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Civil Rights - Employment Discrimination: Modifying Federal Standars to Reflect Principles of State Law: The North Dakota Supreme Court's Examination of the Hicks Rationale Prompts the Court to Customize Its Own Standard to Review State-Based Employment Discrimination Claims

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CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION: MODIFYING FEDERAL STANDARDS TO REFLECT PRINCIPLES OF STATE LAW: THE NORTH DAKOTA SUPREME COURT'S EXAMINATION OF THE *HICKS* RATIONALE PROMPTS THE COURT TO CUSTOMIZE ITS OWN STANDARD TO REVIEW STATE-BASED EMPLOYMENT DISCRIMINATION CLAIMS

Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225 (N.D. 1993)

I. FACTS

Jocelyn Martin had been employed by the Provident Life Insurance Company (Provident Life) for approximately 16 years[1] when her employment was terminated as part of a massive reorganization of Provident Life by its parent company, United Services Life Insurance Company.[2] Martin filed suit against Provident Life, claiming that Provident Life had terminated her because of her gender in violation of the Human Rights Act of North Dakota.[3] The district court, applying the *McDonnell Douglas* standard,[4] found that Provident Life was not motivated by discriminatory reasons and therefore ruled in favor of Provident Life.[5] Martin appealed

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1. Brief for Appellee at 1, Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225 (N.D. 1993) (No. 920350).

2. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 226 (N.D. 1993). Jocelyn Martin's co-worker, Phyllis Schweigert, was also terminated by Provident Life. Brief for Appellant at 1, Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225 (N.D. 1993) (No. 920350). Schweigert joined Martin in the original sex discrimination action and also alleged a separate claim of age discrimination. *Id.* Schweigert, however, did not appeal the district court's decision in favor of Provident Life. *Id.*

3. *Schweigert*, 503 N.W.2d at 226. The Human Rights Act of North Dakota is codified in chapter 14-02.4 of the North Dakota Century Code. N.D. CENT. CODE Ch. 14-02.4 (1991); *see also* 1983 N.D. Laws 173 (Human Rights Act); *State Bar Association of North Dakota, The North Dakota Human Rights Act and You* 1 (1985) [hereinafter SBAND] (referring to ch. 14-02.4 as the Human Rights Act of North Dakota). The Act provides that

> [i]t is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer . . . .

N.D. CENT. CODE § 14-02.4-01 (Supp. 1993).

4. *Schweigert*, 503 N.W.2d at 229. The *McDonnell Douglas* standard was created in *McDonnell Douglas v. Green* to review intentional discrimination claims pursuant to Title VII of the Civil Rights Act. McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973). The court, in *Schweigert*, refers to the *McDonnell Douglas* standard as the *McDonnell Douglas/Burdine* standard. *Schweigert*, 503 N.W.2d at 229. However, this Case Comment will follow the United States Supreme Court's language and not include *Burdine* when mentioning the *McDonnell Douglas* framework. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (labelling the disparate treatment standard without mentioning *Burdine*). *See also infra* notes 23-42 and accompanying text (explaining the *McDonnell Douglas* standard).

5. *Schweigert*, 503 N.W.2d at 226.

the district court's ruling and claimed that the district court's finding was clearly erroneous.[6]

On appeal, Martin argued that Provident Life's discriminatory motivation for terminating her was evidenced by the method Provident Life used to terminate her,[7] the higher rate of severance pay that Provident Life paid to the male employees that were terminated,[8] and the fact that her responsibilities were assigned to a male employee who had not been employed by Provident Life as long as Martin.[9] On review, the North Dakota Supreme Court *held* that the *McDonnell Douglas* standard, which the trial court used to analyze Martin's claim, was partially inconsistent with state evidentiary principles.[10]

Under *McDonnell Douglas*, the presumption of discrimination, which is created when a plaintiff satisfies a prima facie case, shifts only the burden of *production*.[11] Conversely, Rule 301 of the North Dakota Rules of Evidence mandates that presumptions have the effect of shifting the burden of *persuasion*.[12] Accordingly, the supreme court announced a new standard for analyzing claims pursuant to the Human Rights Act of North Dakota.[13] The new standard increases an employer's burden in an employment discrimination case by shifting the burden of persuasion to the employer to disprove discriminatory intent.[14] Applying the new standard, the supreme court ruled that Provident Life had sufficiently satisfied its burden of proving that it had not discriminated against Martin, and thus affirmed the district court's finding.[15]

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6. *Id.* at 230.

7. *Id.* Martin claimed that she and other female employees were "brusque[ly]" informed of their termination and were only given ten-days notice before their employment ended. *Id.* Martin claimed that higher ranking male employees were more respectfully informed of their terminations and were given more than ten-days notice with the option of retiring early. *Id.* The district court held that the difference in treatment was because of the "insensitivity of the officer" that terminated Martin and not because of the company's discriminatory motives. *Id.* at 230-31.

8. *Id.* at 231. Martin showed that women who were terminated received "one week's severance pay for each year of service . . . [while] the discharged men were paid at the rate of one and one-half week's for each year of service." *Id.* The district court reconciled this difference by finding that the discharged men were "elected officers" of the company and the discharged women were not. *Id.* The district court concluded that the difference in severance pay was based on a "gender-neutral policy which awarded extra severance pay to elected officers." *Id.*

9. *Id.* at 231. The district court found that Provident Life favored the male employee over Martin because the male employee was better able to perform all of the necessary functions and not because of Martin's gender. *Id.*

10. *Schweigert*, 503 N.W.2d at 229.

11. *Id.* at 228; *see infra* notes 28-36 and accompanying text (explaining the three stages of the *McDonnell Douglas* standard).

12. *Schweigert*, 503 N.W.2d at 228-29. For the text of Rule 301, *see infra* note 80.

13. *Id.* at 229.

14. *Id.*

15. *Id.* at 229-32.

II. LEGAL HISTORY

A. TITLE VII AND THE *McDONNELL DOUGLAS* STANDARD

Title VII of the Civil Rights Act of 1964 restricts employment discrimination which is based on race, color, religion, sex, and national origin.[16] Enforcement of this Act is largely dependent on two types of civil claims that allow a plaintiff to sue an employer for proscribed employment discrimination.[17] The two types of claims are called "disparate impact" and "disparate treatment."[18] This comment will focus primarily on disparate treatment because it is the only type of claim that was asserted in *Schweigert*.[19]

Disparate treatment involves an employer's intentional mistreatment of an employee (or applicant) because of that person's race, color, religion, sex, or national origin.[20] The focus in a disparate treatment claim is on proving the employer's discriminatory intent.[21] Historically, plaintiffs have struggled to satisfy this burden because intent is a mental process and there is seldom direct evidence of a person's mental process.[22]

The United States Supreme Court recognized the plaintiff's difficulty in producing direct evidence to link a discriminatory intent with an employment practice.[23] The Court, therefore, in *McDonnell Douglas v. Green*,[24] established the *McDonnell Douglas* standard to enable a plaintiff to use circumstantial evidence to prove an employer's discriminatory

16. 42 U.S.C. § 2000e-2 (1988 & Supp. III 1991).

17. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1249 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

18. *Id.*

19. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 229 (N.D. 1993). Disparate impact occurs when an employer uses a "facially neutral" practice that unintentionally affects a protected group "more harshly" than nongroup members. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977). The focus in a disparate impact claim is on the actual consequences or impact of the employment practice regardless of what the employer intended. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

The North Dakota Supreme Court has previously reviewed a claim of disparate impact, but has rejected that claim without extensive analysis. *See* Kent v. Sawyer Public School Dist. 16, 484 N.W.2d 287, 290-91 (N.D. 1992) (finding that the plaintiff's claim of disparate impact was not supported by sufficient evidence).

Other types of claims that are used to enforce Title VII are retaliation, constructive discharge, present effects of past discrimination, and religious discrimination. RICHEY, *supra* note 19, at A-12 to A-17.

20. C. RICHEY, FEDERAL JUDICIAL CENTER, MANUAL ON EMPLOYMENT DISCRIMINATION LAW & CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS A-1 (Jan. 1988 ed.); *see* 42 U.S.C. §§ 2000e—2000e-17 (1988 & Supp. III 1991) (listing the protected characteristics and the prohibited treatment covered by the Act).

21. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1249 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

22. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). "Direct evidence is evidence which, if believed," proves a fact at issue without additional proof or inferences. 1 JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE § 185 at 777 (4th ed. 1992).

23. *See McDonnell Douglas v. Green*, 411 U.S. 792, 801 (1973) (recognizing the subtleness of discriminatory practices).

24. 411 U.S. 792 (1973).

intent.[25] The *McDonnell Douglas* standard, as it was subsequently characterized by the Court in *Texas Dept. of Community Affairs v. Burdine*,[26] is a three-stage analytical formula that directs the sequence and nature of the burdens of proof for both parties in a disparate-treatment action.[27]

In stage I, the plaintiff must prove a prima facie case of discrimination.[28] This involves showing that: 1) the plaintiff is a member of a protected group, 2) the plaintiff applied and was qualified for an available position, 3) the plaintiff did not receive the position, and 4) the employer proceeded to search for applicants with qualifications similar to those of the plaintiff.[29] By proving these elements which establish a prima facie case, the plaintiff creates a presumption that the employer's reasons for its employment action were discriminatory.[30]

In stage II, with the prima facie case already established, the burden of *production* shifts to the employer and requires him or her to rebut the presumption of discriminatory intent by articulating a nondiscriminatory reason for its employment action.[31] This articulation must be established with admissible evidence[32] and must clearly explain the employer's non-

25. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981). Circumstantial evidence is evidence of an indirect fact that requires an additional inference to prove the fact in question. STRONG ET AL., *supra* note 22, at 777.

26. 450 U.S. 248 (1981).

27. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

28. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

29. *Id.* The prima facie case is the "plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *Burdine*, 450 U.S. at 254 n.7 (citing 9 J. WIGMORE, EVIDENCE § 2494 (3d ed. 1940)). The difficulty of proving a prima facie case under the *McDonnell Douglas* formula is not considered to be an "onerous" task. *Burdine*, 450 U.S. at 253. However, "in other contexts, a prima facie case only requires production of enough evidence to raise an issue for the trier of fact," whereas under the *McDonnell Douglas* formula, "the plaintiff . . . [must] actually establish[ ] the elements of the prima facie case . . . by a preponderance of the evidence." St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2757 (1993) (Souter, J., dissenting).

30. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983). The most common reason "for the creation of presumptions is probability . . . . [J]udges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." 2 JOHN WILLIAM STRONG ET AL., ED., MCCORMICK ON EVIDENCE § 343, at 454-55 (4th ed. 1992). Under *McDonnell Douglas*, the plaintiff "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection"—that there was no position available for the plaintiff and that the plaintiff was not qualified. *Burdine*, 450 U.S. at 253-54. With the most common nondiscriminatory reasons eliminated, the Court presumes that the plaintiff was discriminated against. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). In *Furnco*, the Court stated:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only 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 impermissible consideration such as race.

Id. (citations omitted) (emphasis in original).

31. *McDonnell Douglas*, 411 U.S. at 802. *See infra* note 94 (explaining and comparing the burden of production and the burden of persuasion).

32. *Burdine*, 450 U.S. at 255. The burden of production, therefore, cannot be met with "an answer to the complaint or by argument of counsel." *Id.* at 255 n.9.

discriminatory reasons for its actions.[33] If the employer is unable to rebut the presumption, the presumption compels the factfinder to conclude that the employer was motivated by discriminatory reasons.[34] Should the employer adequately produce a nondiscriminatory reason for its employment decision, the presumption is rebutted, and the *McDonnell Douglas* inquiry advances to stage III, where the burden shifts back to the plaintiff.[35] The plaintiff must then prove by a preponderance of the evidence that the employer's proffered reason is pretext for discrimination.[36]

Until recently, the federal circuits were divided over the extent of the plaintiff's burden during the third stage of the *McDonnell Douglas* standard.[37] Some circuits ruled that a plaintiff could satisfy his or her burden by proving *either* that the nondiscriminatory reason proffered by the employer was false *or* that the true reason for the adverse treatment was discriminatory.[38] Other circuits required a plaintiff to prove *both* that the reason proffered by the defendant was false *and* that the true reason was discriminatory.[39]

Even with its "unsettled" third stage, the *McDonnell Douglas* formula's ability to focus the circumstantial evidence and "elusive" facts[40] that accompany claims of employment discrimination caused it to "gain[ ] wide acceptance" among both federal[41] and state[42] courts to analyze non-Title VII based employment discrimination claims.

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33. *Id.* at 255. The purpose of the "clarity" requirement is "to [frame] the factual issue . . . so that the plaintiff will have a full and fair opportunity to demonstrate pretext [in stage III]." *Id.* at 255-56.

34. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 (1993).

35. *Burdine*, 450 U.S. at 253.

36. *Id.*

37. *See Hicks*, 113 S. Ct. at, 2750 (reviewing the different interpretations among the federal circuits of the third stage of the *McDonnell Douglas* standard).

38. *See, e.g.*, Fite v. First Tennessee Prod. Credit Ass'n, 861 F.2d 884, 890-91 (6th Cir. 1988) (allowing the plaintiff to only discredit the employer's proffered reasons for its employment action).

39. *See, e.g.*, Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) (requiring a plaintiff to both discredit the employer's proffered reason and prove that the true reason was discriminatory); *see also Hicks*, 113 S. Ct. at 2750 (reviewing the different circuits' interpretations of the third stage of the *McDonnell Douglas* standard).

40. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981).

41. *Hicks*, 113 S. Ct. at 2757 (Souter, J., dissenting); *see Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983) (employing the *McDonnell Douglas* standard to analyze claims brought pursuant to the Age Discrimination in Employment Act).

42. *See* Sigurdson v. Isanti County, 386 N.W.2d 715, 716 (Minn. 1986) (establishing the *McDonnell Douglas* standard for state employment discrimination claims in Minnesota); Mixon v. Fair Employment and Housing Comm'n., 192 Cal. App. 3d 1306, 1317 (1987) (recognizing the *McDonnell Douglas* standard as the proper standard for state discrimination claims in California); Puetz Motor Sales Inc. v. Labor and Indus. Review Comm'n, 376 N.W.2d 372, 374 (Wis. App. 1985) (recognizing the *McDonnell Douglas* standard as the proper standard for state discrimination claims in Wisconsin).

B. THE HUMAN RIGHTS ACT OF NORTH DAKOTA: *McDONNELL DOUGLAS* STANDARD ADOPTED TO REVIEW STATE-BASED DISPARATE TREATMENT CLAIMS IN *MOSES V. BURLEIGH COUNTY*

Most states have enacted employment discrimination statutes patterned after federal civil rights laws.[43] The Human Rights Act of North Dakota was enacted to "complement" federal antidiscrimination laws and to create a state remedy for victims of employment discrimination.[44] The Act authorizes the North Dakota Supreme Court to develop the proper procedures for making determinations of liability.[45]

The North Dakota Supreme Court first reviewed an employment discrimination claim under the Act in *Moses v. Burleigh County*.[46] In *Moses*, a sheriff's deputy sued the sheriff of Burleigh County alleging race and sex discrimination.[47] In reversing and remanding the trial court's dismissal of Moses' claim, the supreme court used language that suggested its adoption of the *McDonnell Douglas* standard.[48]

The supreme court ordered the trial court to require the defendant "to show a legitimate and nondiscriminatory reason" for its employment practice and to then provide the plaintiff an opportunity to show the "claimed reason was in fact a pretext."[49] The majority's apparent adoption of the *McDonnell Douglas* standard[50] prompted a debate between Justices VandeWalle and Levine over the suitability of using the federal standard to review state-based claims.[51]

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43. RICHEY, *supra* note 20, at H-1. Title VII of the Civil Rights Act of 1964 provides the most comprehensive protection for workers against proscribed discrimination. *See* 42 U.S.C. § 2000e-2000e(17) (1988 & Supp. III 1991) (providing protection for classes of workers based on race, color, religion, sex, or national origin). Additionally, other federal acts provide other types of protection for workers. *See* 29 U.S.C. § 206(d) (1988) (Equal Pay Act of 1963) (proscribing salary discrimination on the basis of gender); *see also* 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992) (Age Discrimination in Employment Act of 1967) (proscribing employment discrimination on the basis of age).

44. SBAND, *supra* note 3, at 1-2.

45. N.D. CENT. CODE § 14-02.4-20 (1991).

46. 438 N.W.2d 186 (N.D. 1989). Although other employment discrimination claims reached the supreme court prior to *Moses*, those claims were rejected without extensive analysis. *See, e.g.*, Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 796 (N.D. 1987) (ruling that the plaintiff failed to show that she was a member of a protected class under the statute's definition); Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 215 (N.D. 1987) (finding that the plaintiff had failed to meet his prima facie case of age discrimination).

47. Moses v. Burleigh County, 438 N.W.2d 186, 187 (N.D. 1989).

48. *Id.* at 189 n.3.

49. *Id.* at 191-92.

50. *Id.* at 189 n.3. The majority only mentioned the *McDonnell Douglas* standard by name in its recognition of Moses' argument in favor of using the standard. *Id.*

51. *See id.* at 194-97 (VandeWalle, J., concurring in part and dissenting in part) (criticizing the use of the *McDonnell Douglas* standard for state employment discrimination claims) and (Levine, J., concurring in part and dissenting in part) (supporting the majority's use of *McDonnell Douglas* in *Moses* and advocating its use in future state employment discrimination claims).

Justice VandeWalle objected to the majority's apparent endorsement of the *McDonnell Douglas* standard.[52] Justice VandeWalle's main criticism was that the presumption created under the *McDonnell Douglas* standard (via the prima facie case) could be too easily proven.[53] Justice VandeWalle asserted that the North Dakota Supreme Court should instead develop its own standard for reviewing intentional discrimination cases "onthe basis of [its] own jurisprudence."[54] Justice Levine disagreed with Justice VandeWalle and argued that the "incorporation" of the *McDonnell Douglas* formula was "useful" because of the "obvious similarities" between the federal and state civil rights laws.[55]

Although it seemed clear that the court had adopted the *McDonnell Douglas* standard,[56] it was not clear what the extent of a plaintiff's burden would be in stage III because the court did not specify how it had interpreted this stage of the standard.[57] With this question left unanswered, the extent of the plaintiff's burden in stage III of the *McDonnell Douglas* standard seemed as unresolved in North Dakota as it was among the federal circuits.

C. *ST. MARY'S HONOR CENTER V. HICKS* RESOLVES THE FEDERAL CONTROVERSY OVER STAGE III

The United States Supreme Court, in *St. Mary's Honor Center v. Hicks*,[58] resolved the controversy among the federal circuits over the extent of a plaintiff's burden in stage III of the *McDonnell Douglas* stan-

52. Moses v. Burleigh County, 438 N.W.2d 186, 195 (N.D. 1989) (VandeWalle, J., concurring in part and dissenting in part).

53. *Id.* Justice VandeWalle argued that if North Dakota patterns its standard after a federal standard, it should utilize the standard established in Batson v. Kentucky, 476 U.S. 79 (1986). *Id.* That standard, Justice VandeWalle stated, would require a plaintiff to show a "*pattern* . . . of failure to hire qualified minority applicants" to create an inference of discrimination. *Id.* at 196 (emphasis added). Justice VandeWalle asserted that "[w]ithout more, [he did] not believe the mere fact that *a* minority applicant did not receive the position would raise such an inference." *Id.* (emphasis added).

54. *Id.* at 196.

55. *Id.* at 197 (Levine, J., concurring in part and dissenting in part). Justice Levine argued that the court should only employ the *McDonnell Douglas* standard when it was useful to do so and not "indiscriminately." *Id.* Justice Levine stated that "where federal law has ironed out some wrinkles, we should take advantage of that experience . . . . [W]e are in the enviable position of incorporating the wheat, while rejecting the chaff." *Id.*

56. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 227 (N.D. 1993) (stating the court's belief that *McDonnell Douglas* had been adopted in *Moses*).

57. *See* Moses v. Burleigh County, 438 N.W.2d 186, 191-92 (N.D. 1989) (instructing the trial court on what burdens the plaintiff and defendant would have on remand). The court stated that, on remand, "Moses will be free to show that any claimed reason was in fact a pretext." *Id.* The court's use of "pretext" rather than "pretext for discrimination" does not necessarily signal the court's belief that a plaintiff has only the burden of proving that the defendant's proffered reason was false. *Compare* St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2752 n.6 (1993) (quoting McDonnell Douglas v. Green, 411 U.S. 792, 804 (1972) in recognizing that "pretext" in the employment discrimination context means "'pretext for the sort of discrimination prohibited by [law]'" (1972)) *with* Mister v. Illinois Co., 832 F.2d 1427, 1435 (7th Cir. 1987) *cert. denied*, 485 U.S. 1035 (1988) (defining "pretext" as meaning only that the proffered reason is false).

58. 113 S. Ct. 2742 (1993).

dard.[59] In *Hicks*, Melvin Hicks, an African-American,[60] was demoted and later terminated by the St. Mary's Honor Center (St. Mary's).[61] Hicks filed a Title VII-based disparate treatment claim against St. Mary's, alleging that he had been demoted and terminated because of his race.[62] The district court, relying on the *McDonnell Douglas* standard,[63] ruled against Hicks even though he had successfully discredited both of St. Mary's two proffered nondiscriminatory reasons.[64]

The two reasons St. Mary's proffered for Hicks' dismissal were "the severity and the accumulation of [rule] violations committed by [Hicks]."[65] Hicks subsequently (in stage III) proved that St. Mary's two proffered reasons were false by showing that "others who committed more serious violations either were not disciplined or were treated more leniently."[66] Although St. Mary's proffered reasons were discredited, the district court was not convinced that St. Mary's unequal treatment of Hicks was due to Hicks' race.[67] The district court stated that Hicks had failed to satisfy the "ultimate burden" of proving that his termination "was racially rather than personally motivated" and therefore, ruled in favor of St. Mary's.[68]

On appeal, the Eighth Circuit Court of Appeals reversed the district court's holding and ruled that Hicks had satisfied his "ultimate burden" of persuasion when he proved that St. Mary's proffered reasons were false.[69] The Eighth Circuit reasoned that the presumption of discriminatory intent cannot be rebutted by nondiscriminatory reasons that are ultimately discredited.[70] The court held that when a plaintiff successfully discredits the employer's proffered reasons, the "plaintiff [is] entitled to judgment as a matter of law."[71]

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59. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2750 (1993).

60. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1246 n.1 (E.D.Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

61. *Id.* at 1245.

62. *Id.* at 1249. A plaintiff, in a discriminatory termination case, must show that the plaintiff: "1) . . . is within a protected . . . group . . .; 2) [t]hat he was . . . discharged; 3) [t]hat he was replaced by a . . . person or persons outside the protected . . . group; and 4) [t]hat he was qualified to do the job." Loeb v. Textron, Inc., 600 F.2d 1003, 1009 n.2 (1st Cir. 1979). The district court found that Hicks had "proved a prima facie case of race discrimination." *Hicks*, 756 F. Supp. at 1249. *See also Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983) (employing the *McDonnell Douglas* standard to analyze claims brought pursuant to the Age Discrimination in Employment Act).

63. *Id.* at 1249.

64. *Id.* at 1252.

65. *Id.* at 1250.

66. Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

67. *Hicks*, 756 F. Supp. at 1252.

68. *Id.* at 1251-53.

69. *Hicks*, 970 F.2d at 492-93.

70. *Id.*

71. *Id.* at 492.

The United States Supreme Court granted certiorari to resolve the debate among the federal circuits concerning the plaintiff's burden during stage III of the *McDonnell Douglas* standard.[72] The Court stated that an employer cannot be liable for "discriminatory employment practices unless . . . an appropriate factfinder determines . . . that the employer has unlawfully discriminated."[73] The Court asserted that the plaintiff's burden cannot be substituted with the "lesser" showing that the employer's explanation for its employment action is false.[74]

Accordingly, the Supreme Court reversed the Eighth Circuit's ruling[75] and held that not only does a plaintiff in a disparate-treatment case have the burden of proving that the employer's reason is false, but he or she must also prove the "ultimate fact"—that the true reason for the employment decision was discriminatory.[76] The Court stated that when the employer's proffered reasons are proven false, courts may "infer the ultimate fact of . . . discrimination" but are not compelled to do so as a matter of law.[77] The Court asserted that this holding is consistent with its previous rulings concerning *McDonnell Douglas*[78] and is in accordance

72. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2748-50 (1993); *see supra* notes 36-42 and accompanying text (explaining the different interpretations of stage III of the *McDonnell Douglas* standard).

73. *Hicks*, 113 S. Ct. at 2751 (emphasis in original).

74. *Id.*

75. *Id.* at 2756.

76. *Id.* at 2747.

77. *Hicks*, 113 S. Ct. at 2749.

78. *Id.* The Court in *Hicks* stressed that despite the burden shifting under *McDonnell Douglas*, "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Id.* at 2753 (citation omitted). The Court acknowledged that some "dicta" in *Burdine* may have caused confusion as to the extent of the plaintiff's burden in stage III. *Id.* at 2752 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)). The "dicta" in *Burdine* suggests that plaintiffs may satisfy their burden in stage III "indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)) (citation omitted). The Court in *Hicks* discredited this passage by noting that other language in *Burdine* stated that "'[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.'" *Hicks*, 113 S. Ct. at 2749 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

The *Hicks* Court stated that any confusion caused by *Burdine* should have been expelled by the Court's subsequent holding in *United States Postal Serv. Bd. of Governors v. Aikens*. *Hicks*, 113 S. Ct. at 2753 (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)). The Court in *Aikens* characterized the "dicta" from *Burdine* as meaning that "'the . . . court must decide which party's explanation . . . it believes.'" *Id.* at 2754 (citing *Aikens*, 460 U.S. at, 714). The *Hicks* Court asserted that the *Aikens* characterization dispelled any doubt created by *Burdine* by confirming that "it is not enough . . . to *dis*believe the employer['s explanation.]" *Id.* (citing *Aikens*, 460 U.S. at 714 (emphasis in original).

The dissent in *Hicks* disputed the majority's interpretation of *McDonnell Douglas*' progeny. *Id.* at 2765 (Souter, J., dissenting). The dissent asserted that the *Aikens* Court confirmed that plaintiffs need to only show that the employer's reasons are false by "favorably" quoting the inconsistent "dicta" from *Burdine*. *Id.* (citing *Aikens*, 460 U.S. at 714; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1980)). The dissent further argued that the *Aiken*'s characterization of the *Burdine* passage, which directs courts "to 'decide which party's explanation of the employer's motivation it believes[,]" forbids the factfinder from considering any possible explanation that is not offered by either party. *Id.* (citing *Aikens*, 460 U.S. at 716; *Burdine*, 450 U.S. at 254); *see* Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991) The district judge was not convinced that the "crusade to terminate [Hicks] . . . was racially rather than personally motivated."

with Rule 301 of the Federal Rules of Evidence.[79]

Rule 301 of the Federal Rules of Evidence governs presumptions that are "not otherwise provided for by . . . Congress . . . ."[80] The *Hicks* Court reasoned that the presumption created in stage I of *McDonnell Douglas* is "like" the presumptions that are directed by Rule 301 of the Federal Rules of Evidence, because stage I shifts only the burden of production to the defendant and does not relieve the plaintiff of the "ultimate burden" of persuasion.[81] The Court opined that by requiring an acceptable nondiscriminatory reason to rebut the presumption of discrimination, the burden of persuasion would be effectively and incorrectly shifted onto the employer to persuade the court that it did not discriminate against the plaintiff.[82] The Court stated that because the employer's burden of production *precedes* the plaintiff's opportunity to disprove the reasons,[83] the presumption should be rebutted whenever an employer properly produces a nondiscriminatory reason, regardless of the persuasiveness of the reason.[84]

In *Hicks*, the Court settled the controversy among the federal circuits by ruling that a plaintiff must discredit an employer's proffered explanation and prove that the true motivation for the employment decision was discriminatory, in order to prove intentional discrimination.[85] In contrast, since *Moses*, the North Dakota Supreme Court had not revisited

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Hicks, 113 S. Ct. at 2766. The dissent asserted that it was therefore an error for the district court to consider that Hicks was mistreated for "personal" reasons, because this possibility was never advanced by St. Mary's. *Id.*

79. *Id.* at 2747; *see* FED. R. EVID. 301(dictating the treatment of civil presumptions).

80. 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 99 (5th ed. 1990 & Supp. 1993). Rule 301 dictates that:

> a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Id.

81. *Hicks*, 113 S. Ct. at 2747.

82. *Id.* at 2748-49. The dissent argued that a presumption created under the *McDonnell Douglas* formula is not rebutted by discredited nondiscriminatory reasons. *Id.* at 2757.

83. *Id.* at 2748.

84. *Id.*

85. *Id.* at 2750.

the extent of both parties' burdens in a disparate treatment claim[86] until *Schweigert v. Provident Life Ins. Co.*[87]

III. LEGAL ANALYSIS

In *Schweigert*, the North Dakota Supreme Court emphasized that its application of the Human Rights Act is not bound by federal application of Title VII of the Civil Rights Act.[88] However, the supreme court noted that federal civil rights interpretations were a useful model after which to pattern its analysis, "given the obvious parallels between" Title VII and the Human Rights Act of North Dakota.[89] The court stated that it would therefore follow the *McDonnell Douglas* standard only "when it is helpful and sensible to do so . . . ."[90]

The North Dakota Supreme Court reviewed the United States Supreme Court's recent decision in *Hicks* and highlighted its rationale concerning Rule 301 of the Federal Rules of Evidence.[91] In *Hicks*, the Court likened the presumption created under the *McDonnell Douglas* standard to those presumptions governed by Rule 301 of the Federal

86. The North Dakota Supreme Court had addressed a claim of employment discrimination since *Moses*, but the plaintiff was unable to advance this claim far enough for the supreme court to review it under the *McDonnell Douglas* standard. *See, e.g.*, Swenson v. Northern Crop Ins. Inc., 498 N.W.2d 174, 177 (1993) (opining that the Human Rights Act of North Dakota did not apply to the employer because of the number of employees). In *Swenson*, a female employee alleged that she was demoted by Northern Crop Insurance because of her gender. *Id.* At the time of the demotion, the Human Rights Act only affected employers with ten or more employees. *Id.* Because Northern Crop Insurance did not have a sufficient number of employees, Swenson was barred from seeking recovery via the Human Rights Act. *Id.* at 178. The North Dakota State Legislature has since amended the Human Rights Act to apply to all employers who employ "'one or more'" persons. *Id.* at 177 n.5 (quoting N.D. CENT. CODE § 14-02.4-02(5) (1991)). For further information about *Swenson*, see Angela M. Elsperger, Case Comment, *Damages—Intentional Infliction of Emotional Distress in the Workplace: Defining Extreme and Outrageous Conduct in North Dakota's Job Description*, 70 N.D. L. REV. 187 (1994).

87. 503 N.W.2d 225 (N.D. 1993).

88. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 227 (N.D. 1993). Title VII of the Civil Rights Act only preempts state anti-discrimination laws that conflict with the federal statutes. Colorado Anti-Discrimination Comm'n. v. Continental Air Lines, 372 U.S. 714, 722-23 (1963) (interpreting 42 U.S.C. § 2000e-7).

The Human Rights Act of North Dakota gives broader coverage than its federal counterpart in a number of respects. For example, Title VII only covers employers that employ more than 15 workers whereas under the Human Rights Act all employers that employ at least one worker are covered. 42 U.S.C. § 2000e (b) (1988); N.D. CENT. CODE § 14-02.4-02(5) (1991). Additionally, an injured party faces simpler requirements to have a claim under the North Dakota law than under Title VII. Under the North Dakota Human Rights Act, a party may file a claim immediately or within a three-year period after the alleged discrimination. N.D. CENT. CODE § 14-02.4-19 (1991). In contrast, Title VII plaintiffs must first file a complaint with the Equal Employment Opportunity Commission (EEOC) and allow the EEOC 180 days to investigate and reconcile the complaint. 42 U.S.C. § 2000e-5 (a), (e) (1988). After the 180 days has expired or the party has received a letter from the EEOC permitting the party to sue, the party is allowed to file a claim in federal district court within a 90-day period. *Id.* at (f)(1).

89. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 227 (N.D. 1993).

90. *Id.*

91. *Id.* at 228. *See supra* notes 75-84 (comparing the presumptions created under *McDonnell Douglas* with those presumptions governed by Rule 301 of the Federal Rules of Evidence).

Rules of Evidence because in both cases, the created presumption shifts only the burden of production.[92]

The North Dakota Supreme Court pointed out that the *Hicks* rationale contradicts the principles of Rule 301 of the North Dakota Rules of Evidence.[93] The state evidentiary rule shifts the "burden of *persuasion* . . . to rebut th[e] presumption[,]" whereas the federal evidentiary rule shifts only the burden of *production*.[94] To make the *McDonnell Douglas* standard conform with state evidentiary principles, the court announced that the presumption created in stage I of the *McDonnell Douglas* standard should be governed by North Dakota's evidentiary rule.[95] The result of the court's alteration is a two-stage formula that combines principles of both state and federal law.[96]

In stage I, the new formula (the *Schweigert* standard) is identical to that of the *McDonnell Douglas* standard in that "the plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of [intentional] discrimination."[97] In stage II, the *Schweigert* stan-

92. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747-49 (1993).

93. *Schweigert*, 503 N.W.2d at 229.

94. *Id.* (emphasis added). Two theories have influenced evidentiary rules regarding presumptions. GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES Ch. 8 Rule 301, at 2 (1987). The Federal Rules of Evidence reflect the theory known as the "bursting bubble" theory. *Id.* at 2. This theory provides that a presumption has the effect of shifting the burden of production in order to rebut the presumed fact. *Id.* at 1. If the party against whom the presumption exists produces contrary evidence, the presumption disappears, thus, bursting the bubble. 2 JOHN WILLIAM STRONG, ET AL., ED., MCCORMICK ON EVIDENCE § 344, at 462 (4th ed. 1992).

The other theory, advocated by the Uniform Rules of Evidence, requires a burden of persuasion to rebut the presumption. GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES Ch. 8 Rule 301, at 2 (1987). Under this theory, the presumption does not immediately disappear upon the production of contrary evidence, but rather, remains until the presumed fact is actually disproven. *Id.* at 3. Eleven states have adopted the Uniform Rules/burden-of-production approach: North Dakota, Montana, Wisconsin, Wyoming, Nevada, Nebraska, Oregon, Utah, Arkansas, Delaware, and Maine. N.D. R. EVID.301; MONT. R. EVID. 301 (1993); WIS. STAT. ANN. § 903.01 (West 1993); WYO. R. EVID. 301; NEV. REV. STAT. § 47.180 (Michie 1986 & Supp. 1993); NEB. REV. STAT. § 27-301 (1989); OR. REV. STAT. § 40.120 (1993); UTAH R. EVID. 301; ARK. R. EVID. 301; DEL. R. EVID. 301; ME. R. EVID. 301. Of the eleven states, only North Dakota's supreme court has found that the *McDonnell Douglas* standard partially conflicts with the state's evidentiary rules governing presumptions. *See* Hearing Aid Inst. v. Rasmussen, 852 P.2d 628, 632 (Mont. 1993) (using the *McDonnell Douglas* standard to review a state case under Montana's employment discrimination law); Puetz Motor Sales, Inc. v. Labor and Indus. Review Comm'n, 376 N.W.2d 372, 374 (Wis. App. 1985) (using the *McDonnell Douglas* standard to review a state claim under Wisconsin's employment discrimination law); Physicians Mut. Ins. Co. v. Scott, 439 N.W.2d 72, 74-75 (Neb. 1989) (using the *McDonnell Douglas* standard to review a state-based claim under Nebraska's employment discrimination law); University of Utah v. Industrial Comm'n, 736 P.2d 630, 634 (Utah 1987) (using the *McDonnell Douglas* standard to review a state-based claim under Utah's employment discrimination law); Riner v. National Cash Register, 424 A.2d 669, 672-73 (Del. Super. Ct. 1980) (using the *McDonnell Douglas* standard to review a state-based claim under Deleware's employment discrimination law); Maine Human Rights Comm'n v. Dept. of Corrections, 474 A.2d 860, 866-67 (Me. 1984) (using the *McDonnell Douglas* standard to review a state-based claim under Maine's employment discrimination law).

95. *Schweigert*, 503 N.W.2d at 229.

96. *See id.* (changing the *McDonnell Douglas* formula to compliment Rule 301 of the North Dakota Rules of Evidence).

97. *Schweigert*, 503 N.W.2d at 229.

dard diverges from the *McDonnell Douglas* standard in that "the burden of persuasion [rather than production] shifts to the employer to rebut the presumption of discrimination by proving by a preponderance of the evidence that its action was motivated by . . . nondiscriminatory reasons."[98] Under the *Schweigert* standard, if the defendant is able to prove this fact, the defendant prevails.[99] Should the defendant fail to prove this fact, "the plaintiff prevails."[100]

Applying the new standard, the supreme court found that Martin had established her prima facie case to create a presumption that Provident Life had discriminated against her.[101] The court further ruled that the district court had, in effect, found that Provident Life met their burden of persuasion to rebut the presumption.[102] The employer's true motive is a "pure question of fact," and accordingly, the supreme court reviewed the district court's finding with a clearly erroneous standard.[103] The supreme court concluded that even though the district court used an incorrect standard to review the evidence, it did not commit clear error in its findings.[104]

Chief Justice VandeWalle concurred with the result of the majority's ruling, but objected to both stages of the majority's newly created formula.[105] Chief Justice VandeWalle reiterated the criticism of stage I that he articulated in *Moses*[106]—that the presumption under *McDonnell Douglas* is too easily created.[107] He further argued that in stage II, the "objectionable" presumption is aggravated by its combination with the more potent state evidentiary rule.[108] Chief Justice VandeWalle asserted

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Schweigert*, 503 N.W.2d at 229. Martin's prima facie case showing was not challenged by Provident Life at trial or on appeal. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 232-33 (Vande Walle, C.J., concurring specially).
106. *Schweigert*, 503 N.W.2d at 232.
107. *Id.*; Moses v. Burleigh County, 438 N.W.2d 186, 195 (N.D. 1989) (VandeWalle, J., concurring in part and dissenting in part).
108. *Id.*; *see supra* notes 51-55 and accompanying text (explaining Chief Justice VandeWalle's objection to the *McDonnell Douglas* standard and his preference of the *Batson* standard). The *Batson* standard was created in Batson v. Kentucky, 476 U.S. 79 (1985). The *Batson* standard is used to analyze equal protection claims in cases in which an attorney uses peremptory challenges to exclude certain classes of people as jurors. *Id.* The *Batson* standard was patterned after the *McDonnell Douglas* standard. *Id.* at 94 n.18, 96-98.

Under *Batson*, the challenger proves a prima facie case by showing a pattern of juror strikes against members of the protected class. *Id.* at 96-97. After the prima facie case is proven, the burden of production shifts to the opponent who must articulate a nondiscriminatory reason for the jury strikes. *Id.* at 97.

Interestingly, the supreme court's decision in *Schweigert* could conceivably affect the *Batson* standard if the standard is employed to analyze a peremptory challenge claim based on equal protection principles in the North Dakota Constitution. In *City of Mandan v. Fern*, the North Dakota Supreme Court rejected a defendant's urging that equal protection provisions in Article I,

that this combination improperly favors plaintiffs far "beyond what the [United States] Supreme Court . . . contemplated" in designing the *McDonnell Douglas* standard.[109]

IV. IMPACT

The North Dakota Supreme Court's reexamination and ultimate modification of the *McDonnell Douglas* standard in *Schweigert* was prompted by the United States Supreme Court's rationale in *Hicks* concerning Rule 301 of the Federal Rules of Evidence. *Hicks* marked the first time the United States Supreme Court extensively compared the presumption created in stage I of the *McDonnell Douglas* standard to those presumptions governed by Rule 301 of the Federal Rules of Evidence.[110] It is ironic that the *Hicks* decision, which favored an interpretation that makes the plaintiff's burden more onerous, gave the North Dakota Supreme Court reason to reanalyze the *McDonnell Douglas* standard and to ultimately modify it in a way that is more favorable to plaintiffs. Under the *Schweigert* standard, a plaintiff does not bear the "ultimate burden" of proving the employer's actual intent as a plaintiff does under *McDonnell Douglas*.

This new standard did not affect the outcome of Jocelyn Martin's claim because Provident Life was able to prove that they had not discriminated against her.[111] However, future North Dakota claimants with circumstances similar to those of Melvin Hicks, in *St. Mary's Honor Center v. Hicks*,[112] could now prevail.

Hypothetically, under the *Schweigert* standard, once Hicks had proved his prima facie case of discrimination, the burden of persuasion would have shifted to the employer to prove that it did not discriminate against Hicks. Because the court did not believe St. Mary's nondiscriminatory reasons for Hicks' termination, St. Mary's would have failed to

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sections 21 and 22 of the North Dakota Constitution should be used to decide his challenge of the state's peremptory challenges. City of Mandan v. Fern, 501 N.W.2d 739, 744 n.3 (1993). The court rejected the argument because Fern did not sufficiently substantiate this claim. *Id.* Should a challenger successfully state an equal protection claim based on North Dakota Constitutional principles, it would be logically consistent to assume that the court would modify the *Batson* standard (in the same manner as it modified the *McDonnell Douglas* standard) to also reflect the principles of Rule 301 of the North Dakota Rules of Evidence. The result would be that after the challenger has proven the prima facie case, the burden of persuasion (rather than production) would shift to the state to prove that it had not acted with discriminatory motives.

109. *Schweigert*, 503 N.W.2d at 233 (VandeWalle, C.J., concurring specially).

110. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). The United States Supreme Court has cited Rule 301 of the Federal Rules of Evidence in prior cases, but did not extensively analyze the rule in relation to the *McDonnell Douglas* standard until its decision in *Hicks*. *See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1980) (citing Rule 301 of the Federal Rules of Evidence without significant analysis).

111. *Schweigert*, 503 N.W.2d at 229.

112. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).

meet its burden of rebutting the presumption, and Hicks would have prevailed.

The United States Supreme Court's decision in *Hicks*, which has widely been criticized as making the plaintiff's burden too onerous,[113] may give other states the occasion to reexamine their use of the *McDonnell Douglas* standard. States that desire a more plaintiff-friendly alternative may opt for a standard similar to the *Schweigert* standard.[114]

The supreme court in *Schweigert* clearly established the standard to be used in disparate treatment claims pursuant to the Human Rights Act of North Dakota. Future development of the Human Rights Act of North Dakota will undoubtedly be influenced by federal interpretations of Title VII as the court was in *Schweigert*. However, the North Dakota Supreme

113. *EEOC Urges Congress to Overturn Supreme Court's 1993 Hicks Decision*, [Oct. 1993] Empl. Discrimination Rep. (BNA) No. 1, at 6-7 (Oct. 27, 1993). The Equal Employment Opportunity Commission (EEOC) is strongly criticizing the United States Supreme Court recent decision in *St. Mary's Honor Center v. Hicks*. *Id.* (citing St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993)). The EEOC claims that this decision will unfairly burden plaintiffs who are trying to proved employment discrimination. *Id.* Senator Howard Metzenbaum, chairman of the Senate Subcommittee on Labor, has introduced the Civil Rights Standards Restoration Act which would overturn the *Hicks* decision and allow a plaintiff to prevail in a disparate-treatment case by proving a prima facie case and "disproving the employer's explanation for its conduct." *Bills Introduced in Senate and House to Overturn Court's Ruling in Hicks*, [Dec. 1993] Empl. Discrimination Rep. (BNA) No. 1, at 200 (Dec. 15, 1993).

114. The states that are most likely to adopt the *Schweigert* standard are Montana, Wisconsin, Nebraska, Wyoming, Oregon, Arkansas, Delaware, Maine, Utah and Nevada. These states' evidentiary rules are similar to North Dakota's in that a created presumption shifts the burden of persuasion onto the defendant to disprove the presumed fact. *See supra* note 94 and accompanying text (explaining the different types of state evidentiary rules concerning presumptions).

Court has made it clear that all future development of the Human Rights Act of North Dakota will reflect principles of North Dakota law.[115]

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115. The North Dakota Supreme Court may soon decide a case that could further define the scope of the Human Rights Act in the area of age discrimination. Interview with the Honorable Kirk Smith, North Dakota District Judge for the Northeast Central Judicial District, in Grand Forks, North Dakota (Mar. 17, 1994). On September 27, 1993, Alan Schuhmacher and Dale Wavra successfully proved in district court age discrimination as the motivation for their respective discharges by the North Dakota Hospital Association (NDHA). Schuhmacher v. North Dakota Hosp. Ass'n, Civil No. 91351, Slip Op. at 1-3 (Feb. 18, 1994). One issue that was critical to the lower court's decision was NDHA's argument that discharging an older and higher paid employee in favor of a younger and lower paid employee to reduce payroll expenses should not be considered age discrimination under the Human Rights Act of North Dakota. Defendant's Brief (Mem. Supp. Jury Instructions) at 4-8, Schuhmacher v. North Dakota Hosp. Ass'n, Civil No. 91351 (Feb. 18, 1994).

This issue has been recently addressed on the federal level. The United States Supreme Court, in *Hazen Paper Co. v. Biggins*, ruled that years of service and age were not synonomous; therefore, it was not disparate treatment under the Age Discrimination in Employment Act for an employer to discharge an employee so that the employee's pension would not vest. Hazen Paper v. Biggins, 113 S. Ct. 1701, 1706-07 (1993). This ruling in *Hazen Paper* was interpreted by another federal court to include replacing an older and higher paid employee with a younger and lower paid worker as not being an intentional discrimination practice. Equal Employment Opportunity Commission v. MCI Int'l, Inc., 829 F. Supp. 1438, 1473 (D.N.J. 1993).

In *Schuhmacher v. North Dakota Hosp. Ass'n*, the NDHA argued that the district court should adopt the federal philosophy concerning age discrimination in its application of the Human Rights Act. Defendant's Brief (Mem. Supp. Jury Instructions) at 3-7, Schuhmacher v. North Dakota Hosp. Ass'n, Civil No. 91351 (Feb. 18, 1994). The plaintiffs, citing *Schweigert*, urged the district court not to adopt the federal philosophy but rather, follow the North Dakota Supreme Court's pattern of allowing broader protection under the Human Rights Act than under federal counterparts. Plaintiff's Brief (Mem. Supp. Jury Instructions) at 4-8, Schuhmacher v. North Dakota Hosp. Ass'n, Civil No. 91351 (Feb. 18, 1994).

The district court ruled that it would not follow the federal philosophy and instructed the jury that employment decisions could not be based on an assessment of the higher relative wages of older employees. Jury Instruction 12, Schuhmacher v. North Dakota Hosp. Ass'n, Civil No. 91351 (Sept. 27, 1993). The NDHA has filed a motion for a new trial, which is awaiting a hearing on May 9, 1994. Interview with the Honorable Kirk Smith, North Dakota District Judge for the Northeast Central Judicial District, in Grand Forks, North Dakota (Mar. 17, 1994).