*, "pretext for discrimination." Thus, "pretext-only" is an inappropriate term because it omits the second half of the equation and does not answer the question of "pretext for what." The same is true of the term "pretext-plus." Significantly, that term does not appear in the Court's opinion in *St. Mary's*, because the premise of the opinion is that "pretext for discrimination" requires, now as it always has, both elements -- falsity and discrimination. Thus, there can be no "plus." It was rather the dissent which used the "plus" term in a pejorative sense to criticize the majority opinion (*St. Mary's,* 509 U.S. at 535-536), arguing

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[14] *See, e.g.*, R. Alexander Acosta and Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases,* 2 Tex. Rev. L. & Pol. 207 (1998).

[15] Those circuits which purport to follow the "pretext-plus" approach include *Vaughan v. Metrahealth Co.,* 145 F.3d 197 (4th Cir. 1998); *Hidalgo v. Overseas Condado Ins.,* 120 F.3d 328 (1st Cir. 1997); *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc); and *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc).

Those circuits which purport to follow the pretext-only include *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997); *Sheridan v. E.I. DuPont de Nemours & Co.,* 100 F.3d 1061 (3d Cir. 1996) (en banc); *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 120 (7th Cir. 1994); and *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993).

[16] Those circuits which have been labeled as following a "hybrid-pretext" approach are *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*), and *Rothmeier v. Investment Advisors, Inc.,* 85 F.3d 1328 (8th Cir. 1996).

that by requiring the plaintiff to show that discrimination was the real reason for the employer's action, the Court has somehow added to the plaintiff's burden. *St. Mary's*, we submit, correctly rejected this approach.

Importantly, moreover, most of the appellate courts that have adopted the "pretext-plus" approach, even if their adoption has been explicit, have done so in a way that demonstrates their commitment to examine all of the evidence to determine if the plaintiff has made a showing of intentional discrimination. For example, in *Gillins v. Berkeley Elec. Co-op, Inc.*, 148 F.3d 413 (4th Cir. 1998), the Fourth Circuit assumed, as did the Fifth Circuit here, that the plaintiff made a sufficient showing that the reason offered by the employer for his demotion was false. Nonetheless, the plaintiff did not prevail because he offered no evidence that the real reason for the demotion was discrimination, and, the employer had previously demoted two white employees to the same position. Thus, there was no evidence to suggest that the plaintiff was discharged because of his race, and therefore, summary judgment was appropriately entered.

In another case, the Eighth Circuit has tried to carve out a middle ground between "pretext-plus" and "pretext-only". *See Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328 (8th Cir. 1996), where that court stated:

> Thus, the [*St. Mary's*] Court recognized that in some cases the overall strength of the *prima facie* case in conjunction with evidence of pretext will be sufficient to permit a finding of intentional discrimination, while in other cases the *prima facie* case in tandem with evidence of pretext will not be sufficient to permit a finding of intentional discrimination.

Id. at 1334-1335.[17] On this standard, the court held that the plaintiff failed to meet his burden of proof; and applying the "same actor defense," the court said that "[t]hese facts

[17] For other circuits that have adopted this so-called hybrid-pretext approach,

run counter to any reasonable inference of discrimination based on age." *Id*. at 1337. Accordingly, because the plaintiff failed to offer any evidence to rebut the latter defense or to establish that he was the victim of discrimination, the court found for the employer.

Comparing the *Rothmeier* and *Gillins* decisions, it is clear that both courts did the same thing. Both presumed a *prima facie* case and sufficient evidence of falsity; and both then looked at the evidence and concluded that there was an insufficient basis for finding unlawful discrimination. Oftentimes, the labels of "pretext-plus" or "hybrid-pretext" are meaningless. Taken together, these cases amply demonstrate that there is no need to resort to labels which obscure the crucial inquiry, that is, whether the plaintiff has in fact proven intentional discrimination. The Court, we submit, should adhere to its rule in *St. Mary's*, and thereby maintain the focus on an examination of whether the plaintiff has submitted sufficient evidence to demonstrate that he was indeed the object of intentional discrimination.

CONCLUSION

The Court should affirm the Fifth Circuit below and in so doing, affirm, whether by means of a sufficiently strong *prima facie* case or by other evidence, direct or circumstantial, that the correct inquiry is whether the plaintiff has proven by a preponderance of the evidence that he is the victim of intentional discrimination. In so

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see Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*), and *Woods v. Friction Materials, Inc*., 30 F.3d 255 (1st Cir. 1994). *See also* Pettigrew, *Employment - Aka v. Washington Hosp. Ctr.: The District of Columbia Circuit Seeks Middle Ground in the Pretext-Only/Pretext-Plus Debate*, 29 U. Mem. L. Rev. 863 (1999).

doing, the Court should make clear that the falsity of an employer's proferred defense does not, in and of itself, establish the requisite proof of discrimination.

Dated this _____ day of February, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court and Counsel of Record in this case for the Chamber of Commerce of the United States ("the Chamber") hereby certifies that three (3) copies of the Chamber's Brief *Amicus Curiae* have this day, February 7, 2000, been served by first class mail, postage prepaid, upon the following at the addresses listed below:

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The undersigned further states that all parties required to be served have been served.

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