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Race-Based Reverse Employment Discrimination Claims: A Combination of Factors to the Prima Facie Case for Caucasian Plaintiffs

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RACE-BASED REVERSE EMPLOYMENT DISCRIMINATION CLAIMS: A COMBINATION OF FACTORS TO THE PRIMA FACIE CASE FOR CAUCASIAN PLAINTIFFS

Shirley W. Bi†

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INTRODUCTION

A Caucasian plaintiff may assert that she suffered racial discrimination in her place of employment, despite her status as a member of a racial majority.[1] In alleging an adverse employment action due to discrimination, her burden in court and the outcome of her claim depend largely on the jurisdiction in which her case will be adjudicated.[2] This Note examines a specific point early in establishing a prima facie case for reverse discrimination under Title VII[3] of the Civil

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[1] *See* Janice C. Whiteside, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413, 413 n.2 (1998) ("The term 'reverse' discrimination . . . refers to discrimination against members of groups which have not traditionally been subjected to discrimination, such as nonminorities and males."); *see also* Peter Gene Baroni, *Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims Under Title VII*, 39 HOW. L.J. 797, 797 (1996); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 662 (2000). Relatedly, note that Shirley E. Stewart, in Comment: *The Myth of Reverse Race Discrimination: An Historical Perspective*, 23 CLEV. ST. L. REV. 319, 322 (1974), asks an interesting question: "Is the removal of a benefit, given for centuries to some at the expense of others, truly a discrimination against that long-privileged class?" *See also* Hope Yen, *Census: White Majority in U.S. Gone by 2043*, NBC NEWS (Jun 13, 2013, 4:11 AM), http://usnews.nbcnews.com/_news/2013/06/13/18934111-census-white-majority-in-us-gone-by-2043. It is also worth noting that the current racial dynamic—with Caucasians being the majority of the United States population—is subject to change in the next few decades. *Id.*

[2] *See* Ryan Mainhardt & William Volet, *The First Prong's Effect on the Docket: How the Second Circuit Should Modify the McDonnell Douglas Framework in Title VII Reverse Discrimination Claims*, 30 HOFSTRA LAB. & EMP. L.J. 219, 219–20 (2012) (describing a hypothetical case involving the average Caucasian plaintiff). Similarly, for purposes of this Note, one may imagine a hypothetical Caucasian plaintiff, John, who works at a wholesale distribution center. After eight years, John received his first promotion to team manager. Another eight years later, he was promoted again to division leader. By his twentieth year on the job, John was promoted to the highest-ranking position for his role, as the manager of operations. However, when later confronted with a physical fight involving three other managers of operations, all of different races, the three other racial minority managers received a disciplinary notice recommending termination. Meanwhile, only John, the Caucasian plaintiff, was actually terminated. A Caucasian plaintiff claiming reverse discrimination is unlikely to possess direct evidence to prove his case. *See infra* note 41. Yet, even with sufficient indirect evidence at hand to establish a plausible case of reverse discrimination, the way to substantiate a claim depends on the jurisdiction in which the Caucasian plaintiff resides. *See, e.g.*, *infra* Parts II.C, II.D, and II.E.

[3] 42 U.S.C. §§ 2000e–2000e-17 (2012). *See infra* note 20 (providing the text of Title VII).

Rights Act of 1964 (Title VII).[4] This currently evolving area of law[5] does not offer the same process to all Caucasian plaintiffs who wish to make a racial discrimination claim. The methods for establishing and evaluating a claim—the allegations made and necessary evidence—vary across federal circuits.[6] Also, the courts have unintentionally created a situation resulting in different outcomes between Caucasian plaintiffs with similar claims, because different federal circuits have adopted different standards for establishing a prima facie reverse discrimination case.[7]

Based on traditional prima facie principles for racial discrimination,[8] federal courts have modified the *McDonnell Douglas* burden-shifting framework[9] to evaluate Caucasian plaintiffs' reverse racial discrimination claims.[10] However, in substituting for the first element of the four-pronged *McDonnell Douglass* prima facie case, courts have disagreed over how a Caucasian plaintiff may establish an inference of reverse racial discrimination.[11] Conceptually, the various modifications—such as the background circumstances approach,[12] protected class approach,[13] and sufficient evidence approach[14]—are justified, because Caucasian plaintiffs, particularly those who are male, have yet to confront a history of hostile discrimination schemes.[15] Yet,

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4 This Note cautiously omits a discussion of the causes and effects of affirmative action, including in hiring and firing decisions. Certainly, the topic of affirmative action deserves its own thorough and extensive discussion as it raises other interesting questions and problems. The issues and problems stemming from both mandated and voluntary affirmative action are beyond the scope of this Note.

5 For a modern example of reverse discrimination and its impact, see Oliver Darcy, *Evidence of Reverse Discrimination Was So 'Overwhelming' That a Jury Awarded the Victim More Than $1 Million*, THE BLAZE (May 29, 2014, 3:31 PM), http://www.theblaze.com/stories/2014/05/29/evidence-of-reverse-discrimination-was-so-overwhelming-that-a-jury-awarded-the-victim-more-than-1-million.

6 *See infra* Parts I.C, I.D, and I.E.

7 *See* EEOC, EEOC COMPLIANCE MANUAL § 15-II, 2006 WL 4673425 (2009).

8 *See infra* Part I.A.

9 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also infra* notes 23–35 and accompanying text.

10 Baroni, *supra* note 1, at 798.

11 *See id.* at 797; Donald T. Kramer, Annotation, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases*, 150 A.L.R. FED. 1 §§ 5–11 (1998); Whiteside, *supra* note 1. *See generally* Timothy K. Giordano, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call For Modification of the Background Circumstances Test to Ensure That Separate is Equal*, 49 EMORY L.J. 993 (2000).

12 *See infra* Part I.C and II.A.

13 *See infra* Part I.D and II.B.

14 *See infra* Part I.E and II.C.

15 Generally, minorities and women historically faced societal discrimination. *See* Whiteside, *supra* note 1, at 421 ("[T]he presumption exists for minorities and women only because of the history of societal discrimination that we have yet to overcome."). Caucasian plaintiffs, including those who are male, have yet to face a hostile discriminatory scheme towards them. Thus,

while permitted in federal courts, reverse discrimination claims carry an implicit philosophical illegitimacy regardless of the available statutory language, legislative history, and early Supreme Court precedent. The modifications of the prima facie case for Caucasian plaintiffs arguably limit reverse claims as a result of the assumption that racial majorities do not face discrimination.

This Note discusses the practical impact resulting from the different modifications of the first prong of the *McDonnell Douglas* burden-shifting framework in reverse discrimination cases.[16] Part I of this Note will provide background information on traditional Title VII racial discrimination claims, when a minority plaintiff alleges racial discrimination in her workplace. Then, it will introduce the three step burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*,[17] which is the foundation for reverse racial discrimination cases. This Note focuses on the first of the four prongs of the prima facie analysis used by federal courts. Part II will introduce each of the three modified approaches for reverse race discrimination analysis.[18] This Part will also analyze, in detail, the divergent elements that circuit courts consider for satisfying the first prong of the prima facie case. Part II will continue by focusing on the arguments set forth by legal scholars, including the advantages and critiques associated with each approach. The essential link between these approaches' advantages and disadvantages and their rationale rests on Caucasian plaintiffs' burdens.

Part III will propose a combination of factors test. This approach to the *McDonnell Douglas* framework recommends that the first prong of the prima facie case draw from essential factors that are viable to the current three approaches. The combination of factors test allows a Caucasian plaintiff to make a prima facie case for reverse discrimination by alleging relevant background circumstances as well as indirect evidence. This Note concludes by reiterating the importance for federal courts to unify its approaches when dealing with the first prong of the *McDonnell Douglas* reverse discrimination prima facie case.

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modification of the prima facie standard was justified to compensate plaintiffs of race and gender minorities for the discrimination they suffered throughout the history of this nation. *Id. See also infra* note 66 and accompanying text.

16 Congress's intent in enacting Title VII, however, was not to ensure that minority individuals receive a "wind-fall" in employment decisions, such that he or she is automatically entitled to favorable treatment simply due to his or her racial status. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

17 411 U.S. 792, 802–03 (1973).

18 *See infra* Part I.C, I.D, and I.E.

I. BACKGROUND: REVERSE RACIAL DISCRIMINATION AND THE THREE APPROACHES TO THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK

A. *Back to Title VII and the* McDonnell Douglas *Framework*

Title VII prohibits employers from hiring, discharging, demoting or otherwise discriminating[19] against employees based on race.[20] Under Title VII, aggrieved plaintiffs who suffered from race-based discriminatory conduct are protected and have a right to bring a legal claim.[21] Traditionally, those alleging Title VII racial discrimination in the workplace were members of racial minorities.[22] In *McDonnell Douglas Corp. v. Green*,[23] the Supreme Court first iterated a three step burden-shifting framework—the *McDonnell Douglas* framework—for complainants alleging that an employer made hiring decisions based on racially discriminatory practices.[24] The *McDonnell Douglas* Court

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[19] *See* Schwartz, *supra* note 1, at 665 ("Discrimination is not different treatment per se, but differential treatment that arises from, and perpetuates, a caste system, a history of oppression, or exclusion of groups based on their group characteristics.").

[20] Section 703 of the Civil Rights Act of 1964 provides, in part, that:

> 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[.]

42 U.S.C. § 2000e-2 (2012). For a discussion of the goals and effects of Title VII, see L. Darnell Weeden, *Justice Alito and the Issue of Racial Discrimination: From Racial Segregation to Racial Diversity*, 33 S.U. L. REV. 469, 482–84 (2006).

[21] The House of Representatives Report stated:

> The purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin . . . . Section 701(a) sets forth a congressional declaration that all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination.

H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401. *See also supra* note 20.

[22] *McDonnell Douglas*, 411 U.S. at 800 ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environment to the disadvantage of minority citizens.").

[23] *McDonnell Douglas* involved an African American civil rights activist who claimed that the defendant, a St. Louis, Missouri based aerospace and aircraft manufacturer, had discharged him and subsequently "had refused to rehire him because of his race and persistent involvement in the civil rights movement." *Id.* at 796. As a part of his protest against defendant McDonnell Douglas Corp., the plaintiff illegally parked his car on the main road to prevent access to the corporation's main facilities. *Id.* at 795.

[24] *Id.* at 802. The *McDonnell Douglas* framework has also been applied in various other

required the plaintiff alleging racially discriminatory hiring practices to satisfy her initial burden of proof by establishing a four-pronged prima facie case.[25] First, the plaintiff must show that she belongs to a class of racial minorities.[26] Second, the plaintiff must prove that she was qualified for the particular employment opportunity to which she applied.[27] Third, the plaintiff must show that, despite meeting qualifications sought by the employer, she was rejected for the position.[28] The fourth prong requires a showing that the position remained available after plaintiff's rejection, as the employer continued to review other applicants with similar qualifications.[29]

A plaintiff has the burden of alleging facts that are legally sufficient to satisfy each of these four prongs to create a presumption[30] of racial discrimination.[31] The burden then shifts to the defendant-employer, who may rebut that presumption by articulating a legitimate, nondiscriminatory reason for refusing to hire the plaintiff.[32] If the defendant-employer satisfies its burden by producing admissible evidence[33] to articulate legitimate, nondiscriminatory reasons to sufficiently justify its employment decisions, the burden once again shifts back to the plaintiff.[34] It is up to the plaintiff to prove that the

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forms of discrimination, including those claims based on gender, age, and national origin. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (discussing the *McDonnell Douglas* burden-shifting framework in a disparate-treatment claim pursuant to the American Disabilities Act); Wilson v. Chertoff, 699 F. Supp. 2d (D. Mass 2010) (discussing the *McDonnell Douglas* burden-shifting framework where the female plaintiff alleged disparate-treatment due to her gender). In addition to hiring processes, the framework may be applied in analyzing disparate treatment regarding promotions, demotions, transfer requests, and termination claims. *See, e.g.*, Kramer, *supra* note 11.

25 *McDonnell Douglas*, 411 U.S. at 802.

26 *Id.* This is the essential element discussed by this Note. All references in this Note to the original *McDonnell Douglas* "first prong" describe this requirement that a traditional plaintiff claiming discrimination must belong to a racial minority.

27 *Id.*

28 *Id.*

29 *Id. McDonnell Douglas* established the basic framework of disparate treatment, generally understood to involve a similarly situated comparator, not in plaintiff's protected class, that received more favorable treatment compared to the plaintiff. *See* Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 63 MERCER L. REV. 1203, 1204 (2012).

30 In St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993), the Supreme Court cited 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 67, at 536 (1977), which stated that "[t]o establish a presumption is to say that a finding of the predicate fact (here, the prima facie case) produces 'a required conclusion in the absence of explanation' (here, the finding of unlawful discrimination)."

31 *See* Baroni, *supra* note 1, at 799.

32 *McDonnell Douglas*, 411 U.S. at 802 ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

33 Baroni, *supra* note 1, at 799.

34 *McDonnell Douglas*, 411 U.S. at 802. *See also* Whiteside, *supra* note 1, at 417. The fulfillment of the prima facie case does not factually establish a case of discrimination. Instead, it raises an inference of discrimination against the plaintiff, which may be rebutted. *Id.*

defendant's stated nondiscriminatory excuse is a pretext for masking discrimination.[35]

To articulate its rationale, the Supreme Court revisited the *McDonnell Douglas* burden-shifting framework eight years later in *Texas Dep't of Community Affairs v. Burdine*.[36] The *Burdine* Court reasoned that the ultimate burden placed on a plaintiff allows courts to test the articulated legitimate, nondiscriminatory reasons for terminating an otherwise qualified employee.[37] Since the presumption of discrimination is rebuttable,[38] the defendant may demonstrate that it lacked a discriminatory motive for racial stratification.[39] Therefore, courts can isolate and evaluate whether these supposed nondiscriminatory reasons were intended to mask an illegal and discriminatory employment action.[40] The *McDonnell Douglas* prima facie case framework additionally allows the plaintiff to survive summary judgment despite the absence of direct evidence.[41] More

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[35] Whiteside, *supra* note 1, at 417.

[36] 450 U.S. 248 (1981). In *Burdine*, the United States Supreme Court further clarified the burden-shifting process:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
>
> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Id. at 252–53 (citations omitted) (quoting *McDonnell Douglas*, 411 U.S. at 802, 804).

[37] *See id.* at 253–54 ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."). The Supreme Court later explained this in *Furnco Constr. Corp. v. Waters*. The prima facie case allows the Court to presume that otherwise unexplained facts are more likely than not based on impermissible, unlawful discrimination against an employee. 438 U.S. 567, 577 (1978).

[38] *See* Whiteside, *supra* note 1, at 417.

[39] *Id.* The third step of the *McDonnell Douglas* burden-shifting framework provides a plaintiff the opportunity to prove that the employer's stated legitimate, nondiscriminatory reasons were actually pretextual and untrue. *See* Baroni, *supra* note 1, at 800. To prove that a defendant-employer's proffered reasons were pretextual, a plaintiff may offer: (1) direct evidence that plaintiff was fired because of her gender; (2) comparative evidence between plaintiff and other similarly situated but poorly performing employees, that plaintiff was discharged while the other employee was retained; or (3) statistical evidence demonstrating that the employer's practices show a pattern against those of plaintiff's race. *Id.* Presumably, the same standard for proving pretext applies in reverse discrimination cases. *See also id.* at n.25.

[40] *See* Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 667 (1998).

[41] *See* Whiteside, *supra* note 1, at 417. If, on the other hand, the plaintiff possesses direct evidence of discrimination, it is unnecessary for the plaintiff to employ the prima facie framework

importantly, the purpose of Title VII and the *McDonnell Douglas* framework supports the plaintiff's opportunity to remain in the courtroom through the use of circumstantial evidence.[42]

B. *All Groups Are Protected*

The Supreme Court later articulated in *McDonald v. Santa Fe Trail Transp. Co.*[43] that the inference from a prima facie case is granted to any individual.[44] This position is wholly consistent with the legislative history of Title VII,[45] as well as with an Equal Employment Opportunity Commission determination that racial discrimination against both Caucasians and nonwhites countered the congressional intention to discourage all discriminatory employment practices.[46]

Nevertheless, race discrimination claims brought by minority plaintiffs differ from those alleged by Caucasian plaintiffs.[47] Under the

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to establish an *inference* of discrimination. The *McDonnell Douglas* framework intends to assist plaintiffs in court, for the obvious reason that they hardly possess direct evidence to prove intentional discrimination. *Id.*

[42] *See Burdine*, 450 U.S. at 253. The *Burdine* Court clarified that the burden of establishing a prima facie case is not onerous. Of course, the plaintiff must still prove, by a preponderance of evidence, all prongs of her claim. *Id.* Moving past pleading, a plaintiff may present evidence to the trier(s) of fact. *Id.* at 254. But if the trier(s) of fact finds such evidence credible, and the employer is silent regarding the presumption, then the court must enter judgment for the plaintiff because there are no issues of fact remaining in the case. *Id.*

[43] 427 U.S. 273, 279–80 (1976). In *McDonald*, the United States Supreme Court clearly stated that "Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race,' § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1)" and its "terms are not are not limited to discrimination against members of any particular race." *Id.* at 278–79.

[44] *Id.* at 279. As early as 1971, the United States Supreme Court articulated that even if it "were not . . . confronted with racial discrimination against whites, [it] described the [1964 Civil Rights] Act in Griggs v. Duke Power Co., . . . as prohibiting '[d]iscriminatory preference for *any* (racial) group, *minority* or *majority*' (emphasis added)." *Id.* (citations omitted). The Supreme Court based its decision on Title VII's legislative intent. *Id.* at 280. ("This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' 110 CONG. REC. 2578 (1964).").

[45] *See* Whiteside, *supra* note 1, at 415–16 ("In addition, the legislative history of Title VII shows that Congress intended that it cover all employees, not just members of historically disadvantaged groups."). *See id.* at n.18; 110 CONG. REC. 2578 (1964) (statement of Rep. Celler explaining that Title VII was intended to cover "white men and white women and all Americans"); *see also* 110 CONG. REC. 7218 (1964) (memorandum of Senator Clark noting that Title VII creates an "obligation not to discriminate against whites").

[46] *See* EEOC Decision No. 74-31, 7 Fair Empl. Prac. Cas. (BNA) 1326, at *2 (1973) ("Accordingly, we must find, even in the absence of evidence that qualified Caucasian applicants have not been denied employment because of their race, that Respondent's recruiting activity violates Title VII to the extent that Caucasians as a class are deprived of an equal opportunity to consider employment with Respondent.").

[47] This is a reasonable conclusion derived from the differences between the privileges of Caucasians and those of minority plaintiffs. *See* Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 71–80 (1999). Onwuachi-Willig

traditional *McDonnell Douglas* framework, the first element of the prima facie case asks whether a plaintiff is a member of a racial minority group.[48] Since then, three distinct approaches have evolved in federal circuit courts, each modifying the first prong of the *McDonnell Douglas* framework as applied to Caucasian plaintiffs.[49] Without these modifications, Caucasian plaintiffs would have never been able to establish a prima facie case because they are not members of a minority group.[50]

Federal courts have thus refined the *McDonnell Douglas* prima facie framework for Caucasian plaintiffs and created: (1) the background circumstances approach; (2) the protected class approach; and (3) a two-method sufficient evidence approach. Each of these approaches is examined below.

C. *The First Approach—The Background Circumstances*

Under this approach, the Sixth,[51] Eighth,[52] and the District of Columbia[53] Circuits all require that a Caucasian plaintiff provide "background circumstances" to prove that the defendant-employer discriminated against members of the majority race.[54] The Seventh

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discusses various studies involving employment opportunity differences between Caucasians and African Americans. These differences include the employment ratios between the two races, socioeconomic class and employment privileges, and privileges in hiring and promotion decisions. *Id.* For an interesting perspective on the social construction of reverse discrimination, see FRED L. PINCUS, REVERSE DISCRIMINATION: DISMANTLING THE MYTH 77–88 (2003).

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

49 Onwuachi-Willig, *supra* note 47, at 55–56. Courts modified the first element of the *McDonnell Douglas* framework to accommodate Caucasian plaintiffs. *See also* Giordano, *supra* note 11, at 1000. Mentions of the modified "first prong" in this Note refer to the three ways that circuit courts have adapted it. *See infra* Parts I.C, I.D, and I.E.

50 *See* Giordano, *supra* note 11, at 1017 ("Conversely, in a traditional Title VII claim, the minority plaintiff is fully aware of what he or she must establish when stating a prima facie case. The first element of the traditional prima facie case is clear: the plaintiff either is a minority, and satisfies it, or is not.").

51 *See, e.g.*, Romans v. Mich. Dep't of Human Servs., 668 F.3d 826 (6th Cir. 2012); Leadbetter v. Gilley, 385 F.3d 683 (6th Cir. 2004); Campbell v. Hamilton Cnty., 23 F. App'x 318 (6th Cir. 2001); Sloan v. Bd. of Educ., No. 12-2515-JDT, 2015 WL 3507077, *2 (W.D. Tenn. June 3, 2015).

52 *See, e.g.*, Schaffhauser v. United Parcel Servs., Inc., 794 F.3d 899 (8th Cir. 2015); Duff v. Wolle, 123 F.3d 1026, 1036–37 (8th Cir. 1999); Donaghy v. City of Omaha, 933 F.2d 1148 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992).

53 Giordano, s*upra* note 11, at n.48; *see also* Mastro v. Potomac Elec. Power Co., 447 F.3d 843 (D.C. Cir. 2006).

54 *See* Giordano, *supra* note 11, at 1001 ("The law regarding the proper prima facie case for reverse discrimination can be divided into three main approaches. The first approach replaces the first element of the traditional prima facie case with the background circumstances test. This approach requires a non-minority Title VII plaintiff to show 'background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the

Circuit also employed this method of proof until recently.[55] This approach assumes that reverse discrimination rarely happens, and therefore, Caucasian plaintiffs are required to prove more than that which is required of minorities, who are historically discriminated against.[56]

In 1981, the District of Columbia (D.C.) Circuit first articulated the "background circumstances" test in *Parker v. Baltimore & Ohio Railroad Co.*[57] At issue in *Parker* was the employer's failure to promote the plaintiff Parker, a white male employee.[58] From 1975 to 1978, Parker applied for a transfer or promotion to the role of locomotive fireman, but never succeeded.[59] He alleged that his unsuccessful applications for promotions resulted from illegal preferences given to black and female applicants.[60] The *Parker* Court modified the original *McDonnell Douglas* standard, now requiring the plaintiff to provide background circumstances to support his suspicion that his employer had intentionally subjected him to raced-based disparate treatment.[61]

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majority.' The majority of the federal circuits that have addressed the prima facie case issue in reverse discrimination claims follow this approach." (footnote omitted) (modification in original)).

[55] *See, e.g.*, Hague v. Thompson Distrib. Co., 436 F.3d 816, 820 (7th Cir. 2006); Phelan v. City of Chi., 347 F.3d 679, 685 (7th Cir. 2003); Pollack v. Crown Cork & Seal, USA, Inc., No. 12 C 6896, 2013 WL 4451227 (N.D. Ill. Aug. 16, 2013). However, recently in *Rahn v. Bd. of Trs. of N. Ill. Univ.*, 803 F.3d 285, 289 (7th Cir. 2015), the Seventh Circuit required that "a plaintiff must produce 'either direct or circumstantial evidence that would permit a jury to infer that discrimination motivated an adverse employment action.'" (quoting Langenbach v. Wal–Mart Stores, Inc., 761 F.3d 792, 802 (7th Cir. 2014)). For what the Seventh Circuit considers either direct or circumstantial evidence, see *infra* note 111.

[56] Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 367 (2007).

[57] 652 F.2d 1012, 1017–18 (1981).

[58] *Id.* at 1013. Plaintiff Parker was a white male who was employed by defendant railroad company as a conductor and trainman since 1974. *Id.*

[59] *Id.*

[60] *Id.* at 1014. In 1976, defendant Baltimore & Ohio Railroad filled six fireman openings with two white men, one white woman, two black men, and one black woman. In 1977, all nine positions were awarded to white men. In 1978, white men accepted eight positions, and a black man accepted a ninth position. Parker claimed that he suffered race and gender discrimination in the 1976 and 1978 promotion decisions. *Id.* at 1014–15.

[61] *Id.* at 1017–18. For a concrete example of what background circumstances a plaintiff presents to the court, see Leadbetter v. Gilley, 385 F.3d 683 (6th Cir. 2004). In *Leadbetter*, the plaintiff alleged that he was passed up for two promotions, but the court determined he did not satisfy his burden in providing suspicious background circumstances supporting the notion that the hiring supervisor discriminated against whites. *Id.* The court stated that when promoting an African American employee over Leadbetter, the President of the University of Tennessee undeniably contemplated race as a factor. *Id.* at 687–92. Such consideration may lead one to conclude that it "demonstrates 'background circumstances [to] support the suspicion' that [the President] discriminates against whites." *Id.* at 692 (quoting Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 614–15 (6th Cir. 2003). However, plaintiff never applied for the position, and only proved that he had at most a general interest in applying had the position paid more. *Id.* at n.3. Without showing that his application for the position would have otherwise been

This modification was made in recognition of the fact that typically, no inference of prejudice arises even when Caucasians were passed over for a promotion and a minority colleague was promoted instead.[62] Rather, the D.C. Circuit recognized that if background circumstances could show that disparate treatment between employees was motivated by race,[63] those circumstances would be functionally equivalent to the first criterion in the *McDonnell Douglas* framework, where the targeted plaintiff was a minority.

By successfully alleging all four prongs of the *McDonnell Douglas* test, a plaintiff triggers a presumption of racial discrimination, which an employer may rebut.[64] The Supreme Court designed the original *McDonnell Douglas* framework to assist plaintiffs in surviving summary judgment.[65] According to Judge Mikva of the *Parker* Court, the original framework was a procedural representation that recognized this nation's legacy of discrimination, particularly in cases where intentional disparate treatment came from employers who typically discriminated against minorities.[66] The *Parker* Court concluded that modification of the first prong of the *McDonnell Douglas* prima facie case was necessary to facilitate majority plaintiffs' discrimination claims, by creating a similar inference of discrimination despite these

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jeopardized by a "blacks only" requirement, Leadbetter failed to establish the first element of his prima facie case. *Id.* at 693.

62 *Parker*, 652 F.2d at 1017–18 ("Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the 'light of common experience' would lead a fact finder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. . . . [I]t 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.").

63 *Id.* at 1018 (noting that "evidence of a racially discriminatory environment served as a functional equivalent of the first *McDonnell Douglas* criterion, membership in a racial minority"). *Id.* Furthermore, "[i]f the court finds evidence of . . . unlawful consideration of race as a factor in hiring in the past justifies a suspicion that incidents of capricious discrimination against whites because of their race may be likely, Parker [sh]ould not be required to adduce direct evidence that race was a factor . . . ." *Id.* at 1018.

64 By making a prima facie case, a plaintiff establishes a presumption of racial discrimination assuming she meets all other criteria of the *McDonnell Douglas* framework. *See id.* at 1018 ("Parker's claim of unlawful discrimination in 1976 will be subject to further inquiry by the district court on remand. If the court finds that evidence of B&O's unlawful consideration of race as a factor in hiring in the past justifies a suspicion that incidents of capricious discrimination against whites because of their race may be likely, Parker should to be required to adduce direct evidence that race was a factor in the 1978 hiring decision. If Parker's qualifications enable him to meet the other criteria of McDonnell Douglas, the burden of going forward would then shift to B&O to articulate a legitimate nondiscriminatory reason for its actions in 1978, in accordance with the usual *McDonnell Douglas* analysis.").

65 Whiteside, *supra* note 1, at 417.

66 *Parker*, 652 F.2d at 1017 ("The McDonnell Douglas test is not an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination.").

plaintiffs' status as racial majorities.[67]

Since the initial adoption of the background circumstances test in *Parker*, circuit courts following this approach have adjudicated cases in a variety of contexts, including disparate outcomes in employee discipline, promotion, demotion, and termination actions.[68] In 1993, the D.C. Circuit adjudicated *Harding v. Gray*,[69] a case involving a white male plaintiff alleging racial discrimination under Title VII for his employer's failure to promote him to a supervisory position in favor of a black candidate.[70] The *Harding* Court further expanded the background circumstances approach by declaring that plaintiffs generally may present evidence in two ways.[71] First, the Caucasian plaintiff may show that the particular employer has a discriminatory inclination against Caucasian employees. Second, she may point to "fishy facts"[72] of that particular case to indicate discrimination.[73] Both types of evidence equally satisfy the background circumstances test.[74]

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[67] Giordano, *supra* note 11, at 1002–03.

[68] The elements of the prima facie case are flexible depending on the facts of the particular case. *See* Baroni, *supra* note 1, at 799. For example, in a discriminatory promotion practices case, the first prong requires the plaintiff to show that she was a qualified candidate for the promotion. *Id.* In Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985), the plaintiff brought a discrimination claim under the Age Discrimination Employment Act, and the Supreme Court applied the *McDonnell Douglas* framework in this context. *See also* Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 679 (7th Cir. 2012) (discussing demotion); Mastro v. Potomac Elec. Power Co., 447 F.3d 843 (D.C. Cir. 2006) (involving disciplinary actions); Leadbetter v. Gilley, 385 F.3d 683 (6th Cir. 2004) (discussing promotions); Phelan v. City of Chi., 347 F.3d 679 (7th Cir. 2003) (involving termination).

[69] 9 F.3d 150 (D.C Cir. 1993).

[70] *Id.* at 152.

[71] *Id.* at 153.

[72] This term was used by the *Harding* Court. *See id.*

[73] *Id.*

[74] *Id.* A fact finder would reasonably conclude that when such a promotion occurs contrary to the employer's own best interest, the employer would likely be acting out of a discriminatory motive. *See* Giordano, *supra* note 11, at 1004. Courts that employ this first approach provide some insight into the types of evidence that a plaintiff may present to establish "background circumstances." *See e.g.*, Campbell v. Hamilton Cnty., 23 F. App'x 318, 324–25 (6th Cir. 2001). Campbell, a Municipal Court probation officer, was asked to resign from his position after two incidents of workplace misconduct. *Id.* Campbell had undergone a polygraph examination while another probation officer who testified against him in the investigation was not required to do so. *Id.* at 322. This disparate treatment led plaintiff to allege reverse racial discrimination. *Id.* The Sixth Circuit determined that plaintiff did not meet his burden in establishing the prima facie case by providing sufficient background circumstances. *Id.* at 324. Although Campbell argued that racial tension caused his supervisor to only investigate him in a polygraph exam, he did not present evidence that that he, as a Caucasian employee, was discriminated against and suffered particularly as a result. *Id.* at 325. This is because everyone involved was questioned regarding the incident, and his response proved inconclusive, thus requiring a polygraph exam. *Id.*

D. *A Second Approach—The Protected Class*

A second group of courts—namely the First,[75] Fifth,[76] Ninth,[77] and Eleventh[78] circuits—have adopted a different modification of the *McDonnell Douglas* prima facie case because they found that the requirement of a showing of "background circumstances" inappropriately heightened a Caucasian plaintiff's burden.[79] As a result, this second approach aims to be more inclusive.[80] The protected class approach does not require plaintiffs to make an additional showing that they belong to a protected class. Instead, Caucasian plaintiffs are not precluded from bringing claims, since they too are protected under Title VII.[81]

Wilson v. Bailey[82] involved two white male deputy sheriffs alleging discrimination based on their employer's failure to promote them over racial minorities and women, despite their having twice been certified as candidates for promotion.[83] Under the first prong, the Eleventh Circuit said that a reverse discrimination plaintiff must prove that she belonged to a protected class.[84] Without attaching additional requirements

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[75] *See, e.g.*, Carey v. Mt. Desert Island Hosp., 156 F.3d 31 (1st Cir. 1998); Akerson v. Pritzker, 980 F. Supp. 2d 18 (D. Mass. 2013).

[76] *See, e.g.*, Young v. City of Hous., 906 F.2d 177, 180 (5th Cir. 1990) (stating that plaintiff did not attempt to establish a prima facie case, but produced evidence of the use of racial slurs like "white token" and "white faggot"). However, it is unclear whether the Fifth Circuit has completely adopted this approach; early case law suggests the Fifth Circuit requires a non-minority plaintiff to make an additional showing when stating a prima facie case. *See* Giordano, *supra* note 11, at 1007–08; *see also* Gregory v. Town of Verona, Miss., 574 F. App'x 525, 528 (5th Cir. 2014) (noting that defendant conceded that Gregory established a prima facie case by satisfying the prong that he is a member of the protected class at the time of the failure to promote).

[77] *See, e.g.*, Vallimont v. Chevron Energy Tech. Co., 434 F. App'x 597, 599 (9th Cir. 2011); Aragon v. Rep. Silver State Disposal Inc., 292 F.3d 654, 659 (9th Cir. 2002); Hawn v. Executive Jet Mgmt., Inc., 546 F. Supp. 2d 703, 717 (D. Ariz. 2008), *aff'd*, 615 F.3d 1151 (9th Cir. 2010).

[78] *See, e.g.*, Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1326 (11th Cir. 2011), *overruling* Bass v. Bd. of Cnty Comm'rs, Orange Cnty, Fla., 256 F.3d 1095 (11th Cir. 2001); Smith v. Sunbelt Rentals, Inc. 356 F. App'x 272, 277 (11th Cir. 2009); Rioux v. City of Atlanta, 520 F.3d 1269 (11th Cir. 2008); Hammons v. George C. Wallace State Cmty. Coll., 174 F. App'x 459, 462 (11th Cir. 2006); Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991). For a discussion of Smith v. Lockheed-Martin Corp., see Corbin & Duvall, *supra* note 29, at 1205–06.

[79] *See* Baroni, *supra* note 1, at 803. Baroni explains that courts adopting the protected class approach viewed the language and intent of Title VII as requiring the same prima facie standard for all claims of employment discrimination. *Id.* This second group of courts declined to distinguish Title VII's protection between traditional and reverse discrimination claims. *Id.*

[80] *See* Darren D. McClain, *Racial Discrimination Against the Majority in Hiring Practices: Courts' Misguided Attempts to Make Race-Conscious Law Color Blind*, 30 STETSON L. REV. 755, 758 (2004).

[81] *Id.*

[82] 934 F.2d 301 (11th Cir. 1991).

[83] *Id.* at 303.

[84] *Id.* at 304 ("In reverse discrimination suits, plaintiffs must establish a *McDonnell Douglas*

regarding the characteristics of this "class" or explaining its rationale, the *Wilson* Court seemed to suggest that its approach included Caucasian plaintiffs, thereby implicitly rejecting the background circumstances test.[85]

Some Fifth Circuit decisions also indicate its adoption of the protected class approach, but narrow its application to only require Caucasian plaintiffs to prove their membership.[86] For instance, in *Whiting v. Jackson State University*,[87] a Caucasian male plaintiff successfully established the first *McDonnell Douglas* prima facie element by asserting that his employment at a historically African-American university made him a member of a protected class.[88]

Because being a Caucasian member of society is also a protected characteristic,[89] some federal courts interpret Title VII to be race-neutral. This interpretation requires the same burden from any plaintiff establishing a prima facie case, regardless of her racial status.[90] Under this approach, the first prong of the *McDonnell Douglas* prima facie

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prima facie case. The test requires a reverse discrimination plaintiff to prove: (1) that he belongs to a class[;] (2) that he applied for and was qualified for a job[;] (3) that he was rejected for the job; and (4) that the job was filled by a minority group member or a woman.").

85 *Id.* at 304. *See also* Giordano, *supra* note 1, at 1005.

86 Giordano, *supra* note 1, at 1007. Giordano categorizes the Fifth Circuit as having rejected the background circumstances test, without clearly adopting the protected class approach. *See* Young v. City of Hous., 906 F.2d 177 (5th Cir. 1990); Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980).

87 *Whiting*, 616 F.2d at 121.

88 *Id.* at 123.

89 The *McDonald* Court used gender and race-neutral terms, and explicitly stated that majority and male employees are protected groups under Title VII. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976). *See also* Whiteside, *supra* note 1.

90 This interpretation was based on the Supreme Court's unanimous opinion in *McDonald*, where the Court noted that "Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race.'" *See McDonald*, 427 U.S. at 278–80. Nevertheless, the *McDonald* Court recognized that the test for establishing an inference of discrimination is not the same for all plaintiffs. *Id.* at 279, n.6. The Court explained:

> Our discussion in McDonnell Douglas Corp. v. Green . . . of the means by which a Title VII litigant might make out a prima facie case of racial discrimination is not contrary . . . . As we particularly noted, however, this 'specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations.' Requirement (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.

Id. (citations omitted). On the other hand, E. Christi Cunningham, in *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 479–80 (1998), argues that the protected class approach, instead, is the Supreme Court's way of directly inquiring whether or not circumstantial evidence suggested discrimination in *McDonald*. ("[T]he Court dispensed with the prong one criterion and looked instead to the heart of the prima facie inquiry—whether plaintiff had established an inference of discrimination.").

case became a mere formality of standing.[91] As such, the jurisdictions following the protected class approach impose no additional requirement on the Caucasian plaintiff in proving the first *McDonnell Douglas* prong because her status as a majority member of society will suffice.[92]

E. *A Third Approach—Sufficient Evidence*

The sufficient evidence approach has been adopted by the Third, Fourth, and Tenth Circuits.[93] The Tenth Circuit first articulated this approach in *Notari v. Denver Water Dep't*,[94] and later reaffirmed it in *Silva v. Goodwill Indus. of New Mexico, Inc.*[95]

A plaintiff's first opportunity to establish sufficient evidence involves her background circumstances.[96] A second opportunity allows a plaintiff to introduce other indirect evidence sufficient to support a reasonable probability that the challenged employment decision would have favored the Caucasian plaintiff but for her majority racial status.[97] In other words, the plaintiff must allege specific facts and produce cumulative evidence to support a reasonable inference that the challenged employment decisions occurred as a result of her Caucasian race.[98]

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91 *See* Mainhardt & Volet, *supra* note 2, at 239.

92 *Id.*

93 *See, e.g.*, Hunter v. Rowan Univ., 299 F. App'x 190, 193–94 (3d Cir. 2008); Mitchell v. City of Wichita, Kan., 140 F. App'x 767, 771 (10th Cir. 2005); Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996); Bowdish v. Fed. Ex. Corp., 699 F. Supp. 2d 1306, 1316 (W.D. Okla. 2010) (evaluating plaintiff's background circumstances); Cutshall v. Potter, 347 F. Supp. 2d 228, 233–34 (W.D.N.C. 2004); Bernstein v. St. Paul Co., Inc. 134 F. Supp. 2d 730, 733 (D. Md. 2001).

94 971 F.2d 585 (10th Cir. 1992). Plaintiff was a white male employed by the defendant, a water and valve services provider. He applied for the safety and security coordinator position five times from 1980 through 1988, but was passed on the promotion because defendant promoted a woman over him. *Id.*

95 210 F.3d 390 (10th Cir. 2000).

96 *Notari*, 971 F.2d at 589. The Court of Appeals for the Tenth Circuit agreed that a reverse discrimination plaintiff with a lack of direct evidence must establish background circumstances to support an inference of racial discrimination against the majority. *See supra* note 61 for an example of indirect background circumstances.

97 *Notari*, 971 F.2d at 590. ("We adopt the set of prima facie case alternatives that the Fourth Circuit has outlined. Thus, a plaintiff who presents direct evidence of discrimination, or indirect evidence sufficient to support a reasonable probability, that but for plaintiff's status the challenged employment action would have favored the plaintiff states a prima facie case of intentional discrimination under Title VII.").

98 *See* McClain, *supra* note 80, at 775–76. The Court in *Notari* did not preclude the plaintiff from establishing a prima facie case for his lack of background circumstances, because it would be untenable and inconsistent with the purpose of Title VII. McClain reasons that since minority plaintiffs were historically able to establish a race discrimination case in two ways—by direct evidence or by establishing a prima facie case—the *Notari* Court granted Caucasian plaintiffs the

This cumulative evidence approach further modified the background circumstances test: the *Notari* Court held that failure to meet the background circumstances test does not automatically preclude the Caucasian plaintiff from making out a prima facie case.[99] The Tenth Circuit added this alternative method to allow for flexibility in assisting Caucasian plaintiffs.[100] The *Notari* Court reasoned that a Caucasian plaintiff would never be permitted an opportunity to present even circumstantial evidence otherwise, should she fail to establish the first prong of prima facie case using only background circumstances as the basis of her claim.[101]

In 1999, the Third Circuit clarified the sufficient evidence approach, and criticized and rejected the background circumstances test.[102] In *Iadimarco v. Runyon*,[103] the court held that a plaintiff must present sufficient evidence to support a reasonable conclusion that an employer treated the Caucasian plaintiff less favorably due to her majority racial status.[104] The *Iadimarco* Court recognized and agreed with the *Notari* Court's two-way method.[105] Writing for the Third Circuit, Judge McKee noted that the Supreme Court created the *McDonnell Douglas* burden-shifting approach because it recognized that disadvantaged employees seldom possess direct evidence of discriminatory employment decisions—employers rarely openly express their discriminatory intentions or policies.[106]

The *Iadimarco* Court then modified the background circumstances analysis into two distinct categories of evidence to enable plaintiffs to proceed with their claims in court despite the absence of direct proof.

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same methods. *Id.*

99 Giordano, *supra* note 11, at 1009.

100 *Notari*, 971 F.2d at 589.

101 *Id.* at 590 ("Unlike the black worker, he will have no opportunity to use his strong indirect evidence to convince the fact finder about the validity of his claim."). Conversely, even if lacking direct evidence, the minority plaintiff's claim would not be dismissed because he would bypass the first prong of the *McDonnell Douglas* framework through circumstantial evidence due to his status as a minority. *Id.* The minority plaintiff's racial status alone would give rise to a presumption that his employer discriminated against him. *Id.*

102 Giordano, *supra* note 11, at 1018. Giordano acknowledged the difficulties in applying the background circumstances test, since as the Third Circuit's criticism stated it is "irremediably vague and ill-defined." *Id.*

103 190 F.3d 151 (3d Cir. 1999).

104 *Id.* at 163. The Third Circuit also noted other factors for the basis of discrimination, such as color, religion, sex, or national origin. *Id.* While important, these factors are outside of the scope of this Note and do not assist the discussion of reverse discrimination claims based on race.

105 *Id.* at 162.

106 *See* Samuel E. Peckham, *Employment Law—Reverse Discrimination—Title RCO Does not Require a Party Alleging Reverse Discrimination to Provide Evidence of Background Circumstances to Demonstrate that the Employer Unjustly Discriminates Against the Majority to Establish a Prima Facie Case of Employment Discrimination*—Iadimarco v. Runyon, *190 F.3d 151 (3d Cir. 1999)*, 30 SETON HALL L. REV. 1012, 1014 (2000).

The first includes evidence demonstrating that an employer has a reason or inclination to discriminate against Caucasians.[107] The second category would indicate that something "fishy"[108] existed, given the particular facts, to give rise to an inference of discrimination.[109] The *Iadimarco* Court reasoned that by showing indirect proof of a reasonable probability of discrimination, the Caucasian plaintiff negated her need to detour, only to present background circumstances.[110] Most recently, the Seventh Circuit has also employed this dual method of proof. [111]

Alternatively, it could be said that *Iadimarco* completely rejected the *Parker* background circumstances test, for it held that sufficient evidence showing a reasonable probability of discrimination ultimately satisfied the *McDonnell Douglas* prima facie case.[112] All that is required from a Caucasian plaintiff is available, sufficient evidence so that a fact finder could reasonably conclude that an employer treated the plaintiff differently due to her race.[113] The flexibility in this approach stems from the *McDonnell Douglas* framework, which requires a plaintiff to show that different treatment occurred "because of" her race.[114]

F. *The Missing Circuit*

A tally of all courts adopting the three approaches discussed reveals that the Second Circuit has yet to adopt any particular standard

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107 *Iadimarco*, 190 F.3d at 159.

108 *Id. See also supra* note 72.

109 *Iadimarco*, 190 F.3d at 159 (citing Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993)).

110 *Id.* at 162.

111 *See* Rahn v. Bd. of Trs. of N. Ill. Univ., 803 F.3d 285, 289–290 (7th Cir. 2015). The court explained:

> Direct evidence is evidence of discriminatory intent without resort to inference, such as an admission of discriminatory intent often referred to as 'smoking gun' evidence. . . . "Circumstantial evidence can take a number of forms, such as suspicious timing, behavior or comments directed at members of the protected group, evidence showing that similarly-situated employees outside the protected group received systematically better treatment, and evidence that the reason the employer gave for the adverse action was pretextual."

Id. See also Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 674–75 (7th Cir. 2012).

112 Mainhardt & Volet, *supra* note 2, at 241.

113 *Id.* at 241–42.

114 *See* Maria A. Citeroni, Iadimarco v. Runyon *and Reverse Discrimination: Gaining Majority Support for Majority Plaintiffs*, 48 CLEV. ST. L. REV. 579, 600 (2000) ("Like any other Title VII plaintiff, a [Caucasian] plaintiff must still present sufficient evidence to allow a reasonable fact finder to conclude that the defendant treated the plaintiff less favorably than others 'because of' his race . . . . However, the mere fact that the plaintiff's race is classified as 'Caucasian,' rather than some other racial classification, does not operate as an automatic bar to satisfying the prima facie case.").

for evaluating reverse race discrimination cases under the *McDonnell Douglas* framework.[115]

Notably, the Second Circuit has consistently evaded the issue.[116] While the Second Circuit has not announced an outright rejection of the background circumstances approach, it has not elaborated on what constitutes a sufficiency of evidence to make out a prima facie case to establish an inference of racial animus against Caucasians.[117] Some of the (co-equal) district court judges have favored both the background circumstances as well as the protected class approaches.[118] Meanwhile, others modified the two-method approach in *Iadimarco* to focus on actual evidence presented;[119] these latter judges rejected the background circumstances test due to its heightened burden.[120]

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115 Mainhardt & Volet, *supra* note 2, at 242. *See also* Maraschiello v. City of Buffalo Police Dep't, 709 F.3d 87, 94 (2d Cir. 2013) (requiring plaintiff to "either provide direct evidence of discrimination or establish . . . that he experienced an adverse employment action 'under circumstances giving rise to an inference of discrimination'") (citations omitted); United States v. Brennan, 650 F.3d 65, 94 (2d Cir. 2011) (noting that plaintiffs, who are all white males, have satisfied the prima facie case); Carroll v. City of Mount Vernon, 453 F. App'x 99 (2d Cir. 2011); Aulicino v. N.Y. City Dep't of Homeless Servs., 580 F.3d 73 (2d Cir. 2009); Tarshis v. Riese Org., 66 F. App'x 238, 240 (2d Cir. 2003); McGuiness v. Lincoln Hall, 263 F.3d 49 (2d Cir. 2001); Abbondazo v. Health Mgmt. Sys., Inc., No. 00 CIV. 4353 (LMM), 2001 WL 1297808, *4 (S.D.N.Y. Oct. 25, 2001), *aff'd* 36 F. App'x 3 (2d Cir. 2002); Seils v. Rochester City Sch. Dist., 192 F. Supp. 2d 100 (W.D.N.Y. 2000). *See also* Sperino, *supra* note 56, at 371.

116 *See* Mainhardt & Volet, *supra* note 2, at 242. Mainhardt and Volet note that the Second Circuit has not been helpful in guiding lower courts within its jurisdiction on applying one or any of the standards in reverse discrimination cases using the *McDonnell Douglas* framework. Furthermore, the authors note that the Second Circuit merely addressed that "the burden of establishing a prima facie case of employment discrimination is minimal and not onerous." *Id.* While the Second Circuit in *Aulicino* addressed that district courts divide between the *Parker* (background circumstances) and *Iadimarco* (two-ways, indirect or sufficient evidence) standards, it did not elaborate its preference or inclination in adopting either. *See Aulicino*, 580 F.3d at 80, n.5.

117 *See Aulicino*, 580 F.3d at 80 n.5.; *see also* Mainhardt & Volet, *supra* note 2, 243–52. Mainhardt and Volet's article provides an extensive discussion, focusing especially on the case law within the Second Circuit's District Courts.

118 Mainhardt & Volet, *supra* note 2, at 243–52. For example, the Northern District of New York has also used the protected class approach. *See* Geras v. Hempstead Union Free Sch. Dist., 13-CV-5094 (ADS)(AYS), 2015 WL 9182980, *19 (E.D.N.Y. Dec. 17, 2015).

119 Mainhardt & Volet, *supra* note 2, at 250. Mainhardt and Volet provide examples of New York's Eastern and Western District decisions referred to here. *See, e.g.*, Adamczyk v. N.Y. State Dep't of Corr. Servs., No. 07-CV-523S, 2011 WL 917980 (W.D.N.Y. Mar. 14, 2011), *aff'd*, 474 F. App'x 23 (2d Cir. 2012); Allaire v. HSBC Bank U.S.A., No. 00-CV-0084E (SC), 2003 WL 23350119 (W.D.N.Y. Oct. 27, 2003), *aff'd*, 109 F. App'x 477 (2d Cir. 2004); Ticali v. Roman Catholic Diocese of Brooklyn, 41 F. Supp. 2d 249 (E.D.N.Y. 1999); *see also infra* Part II.A (discussing the criticisms of the background circumstances approach). Mainhardt and Volet ultimately vouched for the *Iadimarco* two-method approach in reverse discrimination claims. *See* Mainhardt & Volet, *supra* note 2, at 261.

120 *See* Mainhardt & Volet, *supra* note 2, at 261.

II. PROBLEMS ASSOCIATED WITH THE VARIOUS APPROACHES

Federal courts are divided by the above-noted approaches to the first prong of the *McDonnell Douglas* prima facie case in a reverse racial discrimination claim.[121] Each approach has its disadvantages. This section analyzes arguments supporting and critiquing each approach.

A. *Analyzing the Background Circumstances Approach*

The first and most notable issue with the background circumstances approach is that courts following it have subjected Caucasian plaintiffs to a heightened burden in satisfying the first prong of the *McDonnell Douglas* prima facie case.[122] At minimum, a Caucasian plaintiff must allege circumstantial evidence to support the claim that she suffered a history of racial discrimination or disparate treatment.[123] Proof of a history of discriminatory treatment may include evidence of the defendant-employer's unlawful consideration of race as a factor in previous employment decisions.[124] The respective burdens faced by a minority and a Caucasian plaintiff, assuming them to be similarly situated, are not identical. The minority plaintiff in a traditional racial discrimination suit may allege that her race has historically suffered discrimination; she would have little trouble showing that.[125] A Caucasian plaintiff, on the other hand, must craft her

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121 *See* Sperino, *supra* note 56, at 366–72.

122 *See* Baroni, *supra* note 1, at 797.

123 *See* Giordano, *supra* note 11, at 1016–17 ("The background circumstances test correctly attempts to ensure that an inference of discrimination arises when a non-minority states a prima facie case of reverse discrimination. Its chief flaw, however, is that it ignores the other justification for the traditional prima facie case, that direct evidence of intentional discrimination rarely exists. As currently applied, the test does not offer non-minority plaintiffs an equal opportunity to present their claims in the absence of direct evidence." (footnote omitted)).

124 Whiteside, *supra* note 1, at 422 ("The court recognized that background circumstances sufficient to give rise to an inference of discrimination would include proof that the defendant company had unlawfully considered race as a factor in its employment and promotion decisions in the past.").

125 *See* Giordano, *supra* note 11, at n.11; s*ee also* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1104–05 (2004). Sullivan's example demonstrates, by formal logic as well as in terms of outcome, that different requirements produce different results.

> Under any version of the background circumstances approach, the African American plaintiff (or other "racial minority") proves a prima facie case by [the] four [*McDonnell Douglas*] elements, which include simply proving his racial identity. A white plaintiff, however, cannot get to the jury by the identical proof—including her racial identity. Rather, she must prove background circumstances. The point becomes transparent by a thought experiment of three candidates for a single position, an African American, an Asian, and a white. If all three are turned down and each proved

claim to include what courts would deem sufficient circumstantial evidence. This disparity in the making of a prima facie case demonstrates the additional obstacle faced by a Caucasian plaintiff when compared to her non-white counterparts.[126] In other words, the background circumstances approach forces Caucasian plaintiffs to gather evidence and prove discrimination at the outset, while minority plaintiffs do not need to do so.[127] As a result, this heightened burden causes Caucasian plaintiffs to lose the benefit of proceeding in court. They face the increased risk of failing to survive dismissal or summary judgment.[128]

The judicially created burden against Caucasian plaintiffs is apparent in *Parker*.[129] The D.C. Circuit stated that when a racial minority employee was promoted over a Caucasian employee, one cannot immediately and automatically assume that such action was discrimination by the employer.[130]

While the D.C. Circuit, in *Harding v. Gray*, expanded the background circumstances approach to include two comprehensive components,[131] this approach still imposes a more onerous burden on majority plaintiffs.[132] For one, *Harding* created an elevated standard where all Caucasian plaintiffs must do more than minorities to satisfy their burden.[133] Yet, the standard failed to detail for Caucasian plaintiffs

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> his or her racial identity, the existence of the job opening, and that "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications," the two members of racial minorities would have a prima facie case and the white would not.

Id. (footnote omitted).

126 Giordano points out that the Supreme Court would unlikely "approve of such dramatic alteration." Giordano, *supra* note 11, at 1017 ("[T]he background circumstances test requires direct evidence of sufficient background circumstances that suggest the employer is the unusual employer that discriminates against the majority. This requirement is contrary to the recognition that direct evidence of employment discrimination is difficult to obtain." (footnote omitted)).

127 *See* Whiteside, *supra* note 1, at 429–30. The historical disadvantage faced by minorities is what created the presumption of discrimination, making a prima facie case easier for a minority to meet.

128 *Id.* at 430 ("In effect, the reverse discrimination plaintiff must justify the presumption where a minority plaintiff need not do so.").

129 652 F.2d 1012 (D.C. Cir. 1981).

130 *Id.* at 1017 ("Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the 'light of common experience' would lead a fact finder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but 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.").

131 *See* text accompanying notes 69–74.

132 *See* Baroni, *supra* note 1, 813–16. Baroni describes Judge Mikva's conclusion in *Harding* as rhetorically and logically contradicting. *Id.*

133 *Id*. at 815. The burden for all Caucasian plaintiffs are the same. Baroni states that this result

what exactly they must show when they cannot rely on their race to create an inference of discrimination.[134]

For instance, a Caucasian plaintiff may show a statistical pattern of employment decisions to show an inference of discrimination against members of her race, but such evidence is not controlling.[135] This type of factual showing would be similar to that required by the last step of the *McDonnell Douglas* framework,[136] where the plaintiff must show that the employer's legitimate, nondiscriminatory excuse is a pretext.[137] As a result, the vague requirements[138] in the background circumstances approach necessarily lead to more uncertainty in a plaintiff's success.[139] If it were unclear whether statistical patterns involving employment decisions at a particular defendant's workplace constituted proof of background circumstances, courts ultimately have tremendous discretion and perhaps the potential for abuse, when evaluating whether a Caucasian plaintiff has made out the first prong of her prima facie case.[140]

By assigning the burden of showing background circumstances, courts ultimately frustrate the purpose of the *McDonnell Douglas* framework—perhaps even Title VII altogether.[141] The purpose of the original *McDonnell Douglas* standard was to assist plaintiffs who

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is intellectually inconsistent, especially in terms of accepted standards of judicial reasoning. *Id.*

134 *Id.* at 816. Baroni points out that there is a paradox in telling Caucasian plaintiffs to establish background circumstances, but that it is not a greater burden. *Id.*

135 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 n.19. *See also* Whiteside, *supra* note 1, at 430.

136 *See* McClain, *supra* note 80, at 771–72 ("[T]he background circumstances test fails because it is applied in the wrong stage of litigation. . . . The stage at which the background circumstances test should be considered is after the employer proffered legitimate, nondiscriminatory reasons for its actions. At this point, the plaintiff has the ability to rebut the employer's legitimate reasons with a showing of a pattern or history of discrimination against the majority, which would be equivalent to the showing required by the background circumstances test at the prima facie stage." (footnote omitted)).

137 Whiteside, *supra* note 1, at 430.

138 *See* Sullivan, *supra* note 125, at 1080.

139 Whiteside, *supra* note 1, at 431.

140 *Id.*

141 *See* Sullivan, *supra* note 125, at 1106–07. Courts applying the background circumstances test will, as they already have, justify the differences in outcome by pointing to the differences between races. Generally, racial discrimination is common against minorities rather than Caucasians. Sullivan points out that "this line of argument sounds more like a justification of the racial character of the classification than a denial that it constitutes one." *Id.* at 1108. Furthermore, the background circumstances approach may be inconsistent with the Supreme Court's stated focus in Title VII cases. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (1976). The background circumstances test focuses on whether the Caucasian plaintiff could demonstrate that the employer generally discriminates against the entire class of Caucasian employee in that workplace. *See also* Giordano, *supra* note 11, at 1020. Giordano notes that "motivations, hiring procedures, and supervisors change over time." *Id.* The background circumstances approach requires the Caucasian plaintiff to focus on the trends involving those employment factors on the past, rather than her present situation. *See id.*

lacked direct evidence of the defendant-employer's discriminatory intent, which is often difficult to obtain.[142] Instead of dismissing the plaintiff's case, courts allow these plaintiffs to proceed because they established an inference of discrimination.[143] The next step of the *McDonnell Douglas* framework then forces the defendant-employer to come forth with a legitimate, non-discriminatory reason for making the adverse employment decision.[144] However, if past discriminatory acts were unavailable for a Caucasian plaintiff as background circumstances, she cannot force the employer to justify its actions, even if the employer had in fact intentionally discriminated against her.[145] As a result, circumstantial evidence proving an instance of discrimination against a particular Caucasian plaintiff may be insufficient,[146] if such evidence did not provide "background circumstances."[147]

On the other end of the spectrum, supporters of the background circumstances approach instead argue that it is the one most consistent with the purpose of Title VII.[148] Minority plaintiffs, especially African Americans, were the focus of the debate involved in enacting Title VII; they were historically relegated to low-skill jobs and racial discrimination.[149] Thus, the minority classes deserved extra protection under Title VII, as long as all other persons were still safeguarded from discrimination.[150] Furthermore, the *McDonnell Douglas* framework was designed to answer one question: whether a court could infer unlawful discrimination under the given circumstances.[151] This circumstance-specific view of the *McDonnell Douglas* framework justified courts' consideration of all relevant background circumstances, because

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142 *See* Whiteside, *supra* note 1, at 417, 429, 431.

143 *Id.*

144 *Id.* at 429.

145 *Id.*

146 *See* McClain, *supra* note 80, at 770 ("First, the background circumstances test fails because it, like the *McDonnell Douglas* test, focuses on whether the employer has discriminated against a particular group in the past, not whether the employer is discriminating against the plaintiff bringing suit.").

147 *See* Whiteside, *supra* note 1, at 429. This result would be unjust. "It is certainly possible that an individual plaintiff can be a victim of discrimination although the defendant did not discriminate against members of the plaintiff's class in the past. Courts which require background circumstances do not recognize this possibility." *Id.*

148 *See* Onwuachi-Willig, *supra* note 47, at 57.

149 *Id.* at 61. *See supra* Part I.A and I.B (discussing the inclusive legislative history resulting from the Civil Rights Movement).

150 *See* Onwuachi-Willig, *supra* note 47, at 63. While "Whites can and do experience race-based employment discrimination," courts are often conscious of the fact that minorities are in need of extra protection provided by Title VII. *Id.* Furthermore, the usage of the word "same" in *McDonald*, according to Onwuachi-Willig, does not mean the same standard. *Id.* at 63–64 ("Congress' primary purpose in enacting Title VII [was] because this country's 'past history of pervasive societal and institutional discrimination could not be remedied simply by declaring that all persons from now on would be treated equally.'").

151 *Id.* at 65.

Caucasian plaintiffs were not historically rejected for jobs due to their race, despite their qualifications.[152] Without the relevant facts accompanying a plaintiff's background circumstances, proponents of this approach assert that the first prong would otherwise be a standing requirement.[153]

Supporters further suggest that it is necessary for courts to apply a heightened standard towards Caucasian plaintiffs, for our legal system must still combat racial discrimination against minorities overall.[154] Additionally, the background circumstances approach would arguably remain constitutional despite its application to Caucasian plaintiffs' disparate treatment claims.[155] A court would strictly scrutinize the framework because it involves racial classifications.[156] But courts are likely to view Congress's interest in combating and eliminating racial discrimination as compelling and legitimate.[157] The Supreme Court in *McDonald* interpreted Title VII to eradicate race discrimination for all, not just for African Americans or other minorities.[158] Thus, according to some scholars, a racial classification scheme requiring different proof would be constitutional if the requirements were narrowly tailored measures which further a compelling government interest, such as eliminating racism through the legal system.[159]

B. *Analyzing the Protected Class Approach*

The protected class approach is an attempt to put Caucasian and minority plaintiffs on an even playing field. This approach imposes a

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[152] *Id.* For further discussion supporting Onwuachi-Willig's argument, see Barbara J. Fick, *The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 162 (1997).

[153] *See* Onwuachi-Willig, *supra* note 47, at 66; *see also supra* Part I.D. Essentially, if Title VII protects everyone, then everyone has standing to bring a Title VII racial discrimination claim.

[154] *See* Onwuachi-Willig, *supra* note 47, at 86 ("Applying the same standards to Blacks and Whites is only fair if one presumes that Blacks and Whites are treated equally by employers. . . . The background circumstances requirement ensures that the circumstances for both traditional discrimination and reverse discrimination cases brought against white employers are similar.").

[155] *See* Sullivan, *supra* note 125, at 1102.

[156] *Id.* at 1099–1100. In Adarand Constructors v. Pena, 515 U.S. 200, 223–24 (1995), the Supreme Court announced the principles of (1) skepticism (when justifying any racial classifications); (2) consistency (when a standard of review burdens any race); and (3) congruence (state and federal governments are reviewed under the same analysis). Thus, all racial classifications by local, state, or federal governments are to be strictly scrutinized. *Id.*

[157] *See* Sullivan, *supra* note 125, at 1102.

[158] McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 278–79 (1976).

[159] *See* Sullivan, *supra* note 125, at 1102–03 ("Yet, even assuming strict scrutiny, such exacting review is not necessarily fatal to a classification. Read to require background circumstances for whites only, the statute would still be constitutional were it to be justified by a compelling state interest.").

lesser burden than the background circumstances test,[160] as any aggrieved plaintiff could easily satisfy her burden by calling to the court's attention that all individuals are equally protected under the law.[161] Circuit courts have articulated reasons for rejecting the background circumstances test and adopting the protected class approach.[162] The burden of identifying and showing that a Caucasian plaintiff belongs to a protected class is similar to that of a traditional, minority plaintiff.[163]

One supporting argument for this approach points to the values imposed by antidiscrimination legislation such as Title VII, which prohibits discrimination as unjust treatment of individuals due to their protected characteristics.[164] Under these values, it would be unfair to treat Caucasian plaintiffs differently by imposing a higher burden on their racial discrimination claims, just because they are of other racial characteristics.[165]

Opponents attack what they say is the protected class approach's

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[160] *See* Whiteside, *supra* note 1, at 432–33. Whiteside notes that the "purpose of the prima facie case is to assist plaintiffs who do not have direct evidence of discriminatory intent." *Id.* at 433. For this reason,

> Courts which impose no additional requirements upon reverse discrimination claimants consider the presumption [of racial discrimination] a procedural device designed to help the plaintiff who has only circumstantial evidence of discrimination. In order to receive the benefit of the presumption, a reverse discrimination claimant need only meet the same elements that a member of a historically disadvantaged group must meet.

Id. (footnote omitted).

[161] *See* 42 U.S.C. § 1981(a) (2012). Equal rights under the law means:

> All persons within the jurisdictions of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

Id.

[162] Giordano, *supra* note 11, at 1006 (reasoning that "because [when] a non-minority plaintiff is faced with the same evidentiary difficulties as a minority plaintiff, it is wrong to radically alter the prima facie case") (referencing Collins v. Sch. Dist. Of Kan. City, 727 F. Supp. 1318 (W.D. Miss. 1990)).

[163] *See McDonald*, 427 U.S. at 278–80, 283 (noting that Title VII "prohibits [a]ll racial discrimination in employment, without exception for any group of particular employees" and that Title VII claims "are not limited to discrimination against members of any particular race" and "proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites").

[164] Whiteside, *supra* note 1, at 434 & n.123 (citing 42 U.S.C. § 2000e-2(a)).

[165] *Id.* at 435. Whiteside notes that this first prong, by itself, is insufficient to pinpoint racial tension as the cause for employment discrimination. Hence, raising the burden of production on a Caucasian plaintiff merely because of her racial class would not be beneficial to establishing a prima facie case of discrimination, or in later stages of litigation where she persuades fact finders that discrimination occurred. *Id.*

oversimplification of the *McDonnell Douglas* framework.[166] First, since direct evidence of employment discrimination is difficult to come by, one fundamental justification for the traditional prima facie case was to create an inference of discrimination.[167] The Supreme Court in *Furnco Construction Corp. v. Waters*[168] stated that the *McDonnell Douglas* traditional framework was a sensible way of evaluating a plaintiff's evidence in light of common experience. The court presumed such facts exist to give rise to an inference of discrimination.[169] However, while the argument in favor of the protected class approach focuses on the difficulty in obtaining direct evidence,[170] the Supreme Court in *Furnco* cautioned that the presumed facts must still satisfy the prima facie case.[171] That means a Caucasian plaintiff being overlooked for an employment opportunity in favor of a minority member would point to an inference of discrimination, but only if the employer already takes into account that, typically and in light of common experience, Caucasians enjoy more privileges in society than minorities.[172] Thus, the protected class approach runs the risk of automatically qualifying a Caucasian plaintiff, without first inquiring whether her employer was motivated to overcompensate minorities.[173]

Second, the protected class approach creates the potential for

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166 *See, e.g.*, Giordano, *supra* note 11, at 1011. Giordano describes the protected class approach as an inappropriate wholesale rejection of the background circumstances approach. *Id.*

167 *Id.* Another justification for the traditional prima facie case was its focus on socially disadvantage members of society. Accordingly, the *Collins* court pointed out that the background circumstances test created by the *Parker* court ignored the fact that socially disfavored groups relied on the additional assistance in establishing an inference of discrimination. *See Collins*, 727 F. Supp. at 1321.

168 438 U.S. 567 (1978).

169 *Id.* at 577.

170 *See* Giordano, *supra* note 11, at 1013. Giordano uses a murder hypothetical to illustrate the illogical reasoning employed by the courts. Essentially, he asks if direct evidence in a murder case is difficult to obtain, should we also create a prima facie case against a defendant for murdering a victim the same way we create an inference of discrimination for a minority plaintiff? He argues that it would make no sense to do so. *Id.*

171 *Furnco Construction Corp.*, 438 U.S. at 579–80 ("A *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.").

172 *See* Giordano, *supra* note 11, at 1003–04.

173 There may be reasons for some employers to compensate minorities—and therefore overlook a Caucasian employee. For instance, ethnic names may receive less callbacks for interviews. In addition, white men with criminal records are more likely to get callbacks when compared to their minority counterparts. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, NAT'L BUREAU OF ECON. RESEARCH (2013), http://www.nber.org/papers/w9873; Scott H. Decker, et al., *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*, NAT'L INST. OF JUSTICE (2014), https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf.

overcrowding federal dockets with baseless claims[174] because this approach makes the first prong of the modified *McDonnell Douglas* framework a simple standing requirement.[175] Indeed, Title VII offers protection to all individuals alike.[176] Under this view, the protected class approach logically allows Caucasian plaintiffs to also assert that they belong to a protected class. Thus, every adverse employment decision towards *either* a minority *or* Caucasian plaintiff would potentially satisfy the first prong of a prima facie case. Usually, a meritless reverse discrimination claim would be ultimately dismissed, since the plaintiff would be unable to carry her burden in the third step of the *McDonnell Douglas* burden-shifting framework—for example, her failing to show that an employer's legitimate, nondiscriminatory reasons are pretext.[177] Yet, even the initial crowding of the federal docket until a case's dismissal wastes judicial resources in evaluating and adjudicating these claims, all while imposing financial stress on the employer for defending them.[178]

A third critique of the protected class approach accuses it of masking and equivocating the individual's identities with whatever prohibited discriminatory conduct she alleges.[179] For a reverse race discrimination case, a plaintiff fits within the protected class solely

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174 *See* ADMIN. OFFICE OF THE U.S. CTS., UNITED STATES COURTS: JUDICIAL BUSINESS 2014 (2014), http://www.uscourts.gov/statistics-reports/judicial-business-2014 (last visited May 22, 2016) (reporting that civil filings in U.S. district courts increased by 4%).

175 *See* Cunningham, *supra* note 90, at 442–43 (arguing that the first prong of the prima facie test, under the protected class approach, serves as a criterion for standing); *see also* Schwartz, *supra* note 1.

176 *See supra* note 43 and accompanying text; *see also* McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 278–80 (1976).

177 *See* Giordano, *supra* note 11, at 1015; s*ee also* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–54 (1981); *supra* notes 36–37 and text accompanying (explaining the *Burdine* expansion of the burden-shifting framework).

178 *See* Giordano, *supra* note 11, at 1016. Giordano predicts four damaging effects resulting from the increase in claim filings. First and most obvious, courts' dockets will still suffer from congestion, for judges and court staff must still evaluate these claim albeit while not fully trying them. *Id.* Second, this congestion of federal dockets wastes taxpayer money. *Id.* Third, Caucasian and minority workers would be divided in the workplace due to reverse discrimination claims. *Id.* This would probably be a result of carefully contemplated hiring decisions by employers as an effort to avoid reverse discrimination claims. Lastly, reverse discrimination claims in court would damage a business's reputation and require an employer to spend a devastating amount of company resources to defend itself. *Id.* However, one must still consider the purpose of the prima facie case, which is to establish an inference of discrimination that allows a plaintiff to move to later stages of litigation. *See* H.R. REP. NO. 88-914, *supra* note 21, at 2401–02. Whiteside also stresses that the prima facie case is not the same as fact-finding, in which establishing the prima facie case is by no means indicative of whether discrimination occurred. *See* Whiteside, *supra* note 1, at 417.

179 *See* Cunningham, *supra* note 90, at 442–43 ("[T]he criterion serves as a standing requirement that [the protected class approach] unnecessarily defines plaintiffs as specially protected members of a defined group by categories of discrimination rather than as individuals who are unfairly disadvantaged in the workplace.").

because of her Caucasian race.[180] By prohibiting unlawful conduct against a plaintiff because of her race, courts would deem the first prong satisfied.[181] As a result, courts equate one's alleged identity with the statutorily prohibited conduct.[182] Conversely, courts may lose sight of the big picture—the entire four-prong *McDonnell Douglas* prima facie case was created to examine whether there is an inference that a plaintiff suffered a disadvantage in the workplace.[183]

When a minority plaintiff establishes a presumption that the employer discriminated against her, the protected class approach waives the barriers to the plaintiff's claim by pointing to her membership in a historically disadvantaged class.[184] So while the protected class approach is available to both Caucasian and minority plaintiffs, the presumption of discrimination unfortunately coincides with one's historically disadvantaged identity.[185] Accordingly, the critique continues, Caucasian plaintiffs should not get to waive barriers to their prima facie cases, because their historically privileged racial status did not generally generate discrimination.[186] Contrary to the purpose of the *McDonnell Douglas* prima facie case, the protected class approach mistakenly focuses on whether a Caucasian plaintiff has standing as a "protected member" under Title VII, rather than verifying that plaintiff actually suffered under statutorily prohibited conduct.[187]

Fourth, under a color-blind reading (since *all* individuals are protected regardless of race) of Title VII, it is equally inappropriate to discriminate against minorities as it is against Caucasian plaintiffs.[188] Therefore, it would be unfair for the legislation to favor racial

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180 *Id.* at 469. Similarly, a plaintiff claiming national origin discrimination is identified by her national origin; a plaintiff in a gender discrimination claim is identified by her gender. *Id.* at 470.

181 *Id.* at 482. For instance, the Second Circuit in *Fisher v. Vassar College* stated that the plaintiff did not establish a prima facie case for her failure to allege that defendant discriminated against women. *Id.* (citing Fisher v. Vassar Coll., 70 F.3d 1420, 1426, 1429, 1433–34 (2d Cir. 1995)). Cunningham points out that in essence, the court viewed gender as a threshold issue because it evaluated whether plaintiff alleged a form of discrimination. *Id.*

182 *Id.* at 454.

183 *Id.* at 453.

184 *Id.*

185 *See id.* at 453–54.

186 *See* McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 279–80 (1976) (pointing to the nation's trend in historically favoring certain social groups, i.e., Caucasians). Conversely, a "presumption of disadvantage does not exist for individuals who are protected by the statute but do not possess identities trending to foster prohibited forms of discrimination." *See* Cunningham, *supra* note 90, at 454.

187 Cunningham, *supra* note 90, at 453 (stating that "[a] finding that a plaintiff is a member of a 'protected class' . . . where protected class is used to determine whether plaintiff has alleged a prohibited form of discrimination . . . does not serve the substantive purpose of the prima facie case[,]" which is to determine whether the plaintiff carries an inference of being discriminated against).

188 *See generally* Lawrence Blum, *Moral Asymmetry: A Problem for the Protected Categories Approach*, 16 LEWIS & CLARK L. REV. 647 (2012).

minorities at the expense of the majority.[189] This colorblind theory aimed to prevent oppression and the resulting harm imposed by one race onto another.[190] To take it one step further, arguments against the colorblind reading of Title VII (and the *McDonnell Douglas* application to both majority *and* minorities) equate the concept of reverse discrimination with Caucasians' fears of being subjected to racial inferiority identical to that suffered by minorities.[191] If reverse discrimination claims were made easier in order to prevent racial oppression of the majority, thereby maintaining the racial superiority system in the *status quo*, then reverse discrimination would be unworthy of statutory protection.[192]

Lastly, because different standards of proof are required from minorities and the traditionally privileged Caucasians, the protected class approach does not produce desired results.[193] For racial minorities, total equal treatment does not necessarily and automatically eradicate subordination, because the reality is that certain groups have been traditionally powerless in society.[194] Furthermore, equal treatment under the protected class approach no longer offers racial minorities special

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189 Schwartz, *supra* note 1, at 664. Furthermore, unfair treatment arising out of immutable characteristics like race is unreasonable because they are attributes that no individual has control over and should not be held responsible for. *Id.* at 666. However, Schwartz argues that this is merely one of the many sources for non-merit employment decisions. For instance, a supervisor could claim that her personal vendetta against a plaintiff was the nondiscriminatory, legitimate reason for the adverse employment decision—be it hiring, firing, demoting, or failure to promote. Yet, this supervisor would not be subjected to Title VII racial discrimination liability. *Id.* Other sources for non-merit employment decisions sufficient to escape Title VII liability would include cronyism and nepotism. *Id.*

190 *Id.* at 667–68, 670. Schwartz asserts that workers were not legally given rights or expectations in jobs or opportunities for advancements. As a result, workers who suffered injuries from unfair employment advancements may suffer some harm. But even those who were given such employment expectation and remedial protection were compensated for their disappointed expectations, e.g., through damages for breach of contract. *Id.* at 667–68. Instead, Schwartz believes that "[a]ntidiscrimination law did not come into existence in order to protect against disappointments or disruptions to these settled [employment] expectations, but to prevent some other type of injury." *Id.* at 668.

191 *Id.* at 670.

192 *Id.* at 671. While proponents of this colorblind reading of Title VII pointed to the injurious and disappointing experiences of losing job opportunities or employment advancements, one must be mindful that courts have never legally recognized or guaranteed such employment related opportunities as an employee's constitutional right. *Id.*

193 Different standards of proof weakened the notion that the protected class approach even resembles a standing requirement designed to allow every plaintiff to succeed in establishing the first prong of the prima facie case. *See* Onwuachi-Willig, *supra* note 47, at 67, 84.

194 *Id.* at 84 (stating that "the like treatment of all individuals does little to change the subordination of minorities because it fails to recognize which groups are and have been traditionally powerful or powerless in society"). *See also* ROBERT K. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS 114 (1980) ("Equal opportunity in the 100 yard dash consists (at least) in running the race without shackles. Yet the race is half run with one runner shackled. The shackles are now removed; but the other runner is 40 yards ahead. What is to be done?").

opportunities in court, on which they must rely to enforce equal protection against discrimination.[195]

Overall, the plain and neutral language of Title VII—that any person qualifies as a plaintiff regardless of her race—creates drawbacks due to this nation's history in disfavoring racial minorities. If empirical studies support the notion that racial discrimination against minorities is still prevalent,[196] then an adjusted approach that benefits minorities would necessarily be preferable and justifiable in view of compensating that disparity.[197] One may conclude that the all-are-equal, facially attractive protected class approach entirely removes the first prong of the *McDonnell Douglas* prima facie case. Arguably, this effect was not the Supreme Court's intention when it initially created the *McDonnell Douglas* framework, even considering the Court's expansion in *McDonald* to give Title VII protection to every citizen.[198]

C. *Analyzing the Two-Method, Sufficiency of Evidence Approach*

The last approach, set forth in *Iadimarco*, expressly rejected the background circumstances approach in favor of a method that requires equal burdens of proof at the prima facie stage between the minority and Caucasian plaintiffs.[199] The *Iadimarco* Court recognized that the ultimate issue in a reverse discrimination case is to evaluate whether the employer treated an employee more or less favorably due to her race.[200] It rejected the background circumstances test for its vagueness with respect to the precise evidence required.[201] The *Iadimarco* Court also rejected the protected class approach, recognizing that substituting membership of an identifiable minority group with the idea that everyone belongs to some "class" actually eliminated the first prong of the *McDonnell Douglas* prima facie framework.[202]

While the sufficient evidence approach is advantageous to the Caucasian plaintiff because of its flexibility, the approach still presents

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195 *See* Onwuachi-Willig, *supra* note 47, at 84.

196 *See* Sullivan, *supra* note 125, at 1093–98 (noting, from various studies, that actual market participants do in fact discriminate against minorities).

197 *Id.* at 1098.

198 *See supra* Part I.A and I.B.

199 *See* Mainhardt & Volet, *supra* note 2, at 238–39.

200 Iadimarco v. Runyon, 190 F.3d 151, 160 (3d Cir. 1999).

201 Peckham, *supra* note 106, at 1017.

202 *Iadimarco*, 190 F.3d at 163 ("Inasmuch as everyone belongs to some 'class,' substituting membership in an undefined class for membership in a minority group is tantamount to eliminating the first prong of the *McDonnell Douglas* framework *sub silentio*."). On the other hand, Fullinwider suggests that perhaps the Fourteenth Amendment and equal protection of the law require individuals of the same class to be treated similarly. *See* FULLINWIDER, *supra* note 194, at 199 (noting that Congress may define statutory classes however narrowly or broadly).

several problems similar to those in the background circumstances test.

Specifically, the sufficient evidence approach demands proof of discrimination early in the litigation.[203] At the time the plaintiff attempts to establish a prima facie case, the burden has yet to shift to the employer to articulate a nondiscriminatory reason.[204] Until the plaintiff alleges sufficient facts to satisfy her initial burden of establishing a discriminatory inference, the employer may remain silent and refrain from defending its allegedly discriminatory decisions. If the court determines that the plaintiff produced insufficient evidence, the case is dismissed without the employer ever responding.[205] Whether the employer intended to discriminate, whether the employer's reason was pretextual, or whether discrimination actually occurred will only be examined once the plaintiff succeeds in establishing her prima facie case. Another critique is that an employer's hiring of a qualifying minority applicant with unique attributes would risk a reverse discrimination lawsuit, since the Caucasian plaintiff passed for the position may allege that she would have been granted the opportunity but for her race.[206]

Overall, these approaches may have the practical effect of

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[203] McClain, *supra* note 80, at 779 n.177 (reasoning that *Notari* requires a plaintiff to show sufficient facts to support an inference of alleged racial discrimination). The same criticism applies to the background circumstances test, where the defendant-employer would never be forced to articulate a legitimate, nondiscriminatory reason until the plaintiff alleges enough facts to make a prima facie case. *See supra* note 145–147 and accompanying text.

[204] *See* Whiteside, *supra* note 1, at 417 (discussing the idea that a prima facie case is in no way indicative of the actual occurrence of an employer's discriminatory conduct). *But see* Sullivan, *supra* note 125, at 1062 (noting that the low threshold of the prima facie case requires little proof, because the plaintiff does not necessarily have to negate all possible, or even probable, legitimate reasons articulated by the employer, much less must she adduce additional direct evidence). An employer is also unlikely to announce a discriminatory intent in making adverse employment decisions. *See* McClain, *supra* note 80, at 779. Only when a plaintiff has alleged sufficient facts will the employer defend its actions by articulating a legitimate reason. *Id.* Therefore, until the plaintiff meets the initial, heavy burden of showing an inference of a discriminatory intent, the employer may do nothing. *Id.*

[205] *See* McClain, *supra* note 80, at 779 ("When a plaintiff establishes a prima facie case, the employer must defend its actions. If the employer is able to defend its actions, the plaintiff then has the chance to demonstrate that the employer's stated reasons were a pretext for its unlawful discrimination. Through this process, plaintiff may be able to gather evidence demonstrating the employer's intent and establishing a question for a fact finder to decide. However, if a plaintiff is required to offer evidence early in litigation, a plaintiff who through the burden-shifting process could have established the discriminatory intent of the employer will be precluded from so doing." (footnotes omitted)).

[206] *Id.* at 780. This result frustrates the purpose of Title VII, where minorities may be barred from being hired. David S. Schwartz identified this present day, "racial balancing" jurisprudence era, as one where "[a]ggressive judicial protection of minorities petered out, as courts let themselves be persuaded by 'reverse discrimination' claims and began to see their role as one of balancing the race-identified interests of whites and non-whites." *See* Schwartz, *supra* note 1, at 660.

countering legislative and judicial efforts to diversify the workplace.[207] When faced with a Caucasian applicant who is equally as qualified as a minority applicant, employers may face the possibility of litigation regardless of who is hired. The minority applicant and the Caucasian plaintiff could both bring a lawsuit alleging discrimination.[208] Both the protected class approach and the sufficient evidence approach are particularly flexible in nature, allowing Caucasian plaintiffs to gather evidence to raise an inference of discrimination.[209] On the other hand, if employers consciously maintain the *status quo* of having predominantly Caucasian employees to avoid reverse discrimination suits, then minority employees would not be aided by Congress's enactment of Title VII.[210]

When a Caucasian plaintiff raises a reverse discrimination claim, federal courts need a reliable method in dealing with the *McDonnell Douglas* burden-shifting framework without frustrating both the purpose of the framework and Title VII. A further modification of the original *McDonnell Douglas* framework is proposed below.

III. PROPOSAL

One glaring problem with the modified *McDonnell Douglas* framework is the difference in the initial iteration of evidence.[211] In the background circumstances approach, Caucasian plaintiffs are required to do more than minority plaintiffs to establish a prima facie case.[212] The two-way, sufficient evidence approach requires early allegation and

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[207] *See supra* note 4 and accompanying text. It is noteworthy that the sufficient evidence approach creates the ramifications of reversing legal efforts in diversifying the workplace.

[208] McClain, *supra* note 80, at 781–82. McClain focuses his concern only on the sufficient evidence test: that it may discourage employers' diversification of the workplace. This concept applies more broadly than he purports. Combining reverse discrimination and affirmative action seems to suggest that regardless of whether the Caucasian or the minority is favorably treated, litigation could follow. *See id.*

[209] McClain terms this as disastrous, reasoning that since an employer's attempt at hiring a qualified minority to diversify the workplace could lead to a lawsuit brought by the majority, the employer may be disincentivized from hiring the minority candidate. This would be contrary to the purpose of enacting Title VII and protecting those who were disadvantaged historically. *See id.*

[210] *Id.* at 782. Also, while the Supreme Court has upheld voluntary affirmative action efforts, a conscientious hiring of Caucasian employees would occur to avoid reverse discrimination lawsuits, thereby furthering imbalances in the workplace. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 209 (1979).

[211] *See supra* Part II.A; *see also* Sperino, *supra* note 56, at 367. Sperino points out that the rationale behind the increased burdens for Caucasian plaintiffs is that racial discrimination against the majority group rarely happens, which warrants an additional burden on Caucasian plaintiffs to prove more than a member who faced historically prominent discrimination. *Id.*

[212] *See supra* notes 123–128 and accompanying text (discussing this additional burden based on Giordano's article).

presentation of evidence, and would allow a court to dismiss a Caucasian plaintiff's claim before she has the opportunity to prove that the defendant-employer's articulated nondiscriminatory reason was pretext. Meanwhile, the protected class approach eliminates the first prong of the *McDonnell Douglas* prima facie case altogether.[213] The Caucasian plaintiff's burden becomes nonexistent, since one's protected class membership conflates one's identity with the specific discriminatory experience suffered.[214] The focus in modifying the *McDonnell Douglas* framework, then, should be on whether underlying discrimination in fact exists in light of the specific plaintiff's daily experience.[215]

A. *The Combination of Factors Approach*

A better approach would be a combination of factors, selecting efficient elements from each of the three approaches.[216] The proposed test would, in reverse discrimination cases, further modify the first prong of the *McDonnell Douglas* prima facie case.[217]

First, the combination of factors approach asks federal courts to determine whether a plaintiff is Caucasian or a minority. In light of daily experiences, this initial bifurcated inquiry into a plaintiff's racial identity would be determined by an individual's heritage, cultural upbringing and background, as well as self-identification. This is functionally the same as creating a standing requirement under certain views of the protected class approach.[218] If an individual's answer to two of the three elements of threshold consideration affirms her

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213 *See supra* Part II.B.

214 *See* Cunningham, *supra* note 90.

215 For example, if a Caucasian plaintiff were passed up for a promotion despite being equally or more qualified than a minority employee, and that workplace is *predominantly* white, one's daily experience could point to an inference of reverse discrimination arising under those circumstances. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]e 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.").

216 *See supra* Parts II.C, II.D, and II.E (discussing the background circumstances approach, the protected class approach, and the sufficient evidence approach).

217 *See* Sperino, *supra* note 56, at 366. The original *McDonnell Douglas* burden-shifting framework required a plaintiff to prove her membership in a historically disadvantaged racial group, and that she was discriminated against as a member of such protected class. *Id.*

218 *See supra* notes 175, 179, and accompanying text. This part of the combination of factors approach addresses the idea that the protected class approach acts merely as a standing requirement. If everyone is protected under the statute, there is a lack of distinction between a Caucasian and a minority plaintiff bringing a discrimination claim. Every plaintiff will have the prerequisite standing. *See* Cunningham, supra note 90, at 482; *see also* Schwartz, supra note 1, at 669 ("As a legal matter, it is difficult to see how the stigma purportedly laid on minorities by affirmative action gives standing to whites to sue for reverse discrimination.").

Caucasian identity, her racial discrimination claim should invoke the *McDonnell Douglas* reverse discrimination modification.[219]

Second, courts should examine the background circumstances of the entire workplace as alleged by the Caucasian employee. The plaintiff may point to factors such as: (i) she is the racial minority at her particular workplace in terms of absolute numbers; (ii) she was singled out for an adverse employment action; (iii) the advancement history for plaintiff's particular position had been disadvantageous for other Caucasians; or (iv) that the body of supervisors typically responsible for hiring or promoting employees exhibited a pattern of unfavorable decisions toward Caucasians holding that particular position.

Lastly, the Caucasian plaintiff's claim may set out both direct and indirect evidence. The complaint should: (i) detail the sequence of events leading up to the adverse employment action; (ii) isolate incidents that demonstrate discriminatory intent; (iii) document disadvantageous effects suffered by the Caucasian plaintiff; (iv) list direct evidence of discrimination, such as verbal exchanges with or testimony by eyewitnesses who can substantiate the plaintiff's claims during trial; and (v) present any circumstantial evidence sufficient to allow a reasonable person to draw the conclusion that the surrounding circumstances may be the result of an intent to discriminate against the Caucasian plaintiff.

This Note will proceed by showing how each factor of the combination of factors approach is applied in practice.

B. *Application*

The initial "protected class" factor considers the purpose of Title VII and the Supreme Court's intent in protecting every person, hence acting as the standing requirement.[220] The *McDonald* Court expanded the traditional *McDonnell Douglas* prima facie case to protect non-minorities who wish to allege a claim of discrimination. The second "background circumstance" factor supports the original application of

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219 This inquiry draws mainly from a fact finder's common sense and daily experiences. A concrete example of why this inquiry is necessary is as follows: a female of third generation Turkish-American decent (cultural background) who self-identifies as Caucasian (self-identification) would likely meet this initial threshold determination. On the other hand, a Korean-American adopted by an Italian family (heritage) who self-identifies as Asian (self-identification) would not qualify for the reverse discrimination framework. In that case, the traditional *McDonnell Douglas* framework for minorities applies.

220 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The original framework required that a plaintiff be a racial minority. Modifications of the *McDonnell Douglas* prima facie case were made because Title VII prohibited discrimination "because of" particular protected characteristics. Under Title VII, race is a protected trait. *Id.*

the traditional *McDonnell Douglas* framework and isolates the employer's discriminatory intent. The third "sufficient evidence" factor allows flexibility in the plaintiff's early iteration of evidence in support of a discriminatory inference.

Assuming a plaintiff establishes her status as a Caucasian plaintiff, the rest of the reverse discrimination framework applies. In a hypothetical company that historically and predominantly consists of Caucasian employees, one would assume that Caucasians are adequately represented in the workplace in terms of privilege and proportions. Hiring or advancing a minority employee in this hypothetical firm over an equally qualified Caucasian employee gives rise to two possibilities. First, the defendant-employer is actively trying to diversify the workplace and made the decision to advance the minority based on her unique merits and attributes. Alternatively, the defendant-employer actively discriminated against a Caucasian employee by hindering her advancement. Since the former would be legal,[221] the "background circumstances" factor would demonstrate whether a persistent, unfavorable pattern against Caucasian employees exists.

If, however, the Caucasian plaintiff is by absolute numbers actually within the least populous racial group at that workplace, she may point out that the allegedly discriminatory employment decision that she suffered is due to a special preference given to an equally or less qualified minority employee.[222] If the workplace was already composed of mostly minority workers, then the employer cannot claim that a legitimate, nondiscriminatory reason for the adverse employment decision against the Caucasian plaintiff is the effort to diversify the workplace through hiring or promoting a talented racial minority.[223] Instead, hiring or promoting a Caucasian plaintiff would diversify the workplace. This helps the plaintiff prove that "diversification" is pretextual, and would simultaneously force the employer to assert a legitimate reason for the employment decision. If the employer cannot offer another reason, then one may conclude that, but for the Caucasian employee's race, she would have been hired or promoted.[224]

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[221] *See* McClain, *supra* note 80. McClain proposes that an employer should include a job description for an open position to demonstrate that the person hired fits within those qualifications. *Id.* at 795. Those "qualifications do not have to be rigid . . . [since courts recognize] that the goal of Title VII is to ensure that qualified individuals have an evenhanded opportunity to gain employment." *Id.* (footnotes omitted).

[222] This idea is drawn from the sufficient evidence approach, where courts may look at whether the plaintiff's evidence shows a probable inference of discrimination. A plaintiff must be required to show that, but for her race, she would not have suffered the adverse employment decision. *See supra* notes 98, 114, and accompanying text.

[223] *See* McClain, *supra* note 80.

[224] *See supra* Part II.C. This is derived from the focus in the *Iadimarco* decision, which was

In determining whether a Caucasian employee was singled out in an adverse employment decision,[225] courts should focus on the "background circumstances" involving the advancement history of that particular position regarding which the Caucasian plaintiff alleged racial discrimination. An examination of the entire department's, or even the entire company's, employment decision history may be less fruitful.[226] If the hiring or promotional history for that particular position suggests that Caucasian employees generally never receive advancement opportunities, then an inference of discrimination may arise. This factor would likely consist of direct evidence accessible to the plaintiff at the outset.[227]

For the "sufficient evidence" factor, courts reviewing Caucasian plaintiff's detailed allegations and complaints should permit both direct and circumstantial evidence.[228] As noted, direct evidence is not always available; a plaintiff should not bear the heavy burden of producing tangible evidence in her prima facie case.[229] But a Caucasian plaintiff should reasonably investigate, gather, and submit to the court a basic outline of available witnesses and circumstantial evidence. Such available evidence may include plaintiff's and other minority colleagues' overall performance evaluations, attendance records, and professional complaints or achievements. The more favorable the Caucasian plaintiff's record compared to that of a minority colleague, the more likely that something is "fishy" when the employer passed on the plaintiff for advancement. These records may be reasonably easy to obtain, even in cases where position-specific history is unavailable or

addressed by the Third Circuit's two-method cumulative sufficiency approach.

225 Because diversification is no longer a primary focus in the workplace, an adverse employment action that singled out the Caucasian employee, if accompanied by sufficient evidence, may lead to a probable inference of discrimination. *See supra* note 204. In a Sixth Circuit case, Arendale v. City of Memphis, 519 F.3d 587, 603 (6th Cir. 2008), the court stated that Sixth Circuit precedent suggested that an adverse employment decision "made by a member of a racial minority is sufficient to establish the first prong of the [*McDonnell Douglas*] prima facie case." The Sixth Circuit employs the background circumstances approach. *Id.* So, if an employer singles out a Caucasian employee in a workplace where the Caucasian is actually a minority, one may be able to argue that the employer's discriminatory intent is more apparent. *Id.* However, the Sixth Circuit in *Arendale* emphasized that the Caucasian employee must prove that she was treated differently compared to similarly situated minority employees. *Id.* at 603-04.

226 *See supra* Part I.A and Part II.A. The rationale behind this factor is to support an inference of discriminatory intent and disadvantageous effect.

227 *Cf. supra* notes 41 and 96. While direct discriminatory statements are difficult to obtain, plaintiff may reasonably have access to a brief hiring or promotion history for a particular position. For example, internal human resources records concerning employee advancement decisions may suggest a pattern or inference of discrimination.

228 *See supra* Parts II.A and II.C (discussing the additional burdens faced by Caucasian plaintiffs).

229 *See supra* Part I.E (discussing the sufficient evidence approach and how it considers indirect, circumstantial evidence).

indeterminate—either because the position was newly created, or the decision-making supervisors had made an insufficient number of prior employment decisions regarding the position. The Caucasian plaintiff may then use available circumstantial evidence.

The combination of factors test respects an employer's discretion in its advancement decisions.[230] Until a plaintiff sufficiently alleges a sequence of events that would give rise to an inference of disadvantage,[231] the employer may remain silent and choose not to defend the claim. The proposed test ensures that the Caucasian plaintiff's claim is not automatically dismissed, foreclosing her deserved day in court, in front of fact finders.[232] Judges should also view this prong of the prima facie case in light of judicial expertise and common experiences to find support for inferences of disadvantage and discrimination.

CONCLUSION

The creation of the combination of factors approach incorporates the benefits and critiques of the various current approaches. If a Caucasian plaintiff is a minority at work,[233] suffering directly from an adverse employment decisions, then her fulfillment of the combination factors approach described in Part III gives rise to an inference of disadvantage and discrimination. Upon satisfying this first prong of the modified *McDonnell Douglas* prima facie case, the plaintiff is given the opportunity to meet the remainder of the four-pronged test. The procedural posture of the Caucasian plaintiff's claim still follows that of the traditional *McDonnell Douglas* three-step burden-shifting framework. But the combination of factors approach levels the burden faced by Caucasian plaintiffs when compared to their minority

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230 In doing so, the combination of factors approach still considers the effects on "the victims of past discrimination[, who may be] laboring under the accumulated effects of that discrimination." FULLINWIDER, *supra* note 194, at 115. The goal of this approach is not to treat all plaintiffs the same—by disregarding their racial statuses—but rather to create a systematic framework similar to that employed by racial minorities. *Id.* at 117 ("[I]f, in other words, we subscribe to one of the broader views of equal opportunity—then equal opportunity may well require or permit racial preferences where equality of opportunity has not previously obtained for all. If equal opportunity is looked at as some kind of equilibrium . . . [w]e add and subtract weights here and there until equilibrium is restored.").

231 According to Citeroni's discussion of the *Iadimarco* decision, a probable or possible inference of discrimination prevents courts from prematurely foreclosing a plaintiff's day in court, which is a result that directly conflicts with the purpose of creating *McDonnell Douglas* framework to allow the usage of circumstantial evidence. *See* Citeroni, *supra* note 114, at 605.

232 *Id.*

233 In the context of the combination of factors approach, racial minority means majority at one's specific workplace. *See supra* note 219.

counterparts, while staying mindful of the fact that Caucasians were not historically hindered.

With respect to finding and focusing on inferences of discrimination in light of common experiences,[234] the combination of factors approach ensures that Caucasian plaintiffs are given comparable opportunity and assistance to proceed in court, such as those available to minority plaintiffs. Thus, the combination of factors approach has the potential of upholding the purpose of Title VII and the *McDonnell Douglas* framework, as well as unifying federal circuit courts' divided opinions.

234 For a discussion of how the "millennial" generation perceives race and reverse discrimination in recent years, see Jamelle Bouie, *Race, Millennials and Reverse Discrimination: Race is Still a Thorny Thing for Many Young People*, THE NATION (Apr. 26, 2012), http://www.thenation.com/article/race-millennials-and-reverse-discrimination.