Mills v. Health Care Service Corporation: Are "Background Circumstances" too Much to Ask of a Plaintiff Alleging Reverse Discrimination in Employment?

Susan C. Thies

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Title VII of the Civil Rights Act of 1964 was enacted to eradicate discrimination against persons on the basis of "race, color, religion, sex, or national origin" in employment determinations. Title VII protects members of any race, gender, 

1 42 U.S.C. § 2000e-2(a)(1) (1994). This section provides:
It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

2 See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (stating that Title VII requires that employers make employment decisions that are not based on race, sex, or national origin); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating that "the language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities"); Joyce A. Hughes, "Reverse Discrimination" and Higher Education Faculty, 3 MICH. J. RACE & L. 395, 399 (1998) (stating that Title VII "seeks to eliminate discrimination in employment opportunities"); Peter Gene Baroni, Case Note, Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims Under Title VII, 39 HOW. L.J. 797, 797 (1996) (noting that Title VII prohibits employers from discriminating based on unlawful criteria); Brenda D. DiLuigi, Note, The Notari Alternative: A Better Approach to the Square-Peg-Round-Hole Problem Found in Reverse Discrimination Cases, 64 BROOK. L. REV. 353, 357 (1998) ("Title VII... established the Equal Employment Opportunity Commission ("EEOC") and marked its task: to ensure that all individuals are given an evenhanded opportunity for employment and promotion on the basis of ability and qualification, without regard to race, color, sex, religion or national origin."); Tristin K. Green, Comment, Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII, 87 CAL. L. REV. 983, 983 (1999) (stating that Title VII has "served as an important tool in fighting discrimination in the workforce"); Janice C. Whiteside, Note, Title VII and
religion, or national origin. In *McDonnell Douglas Corp. v. Green*, a case involving discrimination against a black employee, the United States Supreme Court set the standard for the evaluation of disparate treatment employment discrimination claims using circumstantial evidence. As suits were commenced


3 See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–80 (1976) (holding that because the terms of Title VII are “not limited to discrimination against members of any particular race,” the Act applies to white plaintiffs in the same manner as it applies to minority groups); *McDonnell Douglas*, 411 U.S. at 800 (noting that, in reference to Title VII, “[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed” (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971))); Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (holding that “[w]hites are also a protected group under Title VII”); Carey v. Mt. Desert Island Hosp., No. 95-0157-B, 1996 U.S. Dist. LEXIS 12397, at *18–20 (D. Me. Aug. 21, 1996) (applying Title VII to a male plaintiff’s claim of sex discrimination in employment); 45A AM. JUR. 2D Job Discrimination § 130 (1993) (“The same standards that prohibit race discrimination against nonwhites apply to whites.”); DiLuigi, *supra* note 2, at 357 (stating that “[a]lthough [Title VII’s] legislative history underscored the need to provide increased employment opportunity to minority persons, the neutral language of the statute reveals that the scope of Title VII was intended to reach persons of all races, including non-minorities”) (footnote omitted); Bridget E. McKeever, Survey, *Tenth Circuit Provides Alternative for Majority Plaintiffs to State a Prima Facie Case Under Title VII: Notari v. Denver Water Department*, 34 B.C. L. REV. 440, 440–41 (1993) (noting that “Title VII’s protections . . . extend to members of historically or socially favored groups”).


by non-minority plaintiffs, the federal courts split on the framework that must be established by "majority"\(^6\) plaintiffs in employment discrimination actions.\(^7\) Recently, in *Mills v. Health*
Care Service Corp., the Seventh Circuit Court of Appeals concluded that the "majority" plaintiff, Douglas Mills, established a prima facie case of employment discrimination by setting forth evidence of "background circumstances which give rise to an inference of discrimination."

Douglas M. Mills was employed by the defendant, Health Care Service Corporation (HCSC). Mills began working at HCSC in 1988. During his employment at HCSC's Quincy, Illinois office, he held a variety of positions. Mills usually received favorable employment reviews. In 1995, an assistant manager position was created at the Quincy office after one of the co-managers resigned. Mills and three women applied for the position. The sole remaining manager in the Quincy office, Linda Amburn, interviewed Mills and one of the women applying for the position, Darlene Butler. The position was ultimately offered to Butler. After the decision was made, Mills brought suit in the United States District Court for the Central District of Illinois alleging gender discrimination in violation of Title VII. The District Court granted summary judgment in favor of the defendant, concluding that Mills could not establish that HCSC's articulated reasons for failing to promote him were merely pretextual. The Seventh Circuit subsequently affirmed the district court's decision employing a somewhat different rationale.

requires that a plaintiff show membership in a minority group. See Iadimarco, 190 F.3d at 158. In a "reverse discrimination" case, the plaintiff necessarily cannot establish membership in a minority group. See id.; DiLuigi, supra note 2, at 356 (describing reverse discrimination as the "square-peg-round-hole' problem").

8 171 F.3d 450 (7th Cir. 1999).
9 Id. at 457. The "background circumstances" test requires that a reverse discrimination plaintiff produce evidence that "support[s] the suspicion that the defendant is that unusual employer who discriminates against the majority." Parker, 652 F.2d at 1017; see also infra notes 63-72 and accompanying text (providing a detailed discussion of the "background circumstances" test).
10 See Mills, 171 F.3d at 453.
11 See id.
12 See id.
13 See id.
14 See id. The resigning co-manager was a female. See id.
15 See id.
16 See id.
17 See id.
18 See id.
19 See id. at 453-54.
20 See id. at 460.
The circuit court began its analysis by discussing the two ways in which a plaintiff can avoid summary judgment in favor of a defendant in an employment discrimination action.21 Because Mills did not set forth direct evidence of employment discrimination, the court analyzed his claim in terms of the McDonnell Douglas framework, which is used when indirect evidence is proffered.22 The court addressed the problem encountered when a “majority” plaintiff attempts to present indirect evidence of employment discrimination using the McDonnell Douglas framework.23 The court discussed two of the several ways in which the first element of the prima facie case could be altered to fit a “reverse discrimination”24 claim.25 The

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21 See id. at 454. One way in which a plaintiff may avoid summary judgment in favor of a defendant is to “present direct evidence showing discriminatory intent by the defendant or its agents.” Id. Direct evidence “must be supported by allegations which, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.” Id. (quoting Eiland v. Trinity Hosp., 150 F.3d 747, 751 (7th Cir. 1998)).

The second way in which a plaintiff may defeat a defendant’s summary judgment motion is to offer some form of indirect evidence of discrimination. See id. Indirect evidence is generally presented in the form of the McDonnell Douglas burden-shifting framework. See id. An alternative way for a plaintiff to present indirect evidence of discrimination, without using the McDonnell Douglas framework, is to show “indirect evidence sufficient to support a reasonable probability... that but for [his] status [as a white male] the challenged employment decision’ would not have occurred.” Id. at 456 (alteration in original) (quoting Taken v. Oklahoma Corp. Comm’n, 125 F.3d 1366, 1369 (10th Cir. 1997)).

22 See id. at 454–55. The court began its analysis of the plaintiff’s claim using the first part of the McDonnell Douglas framework. See id. The first part of the framework requires the plaintiff to establish a four-prong prima facie case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

23 See Mills, 171 F.3d at 454–55. In order to use the McDonnell Douglas framework in a “reverse discrimination” action, the first prong of the prima facie case, which requires the plaintiff to belong to a protected minority class or be a female, must be altered. See id. at 454. The need to alter the first prong of the prima facie case in “reverse discrimination” claims has resulted in several different interpretations. See infra Part II.

24 In this context, the term “reverse discrimination” refers to discrimination against a member of a “majority” group. The term has several definitions. See Philip L. Fetzer, ‘Reverse Discrimination: The Political Use of Language, 12 NAT’L BLACK L.J. 212, 216 (1993) (describing six different definitions of the term “reverse discrimination”); Hughes, supra note 2, at 404 (discussing the origin of the term in relation to affirmative action); see also Baroni, supra note 2, at 797 n.4 (defining “reverse discrimination” as a “Title VII discrimination claim by a majority plaintiff”); DiLuigi, supra note 2, at 354 n.12 (referring to the term and its definition “as [a] type of discrimination in which majority groups are purportedly discriminated against in favor of minority groups” (alteration in original) (quoting BLACK’S LAW DICTIONARY 1319 (6th ed. 1990)); Whiteside, supra note 2, at 413 n.2
court ultimately adopted the “background circumstances” test as a replacement for the first prong of the prima facie case. The court also discussed, but did not apply, an alternative method by which a reverse discrimination plaintiff could use indirect evidence to survive a summary judgment motion by a defendant. The court concluded that Mills established a prima

(noting that the term “refers to discrimination against members of groups which have not traditionally been subjected to discrimination, such as nonminorities and males”). The term “reverse discrimination,” however, has invoked much criticism. See Fetzer, supra, at 212 (stating “that ‘reverse discrimination’ is a covert political term which should be removed from the vocabulary of any serious academician or lay-person”); Hughes, supra note 2, at 405 (noting that “politicizing Title VII by reliance on the concept of ‘reverse discrimination’ is detrimental”).

See Mills, 171 F.3d at 455–56. The first option the court addressed was to drop the first prong of the prima facie case in actions involving “reverse discrimination.” See id. at 455. The court, however, went no further than a one-sentence reference to this option. See id. The court then discussed an alternative option adopted by the District of Columbia Circuit and the Tenth Circuit. See id. This option is known as the “background circumstances” test. See id. The case most often cited as the origin of the “background circumstances” test is Parker v. Baltimore & Ohio Railroad Co., 652 F.2d 1012 (D.C. Cir. 1981). See Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993); Notari v. Denver Water Dep’t, 971 F.2d 585, 588–89 (10th Cir. 1992); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985); Baroni, supra note 2, at 800–01; DiLuigi, supra note 2, at 361–62 (discussing Parker’s creation of the “background circumstances” test).

The Mills court also referred to the test adopted by the Sixth Circuit, which is similar to the “background circumstances” test. See Mills, 171 F.3d at 455 n.2 (discussing Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985), and the Sixth Circuit’s continued use of the Murray test even though it was subjected to controversy within that circuit). The Murray test requires a reverse discrimination plaintiff to satisfy the “background circumstances” test and show “that the employer treated differently employees who were similarly situated but not members of the protected group.” Murray, 770 F.2d at 67. In Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th Cir. 1994), the Sixth Circuit criticized, but did not reject, the use of the “background circumstances” test in reverse discrimination cases. See id. at 801 n.7 (“We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts.”).

See Mills, 171 F.3d at 456–57 (agreeing with the underlying rationale employed by the circuits that already adopted the “background circumstances” test); see also infra Parts II & III.

See Mills, 171 F.3d at 456. The court noted that a reverse discrimination plaintiff who has failed to establish a prima facie case, in its modified form, may nonetheless produce indirect evidence that “‘establish[es] a logical reason to believe that the [employer’s] decision rests on a legally forbidden ground.’” Id. at 456–57 (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (per curiam)). The court also cited with approval the alternative approach adopted in Taken v. Oklahoma Corp. Commission, 125 F.3d 1366 (10th Cir. 1997). See Mills, 171 F.3d at 456. The alternative allows reverse discrimination plaintiffs to make out a prima facie case by producing evidence that
facie case by showing, along with the other three elements of the traditional formulation, sufficient “background circumstances which give rise to an inference of discrimination” in order “to overcome the background presumption that a white man was not subject to employment discrimination.”

Having established the requisite prima facie case, the court went on to review the other two parts of the McDonnell Douglas framework.

Under McDonnell Douglas, once the plaintiff establishes a prima facie case, the defendant must offer legitimate non-discriminatory reasons for the employment decision. HCSC stated that Butler, the female candidate, had superior qualifications as compared to Mills. Some of the qualifications emphasized by HCSC included Butler's computer science degree,

is “sufficient to support a reasonable probability... that but for [his] status [as a white male] the challenged employment decision' would not have occurred.” Id. (alteration in original) (quoting Taken, 125 F.3d at 1369). The court in Taken adopted this alternative test as it was set forth in Notari v. Denver Water Department, 971 F.2d 585 (10th Cir. 1992). See Taken, 125 F.3d at 1369.

The court in Notari adopted the alternative “but for” test in order to deal with the potentially anomalous situation where a black plaintiff would be able to establish a prima facie case of discrimination and a white plaintiff, subject to the “background circumstances” test, would not be able to establish a prima facie case using similar indirect evidence. See Notari, 971 F.2d at 589-90. The Notari court stated that “[t]he claims of two similarly situated victims of intentional discrimination should not be subjected to such dissimilar dispositions.” Id. at 590.

Several other circuits adopted a form of the “but for” test in reverse discrimination cases. See Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999) (noting that in order to establish a prima facie case, all that a “reverse discrimination” plaintiff must show is “sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII”); Duffy v. Wolle, 123 F.3d 1026, 1036-37 (8th Cir. 1997) (citing Notari in adopting this alternative test in an action brought by a male plaintiff alleging gender discrimination); Ticali v. Roman Catholic Diocese, 41 F. Supp. 2d 249, 263 (E.D.N.Y. 1999) (discussing a plaintiff's reverse discrimination claim in terms of whether she produced direct or indirect evidence “sufficient to support a finding that [she] was assigned to teach a different class because of her religion, race or national origin”).

28 Mills, 171 F.3d at 457. Evidence that HCSC disproportionately promoted women during the seven years Mills was employed in the Quincy office was considered appropriate background circumstances by the court. See id. (noting that “[b]etween 1988–1995, nearly all promotions at the office went to women, and at the time the challenged hiring decision was made, females dominated the supervisory positions in the relevant office”).

29 See id. at 457–60.
31 See Mills, 171 F.3d at 457–58.
her greater breadth of experience, and her superior performance on both oral and written interviews.\footnote{See id. at 458.}

In order to satisfy the third component of the \textit{McDonnell Douglas} framework, the plaintiff must demonstrate that the non-discriminatory reasons offered by the defendant are pretextual.\footnote{See \textit{McDonnell Douglas}, 411 U.S. at 804. In order to defeat a summary judgment motion by the defendant, the \textit{Mills} court required that the plaintiff "produce evidence from which a rational trier of fact could infer" that the employer lied about the reasons given for the employment decision. \textit{Mills}, 171 F.3d at 458 (internal quotations and citation omitted).} Mills produced evidence that some of the reasons proffered by HCSC were possibly pretextual.\footnote{See \textit{Mills}, 171 F.3d at 459. The court did not find that Mills' evidence of the falsity of HCSC's statement regarding the use of inquiry unit experience in its decision-making process "created a genuine issue of material fact" as to pretext because Mills did not show that \textit{all} the reasons articulated by the defendant were pretext. \textit{Id.} at 469--60.} The court ultimately concluded, however, that Mills failed to prove that all of the non-discriminatory reasons set forth by HCSC were in fact pretextual.\footnote{See id. at 459--60 (holding that "the plaintiff cannot show that the reasons HCSC proffered for hiring Darlene Butler over him were pretextual").}

It is submitted that although the ultimate conclusion in \textit{Mills} is correct, the court improperly adopted the "background circumstances" test in its evaluation of the plaintiff's prima facie case. The adoption of the background circumstances test does not mesh with the purposes of Title VII and \textit{McDonnell Douglas}. In addition, because the evidence necessary to make a showing of background circumstances is vague, plaintiffs have a difficult time knowing what they must allege and prove in order to make out a prima facie case and survive a summary judgment motion.

Part I of this Comment will focus on \textit{McDonnell Douglas} and the creation of the three-part burden-shifting framework. Part II will discuss reverse discrimination cases and the division among the circuits regarding appropriate changes that need to be made to the \textit{McDonnell Douglas} standard for establishing a prima facie case. Part III will analyze the "background circumstances" test followed by some circuit and district courts, including the court in \textit{Mills}. Part IV will discuss the alteration that should be made to the \textit{McDonnell Douglas} framework in order to resolve the reverse discrimination problem.
The United States Supreme Court, in *McDonnell Douglas Corp. v. Green*, set forth the three-part framework courts use in evaluating employment discrimination claims brought under Title VII of the Civil Rights Act of 1964. In *McDonnell Douglas*, a black plaintiff brought suit against his former employer alleging racial discrimination. The defendant employer terminated the plaintiff's employment in 1964. The plaintiff, in response to his dismissal, joined a "stall-in" protest planned by members of the Congress on Racial Equality. At about the same time as the "stall-in," a "lock-in" took place at one of the defendant's buildings. While it was unclear whether the plaintiff had any knowledge of the "lock-in," he was not arrested for any involvement in the event. After the "lock-in," the defendant employer began advertising for mechanics, the same type of position the plaintiff once held at the corporation.

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37 See id. at 802-05; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (recognizing *McDonnell Douglas* as the opinion that established the framework for analyzing Title VII cases); Chin & Golinsky, *supra* note 5, at 659 (stating "[in 1973, the Supreme Court established the *McDonnell Douglas* test"); *Hughes*, *supra* note 2, at 401-02; *Baroni, supra* note 2, at 798 (stating that the Supreme Court set forth the "framework governing a prima facie case of employment discrimination and the allocation of the burdens of proof" in *McDonnell Douglas*); DiLuigi, *supra* note 2, at 353-54 (referring to the *McDonnell Douglas* case as a "watershed" decision); *Green*, *supra* note 2, at 986 (referring to the three-part framework laid out in *McDonnell Douglas*); Whiteside, *supra* note 2, at 414–15.

38 See *McDonnell Douglas*, 411 U.S. at 794.

39 See id. Prior to his dismissal, the defendant had employed the plaintiff continuously for eight years, except for the plaintiff's twenty-one month military service. See id. at 794 & n.1. The defendant was in the process of reducing its work force when the plaintiff was dismissed. See id. at 794.

40 See id. The "stall-in" was in protest to the defendant's alleged racial discrimination in employment decisions. See id. The protest involved the blockage of the access roads to the defendant's plant during a shift change. See id. The police broke up the protest shortly after it began and the plaintiff was arrested for his participation in the event. See id. at 795. The plaintiff pleaded guilty to an obstruction of traffic charge and received a fine. See id.

41 See id. The "lock-in" involved the padlocking of the front door of an office building while certain employees of the defendant were still inside. See id.

42 See id. at 795 & n.3. Because the plaintiff had participated in the "stall-in," the Court chose not to resolve the issue of whether the plaintiff knew about and/or participated in the "lock-in." See id.

43 See id. at 796.
The plaintiff applied for a position but was allegedly rejected because of his participation in both the "stall-in" and "lock-in." 44

The plaintiff filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), which eventually led to an employment discrimination suit against the corporation. 45 When the Eighth Circuit Court of Appeals reviewed the dismissal of the case, it attempted to establish rules to govern the burden of proof in employment discrimination actions. 46 The Supreme Court noted that the resulting decision of the Eighth Circuit was split into several opinions that failed to reflect a harmonious set of rules. 47 The Court granted certiorari "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination." 48

The result of the Supreme Court's review of McDonnell Douglas was the creation of a three-part burden-shifting framework. 49 The first part of the framework consists of the four-prong prima facie case, which must be established by the plaintiff. 50 The first prong of the prima facie test requires the plaintiff to assert "that he belongs to a racial minority." 51 To satisfy the second prong, the plaintiff must establish "that he applied and was qualified for a job for which the employer was seeking applicants." 52 The third prong requires the plaintiff to demonstrate "that, despite his qualifications, he was rejected" for the position. 53 The fourth prong requires the plaintiff to show

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44 See id.
45 See id. at 796–97.
46 See id. at 801.
47 See id. ("The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.").
48 Id. at 798. The Court held that the plaintiff should be given the opportunity, in a new trial, to prove that the defendant's reasons for not re-hiring him were pretextual. See id. at 807.
49 See id. at 802–04.
50 See id. at 802. The purpose of the prima facie case is to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). By establishing a prima facie case, the plaintiff "creates a presumption that the employer unlawfully discriminated against the employee." Id.
51 McDonnell Douglas, 411 U.S. at 802.
52 Id.
53 Id.
“that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” These prongs, however, can be adjusted to fit different factual situations in Title VII employment discrimination actions.

Once the plaintiff establishes, by a preponderance of the evidence, a prima facie case of employment discrimination, the burden shifts to the defendant to articulate non-discriminatory reasons for the employment decision. If the defendant does not

54 In McDonnell Douglas, the Court noted that “the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.” Id. at 802 n.13. Courts have altered the prongs of the prima facie case in order to adapt the framework to the specific facts of the case. See Burdine, 450 U.S. at 253 n.6 (changing the first prong of the prima facie case to a showing that the plaintiff is a female); Iadimaro v. Runyon, 190 F.3d 151, 163 (3d Cir. 1999) (holding that “a plaintiff... should be able to establish a prima facie case... by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin'” (alteration in original) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)); Parker v. Baltimore & Ohio R.R., 652 F.2d 1012, 1017–18 (D.C. Cir. 1981) (requiring reverse discrimination plaintiff to satisfy the background circumstances test instead of the traditional first prong of the prima facie case); Carey v. Mt. Desert Island Hosp., No. 95-0157-B, 1996 U.S. Dist. LEXIS 12397, at *16–19 (D. Me. 1996) (rejecting the heightened standard of background circumstances); Collins v. School Dist., 727 F. Supp. 1818, 1820–23 (W.D. Mo. 1990) (holding that “because plaintiff is male and is claiming that defendant unlawfully discriminated against him on the basis of his sex, he has satisfied the first element of the McDonnell Douglas prima facie case of discrimination”); Chin & Golinsky, supra note 5, at 663–64 (discussing the various changes made to the prima facie case requirements since the McDonnell Douglas decision); Baroni, supra note 2, at 799 (discussing changes to the prima facie elements in a discriminatory promotion case); DiLuigi, supra note 2, at 359–60 (discussing several cases in which courts have adjusted the framework to fit different types of employment discrimination claims).

55 See McDonnell Douglas, 411 U.S. at 802; see also Burdine, 450 U.S. at 254–55 (applying the McDonnell Douglas framework). The defendant carries the burden of production at this stage, not the burden of persuasion. See St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993) (explaining that this presumption only shifts the burden of production, not the burden of persuasion, to the party who does not hear the original burden of persuasion); Burdine, 450 U.S. at 255–58 (explaining that the Court of Appeals improperly required the defendant to carry the burden of persuasion, instead of the burden of production); Chin & Golinsky, supra note 5, at 664–65 (noting that the Burdine Court made it clear that the defendant bears the burden of production); Baroni, supra note 2, at 799–800 (noting that “defendant’s burden is merely one of production”); Green, supra note 2, at 988. The burden of persuasion always remains with the plaintiff. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983); Burdine, 450 U.S. at 255–56 (discussing the burdens of production and persuasion assigned to the parties); Chin
set forth a non-discriminatory reason for the decision and the evidence produced by the plaintiff in his or her prima facie case is believed, the trier of fact must find for the plaintiff.\(^{57}\) If, however, the defendant does articulate non-discriminatory reasons for the employment decision, the burden shifts back to the plaintiff\(^ {58}\) to show that the reasons proffered by the defendant are pretextual.\(^ {59}\) The plaintiff must satisfy the third element of the framework in order to prevail in an employment discrimination action.\(^ {60}\)

\(^{57}\) See Burdine, 450 U.S. at 254 & n.7. ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.").

\(^{58}\) See Aikens, 460 U.S. at 714–15 (noting that when the defendant provides a non-discriminatory reason, the presumption of discrimination is dropped and the inquiry proceeds to the ultimate question of whether the decision was in fact discriminatory); McDonnell Douglas, 411 U.S. at 804–05.

\(^{59}\) See Burdine, 450 U.S. at 256 (noting that a plaintiff may succeed at this stage if she demonstrates “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence”); McDonnell Douglas, 411 U.S. at 804–05 (holding that a plaintiff must show “that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision”); Baroni, supra note 2, at 800 (stating that pretext may be demonstrated using direct evidence; indirect evidence of disparate treatment of one race or gender in comparison to other races or another gender; or statistical evidence of disparate treatment of others of the same race or gender as the plaintiff). The Supreme Court later refined the requirements of the pretextual showing. See Hicks, 509 U.S. at 511; see also Whiteside, supra note 2, at 418. The Hicks Court held that the plaintiff must show the reasons offered by the defendant were false and that the discrimination was the actual basis for the decision. See Hicks, 509 U.S. at 511 & n.4; see also Whiteside, supra note 2, at 418 (describing the Hicks opinion as establishing a “pretext-plus” analysis). The Hicks decision prompted a variety of interpretations and criticism among lower courts and legal scholars. See Chin & Golinsky, supra note 5, at 666; Whiteside, supra note 2, at 418 n.34.

\(^{60}\) See Hicks, 509 U.S. at 515 (recognizing that “what is required to establish the McDonnell Douglas prima facie case is infinitely less than what a directed verdict demands”); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (explaining that the Court of Appeals improperly equated the prima facie case with a determination that an employer discriminated against the plaintiff in violation of Title VII); Whiteside, supra note 2, at 418 (noting that in most cases, “the plaintiff must present evidence beyond that required to establish a prima facie case”).
II. "REVERSE DISCRIMINATION" CASES AND THE SPLIT AMONG THE CIRCUITS

The clash between the McDonnell Douglas framework and suits alleging discrimination against a majority plaintiff caused a division among the federal courts. In their attempts to adapt the McDonnell Douglas holding to instances involving reverse discrimination, courts have modified the prima facie case in several different ways. The modification adopted by the most circuits is some form of the "background circumstances" test.

See Iadimarco v. Runyon, 190 F.3d 151, 158-60 (3d Cir. 1999) (noting the different changes made to the McDonnell Douglas framework by many courts); Mills v. Healthcare Serv. Corp., 171 F.3d 450, 454-57 (7th Cir. 1999) (discussing various approaches to reverse discrimination cases taken by circuit and district courts); Ticali v. Roman Catholic Diocese, 41 F. Supp. 2d 249, 260-61 (E.D.N.Y. 1999); 45A AM. JUR. 2D Job Discrimination § 130 (1993) (recognizing two different approaches to "reverse discrimination" cases); Baroni, supra note 2, at 802-04 (noting that "[t]here is an ongoing battle among the circuits over whether to follow Parker's background circumstances test in reverse discrimination actions under Title VII"); DiLuigi, supra note 2, at 385 ("Circuit and district courts addressing this issue have produced conflicting views"); McKeever, supra note 3, at 445 (noting that the Notari court focused on the conflict between two approaches to the reverse discrimination problem); Whiteside, supra note 2, at 419-20 (asserting that federal courts have not agreed on the correct formulation for the prima facie case in reverse discrimination claims).

See Iadimarco, 190 F.3d at 163 (stating that to establish a prima facie case, "[t]he Title VII plaintiff needs only to present sufficient evidence to allow a fact finder to conclude that the unexplained decision that forms the basis of the allegation of discrimination was motivated by discriminatory animus"); Notari v. Denver Water Dep't, 971 F.2d 585, 589-90 (10th Cir. 1992) (stating that a reverse discrimination plaintiff may either follow the "background circumstances" test or produce "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff"); Ustrak v. Fairman, 781 F.2d 573, 577 (7th Cir. 1986) (holding that the McDonnell Douglas framework does not apply to cases of employment discrimination against a white employee because "no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black"); Parker v. Baltimore & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (requiring that a reverse discrimination plaintiff satisfy the first prong of the McDonnell Douglas prima facie case by showing "background circumstances [that] support the suspicion that the defendant is that unusually employer who discriminates against the majority"); Collins v. School Dist., 727 F. Supp. 1318, 1323 (W.D. Mo. 1990) (finding that because the plaintiff was male and claimed gender discrimination, the first prong of the McDonnell Douglas prima facie case had been met).

See Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997) (adopting the background circumstances test and citing the Notari opinion with approval); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985) (adopting the background circumstances test); Parker, 652 F.2d at 1017; Barnes v. Federal Express Corp., No. Civ.A.95-CV-333-D-D, 1997 U.S. Dist. LEXIS 8882, at *21 (N.D. Miss. May 19, 1997) (holding that the background circumstances test "more
Instead of establishing the first prong of the traditional McDonnell Douglas prima facie case, a plaintiff must establish "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority."64 This test is based on the assumption that most employers discriminate against minorities and that the promotion of a minority employee over a majority employee does not raise an inference of discrimination.65

Two types of evidence can be used to satisfy the "background circumstances" test.66 The first type is "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites."67 The second type is "evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of

[adequately encompasses the plethora of relevant facts that may give rise to such an inference of discrimination"); Black, supra note 5, at 313; DiLuigi, supra note 2, at 365 (noting that the background circumstances test is "perhaps the most widely accepted approach to reverse discrimination cases," even though it has been attacked by other courts). The Seventh and Tenth Circuits have adopted both the "background circumstances" as well as another test. See Mills 171 F.3d at 456–57; Notari, 971 F.2d at 589–90. The second test requires the plaintiff to establish "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff." Notari, 971 F.2d at 590.

64 Parker, 652 F.2d at 1017; see also Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993).
65 See Parker, 652 F.2d at 1017 (noting that "it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society"); see also Baroni, supra note 2, at 808–09 (discussing the Harding court's holding and the various ways a majority plaintiff can meet the heightened standard of proof in order to establish a prima facie case); DiLuigi, supra note 2, at 362 (citing Parker and Harding to explain why the higher standard of proof in reverse discrimination cases is required).
66 See Harding, 9 F.3d at 153 (discerning from prior cases two general categories of evidence that are sufficient to establish "background circumstances"); Baroni, supra note 2, at 807–08; DiLuigi, supra note 2, at 363.
67 Harding, 9 F.3d at 153; see also Baroni, supra note 2, at 808 (discussing the types of evidence that fit into this category); DiLuigi, supra note 2, at 363. The Harding court cited to several of its prior holdings that included evidence in this category. See, e.g., Bishopp v. District of Columbia, 788 F.2d 781, 786–87 (D.C. Cir. 1986) (involving evidence of minority supervisors combined with proposed affirmative action plan); Lanphear v. Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (providing evidence of external pressure on hiring authority to increase percentage of minorities in its employ as well as proposed affirmative action plan); Daye v. Harris, 655 F.2d 258, 261 n.8 (D.C. Cir. 1981) (containing evidence that showed a disproportionate amount of promotions going to nonwhite nurses).
Specific types of evidence found to satisfy the background circumstances analysis have included: (1) superior qualifications of the plaintiff; (2) "disproportionate hiring patterns" favoring women over men; (3) an expression of an interest in hiring a female by the person in charge of hiring; and (4) the fact that most supervisors and all employees in the department are Hispanic and the plaintiff is white.

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68 Harding, 9 F.3d at 153; see also Baroni, supra note 2, at 808–09; DiLuigi, supra note 2, at 363. The Harding court referred to cases it cited regarding the first type of "background circumstances" evidence to show the types of evidence that fit into the second category. See, e.g., Bishop, 788 F.2d at 786–87 (promoting "in an unprecedented fashion" a minority employee less qualified than four white plaintiffs); Lanphear, 703 F.2d at 1315 (explaining how an overly qualified plaintiff received "little or no consideration" for a position which was ultimately filled by a minority applicant and how the hiring official failed to fully inquire into the qualifications of the minority promotee); Daye, 655 F.2d at 260 (noting plaintiff's allegation of a conspiracy that sought to rig performance ratings within the "Hospital Merit Promotion Plan" ultimately resulting in the promotion of lesser qualified minority nurses). The Harding court also noted that this second type of evidence of "background circumstances" might establish, on its own, a prima facie case of discrimination. See Harding, 9 F.3d at 153.

69 See Harding, 9 F.3d at 153–54. The Harding court reasoned that: A rational employer can be expected to promote the more qualified applicant over the less qualified, because it is in the employer's best interest to do so. And when an employer acts contrary to his apparent best interest in promoting a less-qualified minority applicant, it is more likely than not that the employer acted out of a discriminatory motive.

70 Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999) (finding plaintiff satisfied the "background circumstances" test by showing that at the plaintiff's office almost all promotions were given to women, and that women held most of the supervisory positions).

71 See Duffy v. Wolle, 123 F.3d 1026, 1037 (8th Cir. 1997) (finding that interest in hiring a female, evidence of superior qualifications of the plaintiff, and evidence of other female hires were all "background circumstances"). The Duffy court noted that "Duffy [was] statutorily exempt from bringing a claim under Title VII." Id. at 1036 (citing 42 U.S.C. § 2000e-16 (1994). Duffy, however, was able to bring a Bivens action, which is "an inherent cause of action [recognized by the Supreme Court] for damages against federal actors for violations of federal constitutional rights." Id. at 1033. In this case, the federal constitutional right alleged to be violated was "the Due Process Clause of the Fifth Amendment to the United States Constitution," which forbid[s] the federal government from discriminating on the basis of gender. Although this was not a Title VII employment discrimination claim, the court still applied the "background circumstances" test as a replacement for the first prong of the McDonnell Douglas prima facie case. See id. at 1036–37.

72 See Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1534–35 (10th Cir. 1995) (concluding that a white plaintiff satisfied the "background circumstances" test by showing that she was the only non-Hispanic member of the Bilingual/ESOL Department).
A more recent approach has been to require the plaintiff to "present[] sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin,'" instead of requiring a showing of "background circumstances."73 Other courts have required plaintiffs to satisfy either the background circumstances test or "establish[] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground."74

A fourth approach to the situation is to substitute a showing that the plaintiff is a member of a minority group for a showing that the plaintiff is a member of a class.75 This test generally requires that a reverse discrimination plaintiff show that he is white, male, or both, depending on the type of discrimination alleged, instead of membership in a racial minority, as is required by the traditional prima facie case.76 A final approach

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73 Iadimarco v. Runyon, 190 F.3d 151, 163 (3d Cir. 1999) (second alteration in original) (quoting Furnco Const. Corp. v. Waters, 450 U.S. 567, 577 (1978)).

74 Mills, 171 F.3d at 456–57 (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (per curiam)) (adopting both the background circumstances test and an alternative test and citing with approval most of the Notari approach to the reverse discrimination problem); see also Fucarino v. Thornton Oil Corp., No. 98-C1429, 1999 U.S. Dist. LEXIS 13609, at *20–21 (N.D. Ill. Aug. 23, 1999) (adopting the Mills standard). In Notari v. Denver Water Department, 971 F.2d 585 (10th Cir. 1992), the court adopted a similar approach, allowing reverse discrimination plaintiffs to establish a prima facie case either through the background circumstances test or by showing "indirect evidence sufficient to support a reasonable probability, that but for the plaintiffs status the challenged employment decision would have favored the plaintiff." Id. at 590.

75 See Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991) (requiring a reverse discrimination plaintiff to prove membership in a class); Carey v. Mt. Desert Island Hosp., No. 95-0157-B, 1996 U.S. Dist. LEXIS 12397, at *19 (D. Me. Aug. 21, 1996) (applying the traditional McDonnell Douglas framework to a suit alleging gender discrimination and holding that the male plaintiff satisfied the test); Collins v. School Dist., 727 F. Supp. 1318, 1323 (W.D. Mo. 1990) (finding that the first prong of the McDonnell Douglas prima facie case was established because the plaintiff was a male and alleged unlawful gender discrimination); DeLuigi, supra note 2, at 365–66 (underscoring the Wilson court's apparent rejection of the "background circumstances" test); Whiteside, supra note 2, at 426–27 (discussing the Collins court's rejection of the "background circumstances" test in favor of requiring the plaintiff simply to state class membership). The Eighth Circuit Court of Appeals eventually chose to adopt the "background circumstances" test in lieu of the standard set forth in Collins in a Bivens employment discrimination case. See Duffy, 123 F.3d at 1087; see also supra note 71 (discussing Duffy's Bivens employment discrimination action).

76 See Carey, 1996 U.S. Dist. LEXIS 12397, at *14, 19 (observing that since the first prong of a prima facie gender discrimination suit requires membership in a
to the conflict is to reject altogether the *McDonnell Douglas* framework when analyzing a reverse discrimination claim.\textsuperscript{77} This approach is based on the assumption that the *McDonnell Douglas* prima facie case was meant to assist minorities and women only.\textsuperscript{78} Under this approach, the plaintiff in a reverse discrimination action may not rely on a presumption of discrimination solely because a minority candidate is chosen.\textsuperscript{79}

III. THE "BACKGROUND CIRCUMSTANCES" TEST IS A FAILURE

The court in *Mills* applied the "background circumstances" test to the plaintiff's reverse discrimination case.\textsuperscript{80} The "background circumstances" test, however, should not be used as a replacement for the first prong of the *McDonnell Douglas* prima facie case.\textsuperscript{81} First, the test improperly requires a reverse discrimination plaintiff to make a greater showing at the prima facie level than other plaintiffs who allege employment discrimination under Title VII.\textsuperscript{82} By requiring a greater degree

\textsuperscript{77} See Ustrak v. Fairman, 781 F.2d 573, 577 (7th Cir. 1986) (holding that the presumption of discrimination which arises when minorities and women make out a prima facie case does not arise for white plaintiffs). \textit{But see} Whiteside, supra note 2, at 420 (criticizing the *Ustrak* court's decision to not apply the *McDonnell Douglas* framework to a reverse discrimination action). The Seventh Circuit has since held that the *McDonnell Douglas* framework does indeed apply, with some alteration, to reverse discrimination claims. \textit{See} Mills, 171 F.3d at 454–56.

\textsuperscript{78} See Ustrak, 781 F.2d at 577.

\textsuperscript{79} See id.

\textsuperscript{80} See Mills, 171 F.3d at 456–57 (adopting the "background circumstances" test, which emanates from the presumption that "it is the unusual employer who discriminates against majority employees").

\textsuperscript{81} See Iadimarro v. Runyon, 190 F.3d 151, 160 (3d Cir. 1999) (rejecting the "background circumstances" test); Carey, 1996 U.S. Dist. LEXIS 12397, at *16–17 (holding that the "background circumstances" standard should not be adopted); Collins, 727 F. Supp. at 1322–23 (holding that reverse discrimination plaintiff need not make a showing of background circumstances to establish a prima facie case); \textit{see also} Whiteside, supra note 2, at 428 (submitting that a reverse discrimination plaintiff should not have to show background circumstances).

\textsuperscript{82} See Iadimarro, 190 F.3d at 159 (discussing several cases that regard the "background circumstances" approach as a heightened standard which should not be required of reverse discrimination plaintiffs); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."); Carey, 1996 U.S. Dist. LEXIS 12397, at *15–19 (discussing "background circumstances" as a heightened standard and holding that a heightened standard violates Title VII's
of proof from some plaintiffs and not others, the "background circumstances" test violates the intent of the neutral language in Title VII.\footnote{See 42 U.S.C. § 2000e-2(a)(1) (1994) (listing "race, color, religion, sex, or national origin" as protected classifications without limitations on the particular "race, color, religion, sex, or national origin" of the individual); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (stating that "Title VII... proscribe[s] racial discrimination... against whites on the same terms as racial discrimination against nonwhites"); Iadimarco, 190 F.3d at 161 (discussing prima facie case requirements as applicable to all Title VII plaintiffs); Collins, 727 F. Supp. at 1322 (emphasizing that legitimate Title VII claims are defeated by a background circumstances requirement); see also Whiteside, supra note 2, at 434 (arguing that since Title VII prohibits discrimination based upon protected attributes, the "background circumstances" test should not be applied because it treats plaintiffs differently based on those very attributes).}

Second, the "background circumstances" test alters the entire McDonnell Douglas burden-shifting framework.\footnote{See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (recognizing that the prima facie showing is not tantamount to an ultimate finding of fact that employment discrimination existed); Iadimarco, 190 F.3d at 161 (noting that background circumstances "can undermine the basic point of the McDonnell Douglas burden-shifting regime"); Collins, 727 F. Supp. at 1321 (stating that the "background circumstances" standard "eliminates the McDonnell Douglas framework from reverse discrimination cases"); Black, supra note 5, at 337 (stating that the "background circumstances" test almost requires reverse discrimination plaintiffs to demonstrate direct evidence of discrimination); Whiteside, supra note 2, at 427.} The test requires the reverse discrimination plaintiff to present evidence that would usually be required of a plaintiff at the third
By prematurely invoking the third step, reverse discrimination plaintiffs must present evidence of pretext before they get the benefit of forcing the defendant to articulate nondiscriminatory reasons for its employment determination.\footnote{See Iadimarco, 190 F.3d at 161; Collins, 727 F. Supp. at 1321; see also Whiteside, supra note 2, at 430 (noting that types of evidence reviewed by the Parker court in the background circumstances context were used by the McDonnell Douglas Court in determining pretext).}

The Supreme Court noted that “the method suggested in McDonnell Douglas for pursuing [an employment discrimination] inquiry . . . was never intended to be rigid, mechanized, or ritualistic.”\footnote{See Iadimarco, 190 F.3d at 161 (noting that acceleration of the pretext analysis to the prima facie step destroys one of the underlying motifs of the framework, i.e., a gradual process of first removing some of the typical nondiscriminatory reasons for employment decisions and then placing the burden on the defendant employer to articulate a legitimate nondiscriminatory reason for its decision); Collins, 727 F. Supp. at 1321; see also Whiteside, supra note 2, at 430 (maintaining that a “background circumstances” standard requires a “reverse discrimination plaintiff [to] justify the presumption” that arises through the showing of a prima facie case, something which is clearly not required of minority plaintiffs).}
The Court appears to be referring to the changes that are necessary to adapt the prima facie case to different types of employment decisions.\footnote{Furnco Constr. Corp., 438 U.S. at 577. When it set down the elements of the prima facie case in McDonnell Douglas, the Court noted that “[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.” McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973). The Court, in discussing the elements of the prima facie case, further articulated that “[r]equirement (i) of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII’s prohibition of racial discrimination.” McDonald, 427 U.S. at 279 n.6. This supports the reading of Title VII as proscribing all discrimination based on race in the employment sector. It also implies that plaintiffs can present evidence of racial discrimination in another manner, so long as the burden on plaintiffs is not different. This reading is at odds with the “background circumstances” test because that test requires reverse discrimination plaintiffs to bear a higher burden than other plaintiffs. Another author has interpreted footnote six in McDonald in a similar manner, concluding that the “background circumstances” test is not in accord with Supreme Court precedent. See Whiteside, supra note 2, at 435–36. That author, however, further concluded that in reverse discrimination cases, the first element of the prima facie case should be changed from a statement of membership in a racial minority to a statement of class membership. See id. But see infra Part IV (discussing a better solution to the reverse discrimination problem).}

By adopting the background
circumstances test, however, the court in Mills overstepped the bounds provided by the United States Supreme Court. The Mills court distorted the proof required of plaintiffs at the prima facie level and made reverse discrimination plaintiffs put forth evidence of the ultimate question of discrimination at the very beginning of the case.

In addition, as the Court noted in discussing the burden-shifting framework, employment discrimination is often difficult to prove. The prima facie case was designed to assist plaintiffs, rather than burden them. The “background circumstances” test, however, performs just the opposite function by requiring a reverse discrimination plaintiff to meet a higher standard of proof at the prima facie level.

Finally, the courts that have adopted the “background circumstances” test have failed to clearly define or apply it. The test does not provide a clear standard for reverse discrimination plaintiffs to follow when attempting to establish a employment actions. See id. It is more likely that the Court was discussing these types of changes to the prima facie case when it noted that changes would need to be made in the prima facie elements to fit the facts of the case, not changes that would alter the entire framework, as does the “background circumstances” test. See id.

89 See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult."); Collins, 727 F. Supp. at 1321 (stressing that "[t]he McDonnell Douglas framework was . . . a procedural embodiment of the recognition that employment discrimination is difficult to prove with only circumstantial evidence"); Whiteside, supra note 2, at 433 ("The purpose of the prima facie case is to assist plaintiffs who do not have direct evidence of discriminatory intent."). The Court also noted that in dealing with the difficult problem of discriminatory intent, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." Aikens, 460 U.S. at 716.

90 See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (noting that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous"); Whiteside, supra note 2, at 436 (noting that, in establishing a prima facie case, the burden imposed upon the plaintiff is not "onerous" and the factual showing is "minimal" in order "to allow the plaintiff to get past the summary judgement stage of litigation").

91 See Black, supra note 5, at 336 (underscoring that the "background circumstances" test adopted by the Parker court places a burden on the reverse discrimination plaintiff "that is nearly close to impossible to meet and one that destroys the very purpose of the prima facie case").

92 See Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999) (stating that "the concept of 'background circumstances' is irremediably vague and ill-defined"); see also Whiteside, supra note 2, at 431 (noting that "[t]he factual showing necessary to meet the requirement of background circumstances is unclear; it changes with each individual case and the individual judges deciding each case").
prima facie case of reverse discrimination. Plaintiffs should not be subjected to an undefined requirement in order to make out a prima facie case.

In Mills, the court found that the plaintiff produced evidence that was sufficient to satisfy the "background circumstances" test. Other reverse discrimination plaintiffs, however, have not been as successful in satisfying the "background circumstances" test. The McDonnell Douglas framework was meant to guide plaintiffs in order to sustain their case beyond summary judgment. By requiring reverse discrimination plaintiffs to satisfy the "background circumstances" test, plaintiffs are less likely to defeat summary judgment motions than are other employment discrimination plaintiffs. In addition, the higher burden placed upon reverse discrimination plaintiffs defeats the equitable purposes of Title VII.

93 See ladimarco, 190 F.3d at 161 (questioning whether the fact that the plaintiff was more qualified than the person actually hired is a background circumstance); see also Whiteside, supra note 2, at 430–31 (noting the confusion created by court decisions which hold that the plaintiff has failed to demonstrate facts sufficient to satisfy the "background circumstances" test without identifying facts that would be sufficient).

94 See Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999) (holding that the facts presented by plaintiff were "enough to overcome the background presumption that a white man was not subject to employment discrimination").

95 See Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 68 (6th Cir. 1985) (holding that because the reverse discrimination plaintiff failed to set forth "background circumstances suggesting the defendants are the unusual employers who discriminate against the majority," summary judgment in favor of the employer was proper, without providing any indication of what evidence would be acceptable); see also Whiteside, supra note 2, at 430–31 (discussing cases in which reverse discrimination plaintiffs did not satisfy the background circumstances test and demonstrating the lack of clarity regarding what facts are necessary to satisfy the background circumstances test).

96 See Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985). The Trans World Court stated that "[t]he shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" Id. (alteration in original) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)); see also Whiteside, supra note 2, at 429 (noting that the Court, in Trans World, has articulated the purpose of the McDonnell Douglas framework "as helping the plaintiff survive summary judgement so that he or she has an opportunity to prove the case in court despite the absence of direct evidence").
IV. A BETTER SOLUTION TO THE REVERSE DISCRIMINATION PROBLEM

When faced with a reverse discrimination plaintiff, courts should abandon the "background circumstances" test as a modification of the first prong of the McDonnell Douglas test in favor of the approach taken by the court in Iadimarco v. Runyon. In Iadimarco, the court concluded that when a reverse discrimination plaintiff attempts to establish a prima facie case with indirect evidence, the plaintiff must present "sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin.'" The Iadimarco approach conforms to the purposes and requirements of each stage of the traditional McDonnell Douglas framework and avoids the problems associated with the "background circumstances" test. Therefore, the Iadimarco approach more properly serves the equitable purposes of Title VII.

In Iadimarco, the plaintiff, a white male, alleged reverse discrimination in employment after his employer, the Postal Service, failed to offer him a promotion. During a reorganization of the Postal Service, many positions were eliminated and managerial employees were asked to submit their preferences for available managerial positions. As requested, Iadimarco indicated his preference for three of the available positions. White male employees filled two of the three positions he listed. Among the remaining candidates for the third position, only three were rated "'superior'" in six different "'knowledge, skills and abilities'" categories used by the Postal Service to evaluate employees. Two of the candidates were placed in other jobs, leaving Iadimarco as the only candidate for the position who received a rating of

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97 190 F.3d 151 (3d Cir. 1999).
98 Id. at 163 (alteration in original) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).
99 See id. at 154.
100 See id.
101 See id.
102 See id.
103 Id. The categories were related to management abilities, customer service, and technical skills. See id. at 154 n.1.
“superior” in all six categories. Instead of automatically promoting Iadimarco, his supervisor sought additional applicants for the position. Shortly thereafter, Iadimarco took another job in the Postal Service. A black female, Ms. Williams, subsequently filled the position Iadimarco had sought.

The court found that the evidence presented by Iadimarco was sufficient to establish a prima facie case for the purpose of shifting the burden pursuant to the framework outlined in McDonnell Douglas. The court noted that, unlike Iadimarco, Williams was not rated by the Postal Service. Furthermore, Williams had no experience in a comparable position. The court also discussed the change in the job requirements after Williams became a candidate for the position. Specifically, an engineering degree, which Williams allegedly did not possess, was no longer a requirement for the position. The court stated that this evidence must be viewed in light of a diversity memo distributed by the supervisor who declined to promote Iadimarco. The court determined that, based on the evidence presented by Iadimarco, the district court erred in finding that Iadimarco failed to establish a prima facie case of "reverse discrimination."
The court in *Mills* adopted a test to determine whether a plaintiff has established a prima facie case of reverse discrimination that takes a middle approach and is similar to the test adopted in *Iadimarco*.\(^{114}\) The middle approach adopted by the court in *Mills* allows a reverse discrimination plaintiff to make out a prima facie case by "‘establish[ing] a logical reason to believe that the [employer’s] decision rests on a legally forbidden ground.’"\(^{115}\) Both the *Iadimarco* approach and the *Mills* alternative seem to broadly view the indirect evidence presented to determine whether the employer discriminated against the plaintiff in violation of Title VII,\(^{116}\) instead of requiring that the plaintiff fit his or her evidence into one of the two categories of background circumstances.\(^{117}\) The *Mills* court, however, also adopted and subsequently applied the "background circumstances" test to analyze the plaintiff’s claim.\(^{118}\)

There is no need to apply a "background circumstances" test once the middle approach is taken.\(^{119}\) The "background circumstances" test attempts to fit a new standard into the first prong of the prima facie case and requires a plaintiff to satisfy the modified four prongs of the prima facie case. Instead of this approach, a reverse discrimination plaintiff should be allowed to focus directly on the issue of employment discrimination.\(^{120}\) Once the plaintiff establishes a prima facie case "by presenting sufficient evidence to allow a reasonable fact finder to conclude

\(^{114}\) See *Mills* v. Health Care Serv. Co, 171 F.3d 450, 457 (7th Cir. 1999).

\(^{115}\) Id. (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (per curiam)).

\(^{116}\) See *Iadimarco*, 190 F.3d at 163 (stating that "the totality of the circumstances" should be reviewed to determine whether the plaintiff has established a prima facie case); *Mills*, 171 F.3d at 457 (noting that the "background circumstances" test "is not to be interpreted in a constricting fashion" and allowing reverse discrimination plaintiffs to remove themselves from the restrictions of the test by "‘establish[ing] a logical reason to believe that the [employer’s] decision rests on a legally forbidden ground’" (second alteration in original) (quoting Carson, 82 F.3d at 159)).

\(^{117}\) For a discussion of the "background circumstances" test, see supra notes 63–72 and accompanying text.

\(^{118}\) See *Mills*, 171 F.3d at 457.

\(^{119}\) See *Iadimarco*, 190 F.3d at 161–62. The court noted that it is not necessary to analyze whether a plaintiff has presented background circumstances when this new approach is adopted. See id. at 162. In adopting both tests, some courts have rendered the "background circumstances" test moot. See id. at 161.

\(^{120}\) See id. at 163 (noting that instead of running into problems trying to "‘cram['] the ‘background circumstances’ inquiry into the first prong of McDonnell Douglas," plaintiffs should follow a new test for establishing a prima facie case).
(given the totality of the circumstances) that the defendant treated plaintiff 'less favorably than others because of [his or her] race, color, religion, sex, or national origin,'"121 the traditional framework comes back into play.122

The Iadimarro approach to determining whether a reverse discrimination plaintiff established a claim is more appropriate than the "background circumstances" test adopted in Mills. First, this test may be applied to any type of employment discrimination claim, not just reverse discrimination, without requiring a heightened level of proof for any plaintiff.123 Second, the test focuses the inquiry on the alleged discrimination against the plaintiff, just as with the traditional prima facie case.124 Furthermore, this approach is not as rigid as the "background circumstances" test. The test does not require plaintiffs to mold their evidence into specific categories in order to establish a prima facie case against the employer. Finally, the test does not necessitate that plaintiffs show, at the prima facie level, that it is the "unusual employer who discriminates against the

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121 Id. (alteration in original) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).
122 See id. After holding that the plaintiff had presented a prima facie case using this new method, the court then went on to review the second and third steps in the McDonnell Douglas burden-shifting framework. See id. at 165–67.
123 The Fourth Circuit Court of Appeals set down a similar test in a case involving racial discrimination against a black man. See Holmes v. Bevilacqua, 794 F.2d 142, 146 (4th Cir. 1986). The court required that the plaintiff, who alleged disparate treatment, either present direct evidence of discrimination or by indirect evidence whose cumulative probative force, apart from the presumption’s operation, would suffice under the controlling standard to support as a reasonable probability the inference that but for the plaintiff’s race he would have been promoted. Without such evidence, the claimant must resort to the McDonnell Douglas presumption with all of its ensuing complexities. Id. (citation and footnote omitted). The court in Notari v. Denver Water Department, 971 F.2d 585, 590 (10th Cir. 1992), adopted the Holmes test as an alternative to the "background circumstances" test. See McKeever, supra note 3, at 446–47. The Mills court adopted, but did not apply, an alternative to the "background circumstances" test that is similar to the Holmes/Notari approach. See Mills, 171 F.3d at 457 (noting that reverse discrimination plaintiffs may make out a prima facie case by "establish[ing] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground") (second alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996)).
124 See Furnco, 438 U.S. at 577 (noting that the focus of the prima facie case is "whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin'"). The test for reverse discrimination plaintiffs focuses on the same inquiry at the prima facie level. See Iadimarro, 190 F.3d at 163.
majority.” To require such proof at the prima facie level creates another hurdle for reverse discrimination plaintiffs, which is contrary to Title VII and United States Supreme Court precedent.

CONCLUSION

In *McDonnell Douglas*, the Supreme Court set forth the three-part framework used to analyze employment discrimination claims brought under Title VII. This framework includes a requirement that the plaintiff establish membership in a racial minority. When majority plaintiffs began to bring reverse discrimination actions, the federal courts split on how to alter the *McDonnell Douglas* framework. A majority of the courts adopted the “background circumstances” test to deal with the reverse discrimination problem.

The *Mills* court erred in adopting the “background circumstances” test as a resolution to the reverse discrimination problem. The “background circumstances” test improperly places a higher burden on reverse discrimination plaintiffs than is required at the prima facie level of the traditional *McDonnell Douglas* framework. By placing a higher burden on reverse discrimination plaintiffs at this level, the test undermines the underlying purposes of the prima facie case and the burden-shifting framework. Additionally, this heightened burden violates the intent behind the neutral language in Title VII.

A better solution of the reverse discrimination problem is to require reverse discrimination plaintiffs to present “sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff

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125 Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981). The court in *Mills* agreed with this presumption. See *Mills*, 171 F.3d at 456–57. The *Collins* court attacked the use of such a presumption in a Title VII analysis, stating that “[t]he *Parker* requirement only protects the ‘unusual employer who discriminates against the majority,’ employers who do not make employment decisions based on impermissible factors are already adequately protected from frivolous claims by the *McDonnell Douglas-Burdine* framework.” *Collins v. School Dist.*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990). The court in *Iadimarco* also attacked the requirement that plaintiffs establish this presumption at the prima facie level. See *Iadimarco*, 190 F.3d at 161 (noting that such a showing would more likely be relevant as evidence in the pretext stage of the framework). The *Parker* court’s presumption, if ever proper, is no longer valid. See Black, supra note 5, at 350–51 (noting that “[t]he assumption that an employer generally does not discriminate against majority class members is therefore no longer valid”).
'less favorably than others because of [his or her] race, color, religion, sex, or national origin' "to establish a prima facie case.\textsuperscript{126} This approach does not require a reverse discrimination plaintiff to prove more than is required by the traditional \textit{McDonnell Douglas} test. Also, by not requiring more of reverse discrimination plaintiffs, the neutral language of Title VII is not violated.

Resolution of this problem is essential in order for reverse discrimination plaintiffs to determine the types of evidence that must be produced to succeed in employment discrimination actions. Until the Supreme Court addresses the subject, courts should adopt a test for reverse discrimination plaintiffs that does not discriminate by eliminating the benefits of the \textit{McDonnell Douglas} burden-shifting framework.

\textsuperscript{126} \textit{Iadimarco}, 190 F.3d at 163.