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Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis

by Mack A. Player*

I. MOTIVATION AND ITS PROOF: THE McDonnell Douglas MODEL

Title VII of the Civil Rights Act of 19641 prohibits employers, labor organizations, and employment agencies from discriminating in employment decisions because of the race, color, religion, sex, or national origin of the employee or applicant. The Age Discrimination in Employment Act of 1967* (ADEA) similarly prohibits discrimination because of age against employees and applicants between the ages of forty to seventy.3

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1982). The provision relevant to this discussion is found at 42 U.S.C. § 2000e-2(a) (1982), which reads:
   It shall be an unlawful employment practice for an employer:
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


3. Id. § 623.
Violations of these statutes can be established without regard to the defendant's motivation. If the plaintiff can show that a particular employment practice has an adverse impact upon the protected class of persons of which the plaintiff is a member, the burden is shifted to the defendant to prove that the challenged practice is a "business necessity." Proof of


5. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) addressed the impact of two different selection criteria: a high school diploma requirement and a passing score on a nationally developed employment test. The Court found the adverse impact of the diploma requirement by using census data that showed 34% of the white males in the state of North Carolina had high school diplomas, compared to only 12% of the black males. Id. at 430 n.6. The impact of the objective test was found by accepting an EEOC study of a similar test at an unnamed time and location which indicated that 58% of the whites received a passing score compared to a success rate for blacks of only 6%. Id. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court found adverse impact on women of a minimal height and weight requirement from statistical data indicating that over 41% of the female population of the United States would not qualify, compared to an exclusion rate for potential male applicants of only 1%. 401 U.S. at 329-30. Both Griggs and Dothard used potential applicant pool statistical data to establish the impact of the job qualification. Cf. New York City Transit Auth. v. Beazer, 440 U.S. 568, 583-87 (1979), which rejected such data. The Court in Connecticut v. Teal, 457 U.S. 440 (1982), found adverse impact by using 'applicant flow' data. Minority applicants were disqualified from further consideration in the selection process at a higher rate than nonminority applicants.

6. The seminal case of Griggs v. Duke Power Co., 401 U.S. 424 (1971), adopted the concept of 'business necessity.' It did not, however, define its meaning. The Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id. at 431. Later in the opinion, the Court said: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Id. at 432. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court clarified the concept somewhat. The concept of 'lesser discriminatory alternatives' was considered to be an element of 'business necessity' in that a criterium would not be 'necessary' if alternative methods of selection were available. The Court in Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975), held that selection tests having an adverse impact must be validated according to professionally developed standards. General conclusions about work relatedness would not suffice to carry defendant's burden. Cf. Washington v. Davis, 426 U.S. 229, 248-52 (1976), in which strict valuation was not required. In New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), however, the Court suggested a significantly lighter burden. A rule barring methadone users would be justified if 'job related,' and it would be 'job related' if "those [business] goals are significantly served by—even if they do not require—[the rule]." Id. at 587 n.31. The burden upon a defendant is a burden of persuasion, to convince the court of the existence of
good faith or the lack of improper motivation alone does not relieve the defendant of liability.\textsuperscript{7} If the defendant fails to prove the 'necessity' of the practice having the adverse impact on the protected class, the plaintiff will prevail.\textsuperscript{8}

Motive, however, is always relevant in employment discrimination cases.\textsuperscript{9} If the plaintiff can establish discriminatory treatment 'because' of the statutorily proscribed criteria, he will prevail. In the absence of direct evidence of motivation\textsuperscript{10} there are two major methods by which a plaintiff can prove illegal motivation. Both rely on evidentiary inferences. The first method by which an inference of illegal motivation can be created is through statistical data. If the plaintiff can show a starkly disproportionate number of women or minorities in the work force or any particular segment thereof, a comparison that would not be the product of chance, the burden will shift to the defendant to come forward with a creditable, lawful explanation for the statistical disparity.\textsuperscript{11} Absence of an explanation leaves unrefuted the inference that illegal considerations motivated the selection process. At this stage the defendant can avoid liability only

\textsuperscript{7} See Walker v. Jefferson County Home, 726 F.2d 1554, 1558 (11th Cir. 1984); Johnson v. Uncle Ben's, 657 F.2d 750, 752 n.2 (5th Cir. 1981), cert. denied, 459 U.S. 967 (1982); Contreras v. City of Los Angeles, 656 F.2d 1267, 1276 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).


\textsuperscript{9} See supra note 6.


\textsuperscript{11} See supra note 6.
by showing that notwithstanding the pervasive illegal motivation, the
particular applicant would not have been selected.\textsuperscript{12}

In a situation involving individual disparate treatment, the court in
\textit{McDonnell Douglas Corp. v. Green}\textsuperscript{13} held that a plaintiff can establish an
initial inference of illegal motivation by proving the existence of six objec-
tive elements:\textsuperscript{14} (1) plaintiff belongs to a class protected by Title VII;\textsuperscript{15}

\textsuperscript{12} See International Bhd. of Teamsters v. United States, 431 U.S. 324, 357-62 (1977);
Castenda v. Partida, 430 U.S. 482 (1977); King v. Trans World Airways, 738 F.2d 255 (8th
Cir. 1984); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982); Muntin v.
California Parks & Rec. Dept', 671 F.2d 360, 363 (9th Cir. 1982). Cf. NLRB v. Transportation
Management Corp., 462 U.S. 393, 400-01 (1983). Under Board procedures, once the
general counsel established that illegal motivation was present, the employer was required
to show that the same decision would have been made even absent the illegal motivation.
The Court agreed that this did not improperly shift the burden of proving motivation from
the general counsel to the respondent.

\textsuperscript{13} 411 U.S. 792 (1973).

\textsuperscript{14} \textit{Id.} at 802. The Court actually listed four elements:
(i) plaintiff belongs to a racial minority; (ii) plaintiff applied and was qualified for
a job which the employer was seeking applicants; (iii) despite plaintiff's qualifica-
tion, he was rejected, (iv) after plaintiff's rejection, the position remained open
and the employer continued to seek applicants from persons of complainant's
qualifications.

\textit{Id.} Under factor (ii), the Court combined three distinct factual elements: (a) application,
b) qualification of plaintiff, and (c) vacancy.

The \textit{McDonnell Douglas} model has been adapted for use in ADEA disparate treatment
cases. See Blackwell v. Sun Elec. Corp., 636 F.2d 1176, 1179-80 (6th Cir. 1983); Anderson v.
Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982); Cuddy v. Carmen, 694 F.2d 853,
864 (D.C. Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); Geller v.
Markham, 635 F.2d 1027, 1034-35 (2d Cir. 1980), \textit{cert. denied}, 451 U.S. 945 (1981); Smithers
v. Bailar, 629 F.2d 892, 896 (3d Cir. 1980); McCorstin v. United States Steel Corp., 621 F.2d
749, 752 (5th Cir. 1980); Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980); Loeb v. Telextron, Inc.,
600 F.2d 1003, 1013-14 (1st Cir. 1979); Cova v. Coca-Cola Bottling Co., Inc., 574 F.2d 958,
960 (8th Cir. 1978). Although the precise formulation varies from circuit to circuit the best
restatement requires a plaintiff to show that he or she is within the protected age group,
met applicable job qualifications, sought the job and was not hired (or was discharged), and
that a person substantially younger than the plaintiff was hired or retained. \textit{See Douglas},
656 F.2d at 531-32; \textit{Cuddy}, 694 F.2d at 854. The Fifth and Eleventh Circuits require the
plaintiff's proof to include a showing that the person favored over the plaintiff was not only
substantially younger than the plaintiff but was also under the age of 40. \textit{See Allison v.
Western Union Tel. Co.}, 680 F.2d 1318, 1320 (11th Cir. 1982); \textit{Williams v. General Motors
Corp.}, 656 F.2d 120, 122 n.3 (5th Cir. 1981), \textit{cert. denied}, 455 U.S. 943 (1982). \textit{See also
Player, Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Ver-

Courts have interpreted 42 U.S.C. § 1981 (1976) to reach racial discrimination in employ-
ment (see, e.g., \textit{General Bldg. Contractors Ass'n v. Pennsylvania}, 458 U.S. 375 (1982)), and
have used the \textit{McDonnell-Douglas} standards to address individual disparate treatment. \textit{See
Gay v. Waiters' & Dairy Lunchmen's Union Local No. 30}, 694 F.2d 531, 539 (9th Cir. 1982).

\textsuperscript{15} White males are protected by Title VII against race and sex discrimination. \textit{See
(2) defendant had a vacancy and was seeking applicants;\(^\text{16}\) (3) plaintiff has the qualifications to perform the job;\(^\text{17}\) (4) plaintiff applied;\(^\text{18}\) (5) plaintiff was not hired;\(^\text{19}\) and (6) defendant continued to seek

the person making the employment decision is of the same race and gender as the plaintiff this refutes any inference of illegal discrimination drawn solely from the rejection of an applicant. The courts, however, have rejected a 'governing majority' concept whereby an inference of motivation necessarily is refuted by showing that the decisionmaker who rejected a minority applicant was also a minority person. See Bell v. Bolger, 708 F.2d 1312, 1315 n.3 (9th Cir. 1983). See also Castenda v. Partida, 430 U.S. 482, 499-500 (1977). An inference of race or sex discrimination against nonminority persons may be created by a showing that the person making the employment decision was of a different race or gender, Chaline v. KCOH, Inc., 693 F.2d 477 (6th Cir. 1982); Whiting v. Jackson State Univ., 616 F.2d 116, 123-24 (5th Cir. 1980), or that there are 'special circumstances,' such as an affirmative action plan, from which it can be inferred that the plaintiff was rejected because he was a white male. See Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982); Parker v. Baltimore & O.R.R., 652 F.2d 1012 (D.C. Cir. 1981); Daye v. Harris, 655 F.2d 258 (D.C. Cir. 1981). See also Martinez v. El Paso County, 710 F.2d 1102, 1104 (5th Cir. 1983), in which the court held that a white male had established a prima facie case simply by showing that he was a member of a 'protected class.'

Regardless of whether a person of a race or sex similar to the decisionmaker can establish a prima facie case simply by showing a rejection, it is clear that if the decisionmaker was unaware of the plaintiff's age, race, or sex, this will refute an inference of illegal motivation. See Miller v. Mercy Hosp., 720 F.2d 357, 363-68 (4th Cir. 1983); Parcinski v. Outlet Co., 673 F.2d 34, 36-37 (2d Cir. 1982), cert. denied, 459 U.S. 1103 (1983).

16. See Davis v. Payless Cashways, 661 F.2d 1022, 1025-26 (5th Cir. 1981); Chavez v. Tempe Union High School Dist., 565 F.2d 1087, 1091-92 (9th Cir. 1977).

To establish that a plaintiff is 'qualified,' she need only show that she possesses the posted job qualifications, or otherwise has been performing the job satisfactorily. See EEOC v. Federal Reserve Bank, 698 F.2d 633, 637 (4th Cir. 1983); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813-14 (8th Cir. 1983); EEOC v. Brown & Root, Inc., 688 F.2d 336, 340 (5th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981); Aikens v. United States Postal Serv., 665 F.2d 1057, 1059 (D.C. Cir. 1981), rev'd on other grounds, 460 U.S. 711 (1983). Comparative superiority of the person who secured the job or was retained in the plaintiff's place is a 'legitimate nondiscriminatory reason' to be established by the defendant; it is not a part of the plaintiff's prima facie case. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258-59 (1981). Cf. Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 465 (4th Cir. 1983); Cartagena v. Secretary of Navy, 618 F.2d 130, 133 (1st Cir. 1980); Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981), which suggest that unless a plaintiff can establish her relative superiority she will have failed to establish a prima facie case.

18. See Reilly v. Friedman's Express, Inc., 556 F. Supp. 618, 624 (M.D. Pa. 1983) (an informal inquiry was not an application and, thus, no prima facie case was made). In EEOC v. F & D Distrib., Inc., 728 F.2d 1281 (10th Cir. 1984), plaintiff inquired about an advertised job vacancy. An employee, who had the appearance of being in charge of the store, told the female plaintiff that the job was for men as it required some lifting. Plaintiff left without filling out a formal application or pursuing the matter with the employee's superiors. The court held that plaintiff failed to prove her case. Id. at 1283. If the issue is discriminatory discharge plaintiff need not prove 'application.'

19. If the issue is discriminatory discharge, a plaintiff needs to prove that she was discharged. See Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983), in which the
Although the *McDonnell Douglas* test arose in a discriminatory hiring case, with appropriate modifications it has been applied when the issue was discriminatory discharge. In order to establish an inference of illegal motivation, a plaintiff must demonstrate that he is a member of a protected class, that he was performing satisfactory work prior to the discharge, and that the employer either sought to fill the vacancy or used nonminority persons to perform the work previously assigned to the plaintiff.

The court held that since plaintiff had voluntarily resigned she had failed to establish a prima facie case. If an employer deliberately makes an employee’s working conditions intolerable, however, a resignation may be deemed to be a constructive discharge. See *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 372 (6th Cir. 1981).

20. This element is not uniformly required. If a nonminority person was simultaneously hired with the rejection of the plaintiff, or in a discharge case, if the minority person was discharged while a white employee was retained, this will establish a prima facie case without a showing that the employer searched for applicants. See *Hagans v. Andrus*, 651 F.2d 622 (9th Cir. 1981), *cert. denied*, 454 U.S. 859 (1981). See also *United States Postal Serv. v. Aikens*, 460 U.S. 711 (1983) (denial of promotion to black but granted to white established a prima facie case); *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (discharge of female while retaining male). Both cases presupposed a prima facie case without this final element. See also *Peters v. Jefferson Chem. Co.*, 516 F.2d 447 (5th Cir. 1975), in which a prima facie case was established even though the rejection of a minority applicant was not followed by any further searching, apparently because the employer believed he would continue to receive minority applicants.

The grant of the position to someone of the same race or sex might refute a prima facie showing. See *Jones v. Western Geophysical Co. of Am.*, 669 F.2d 280, 284 (5th Cir. 1982); *Freeman v. Lewis*, 675 F.2d 398, 400 (D.C. Cir. 1982). Cf. *Keys v. Lutheran Family & Children’s Servs.*, 668 F.2d 356 (8th Cir. 1981). See also *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534 (11th Cir. 1984), holding that the hiring of a black person to the vacancy did not destroy the prima facie case of a black applicant, when plaintiff’s challenge was to a practice to which only members of his race were subjected. Similarly, the hiring of a woman to the position does not refute the prima facie showing of a black plaintiff. *DeLesstine v. Fort Wayne Hosp.*, 682 F.2d 130 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982).

21. Because a promotion or transfer is similar to a hiring, similar standards have been used to determine the elements of a prima facie case. See, e.g., *United States Postal Serv. v. Aikens*, 460 U.S. 711 (1983). Some courts have suggested, however, that for entry into nonroutine jobs, the *McDonnell Douglas* formula for a prima facie case is not appropriate. To raise an inference of improper motivation the plaintiff needs to show more than bare minimal paper qualifications. See *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93-94 (2d Cir. 1984) (significant portion of department, referrants, or other scholars hold favorable view of plaintiff’s promotion); *Mason v. Continental Ill. Nat’l Bank*, 704 F.2d 361, 366 (7th Cir. 1983) (high level job requires a plaintiff to show ability superior to the person selected).


In disciplinary discharge situations one court has articulated a more precise standard for creating a prima facie case. A plaintiff must prove that he is a member of a protected class,
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Proof of these elements establishes a prima facie case of illegal motivation. These objective elements create "an inference of discrimination . . . because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."24 This showing, however, is not conclusive proof of discriminatory motive. The Court in McDonnell Douglas held that if a plaintiff establishes these objective elements, thus creating an inference of illegal motivation, "the burden must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."25 Failure of the defendant to 'articulate' a 'reason' that is 'legitimate' and 'nondiscriminatory' will result in a judgment, as a matter of law, for the plaintiff.26 This is because when "all legitimate reasons for rejecting an applicant have been eliminated [or none articulated] . . . it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration."27

The Court in McDonnell Douglas gave no guidance concerning what it meant by "burden to articulate reason."28 The term 'articulate' suggests that defendant's obligations could have been satisfied simply by pleading a reason or stating a reason in argument of counsel.29 The term 'burden' on the other hand implies a duty to convince the fact finder that the employer was motivated by the proffered reason.30 After considerable

that there is a company policy concerning the activity for which the plaintiff was disciplined, that employees of a different class were given the benefit of a lenient company practice or not held to compliance with a strict company policy, and that the plaintiff was disciplined either without the application of a lenient policy or in conformity with the strict one. EEOC v. Brown & Root, Inc., 688 F.2d 338, 340 (5th Cir. 1982).
25. 411 U.S. at 802.
26. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Prior to Burdine there was some question concerning whether the prima facie case merely allowed a finding on behalf of the plaintiff, or whether, in the absence of contradicting evidence, a prima facie case required a finding for the plaintiff. See, e.g., Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976). See also Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 Stan. L. Rev. 1129, 1149-50 (1980). The decision in Burdine clearly means, however, that the inference of discrimination created by a prima facie case is not merely a 'permissible' inference that allows the inference of the fact in issue, but is a 'rebuttable presumption' that requires a finding in favor of the party who has the benefit of the presumed fact. Cf. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358-60 nn. 44-45. See generally 9 J. WIGMORE, EVIDENCE § 2494 (Chadbourn rev. ed. 1981).
28. The 'burden to articulate reasons' in evidentiary terminology is meaningless. The defendant's obligation must be defined in terms of evidentiary burdens. See generally Mendez, supra note 26.
29. WEBSTER'S THIRD NEW INT'L DICTIONARY 124 (Unabridged, 1967) defines 'articulate' as "to utter distinctly." Id.
30. 'Burden' has two evidentiary meanings. The first is producing evidence of a particu-
The Court eventually concluded that the 'burden to articulate' did not impose on the defendant a burden of persuasion on the issue of motivation; instead, the ‘burden to articulate’ imposed an evidentiary obligation on the defendant that was not satisfied by merely pleading a reason or providing a reason in an argument. Defendant was required to ‘come forward’ with admissible evidence “legally sufficient to justify a judgment for the defendant.” Even this holding contains considerable ambiguity. It can be suggested that a defendant meets its burden by presenting legally sufficient evidence that tends to establish the factual existence of the reason, but a defendant has no duty to convince the fact finder that the reason articulated actually exists. The defendant, however, must meet and refute the inference of illegal motivation created by a plaintiff’s prima facie showing. To do this, the defendant must establish to the satisfaction of the fact finder that the articulated reason (to be distinguished from motive) actually exists. Only by concluding that the

33. “An articulation not admitted into evidence will not suffice. Thus the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.” Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 255 n.9 (1981). “Defendant's explanation of its legitimate reasons must be clear and reasonably specific.” Id. at 258.
34. Id. at 255. See also White v. Vathally, 732 F.2d 1037, 1042 (1st Cir. 1984) (averments of good faith and a passing reference to a defect was not the articulation of a reasonably specific reason); Baylor v. Jefferson County Bd. of Educ., 733 F.2d 1527, 1533 (5th Cir. 1984) (burden of articulating reason was not met by using transcript of hearing made after the decision to discharge had been made); Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984); Lee v. Conecuh County Bd. of Educ., 634 F.2d 959, 963 (6th Cir. 1981).
35. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981), presents an uncertain analysis of the extent of a defendant’s burden. Some of the Court's language superficially suggests that a defendant will satisfy its burden simply by presenting evidence that would allow a fact finder to conclude that the reason exists, and that the defendant is under no further burden to convince the fact finder that the reason exists. A number of decisions follow the implications of Burdine, and hold specifically that the defendant carries its burden even if the fact finder does not believe that the articulated reasons exist. Thus, once the defendant presents evidence of the existence of a reason, if the plaintiff cannot carry the ultimate burden of persuading the fact finder of illegal motive, the defendant will prevail. See Brooks v. Ashtabula County Welfare Dep't, 717 F.2d 263 (6th Cir. 1983), cert. denied, 104 S. Ct. 1687 (1984); Danzl v. North St. Paul-Maplewood-Oakdale Ind. School Dist. No. 622, 663 F.2d 65, 66-67 (8th Cir. 1981) (en banc); Sanchez v. Texas Comm. on Alcoholism, 660 F.2d 658, 662 (5th Cir. 1981); St. Peters v. Secretary of the Army, 659 F.2d 1153, 1157-38 (D.C. Cir. 1981), cert. denied, 455 U.S. 196 (1982).
defendant's proffered reason exists, or that the defendant believed it existed, can a trial court infer that the reason, rather than the illegal factor, motivated the particular employment action. 37

If the defendant carries its burden of articulating a legitimate nondiscriminatory reason, it will be entitled to a judgment unless the plaintiff can present additional evidence of illegal motivation. 38 The plaintiff must establish the factual existence of objective elements from which the inference of illegal motive can be deduced. Similarly, since a defendant must create an inference of legal motive, it should be necessary for the defendant to establish the objective facts from which such motivation can be inferred. If the fact finder does not believe that the reason articulated actually exists, or that the defendant believed that it existed (DeAnda v. St. Joseph Hosp., 671 F.2d 850, 854 (1982)), there is no premise from which the fact finder can infer that the articulated reason, rather than proscribed criteria, motivated the employment decision. Thus, the plaintiff's prima facie showing of illegal motivation has not been met and refuted by a legally sufficient counter-inference. See Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984); Sylvester v. Callon Energy Serv., Inc., 724 F.2d 1210 (5th Cir. 1984); Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1984); Harris v. Birmingham Bd. of Educ., 712 F.2d 1377 (11th Cir. 1983); Lamphear v. Propkope, 703 F.2d 1311 (D.C. Cir. 1983); Mohanved v. Callaway, 698 F.2d 395 (10th Cir. 1983).

In analyzing sex discrimination in pay under the Equal Pay Act, 29 U.S.C. § 206(d) (1982), the Court has held that once unequal pay for 'equal work' has been established the burden is upon the employer to establish that the pay distinction is justified by a 'factor other than sex.' The plaintiff has no burden to prove or present evidence of sex motivation. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974). That 'factor' must be proven to exist and to be sex neutral. Id., see also Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.), cert. denied, 414 U.S. 822 (1973). There is a need to interpret Title VII and the Equal Pay Act in a consistent manner. See City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 711-14 (1978). It is advisable, therefore, to place on a defendant a similar burden of establishing the existence and legitimacy of the reason that it articulates. See Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982); Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100 (8th Cir. 1981).

37. This can be accomplished by shifting the burdens of coming forward with the evidence. A defendant satisfies its immediate burden of coming forward by producing legally admissible evidence of the reason's objective existence. This, in turn, shifts to a plaintiff the burden of coming forward on the issue of the existence or nonexistence of the reason. If the plaintiff presents no evidence to suggest that the reason articulated by the defendant does not exist, the court must find that the reason exists. If the plaintiff has failed to place this fact in issue, judgment must be for the defendant. If, however, the plaintiff presents legally admissible evidence that the reason did not exist, that factual issue is joined, and the court must decide whether the articulated reason exists. Once the issue of the reason's existence is joined, the defendant should carry the risk of persuading the fact finder of its existence. Only if that burden is met by the defendant, must the plaintiff carry the ultimate burden of proving that the illegal factor, not the articulated reason, motivated the employer. See Player, supra note 36, at 31-38.

38. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983). The Court in Burdine rejected Professor Morgan's theory that a presumption flowing from a prima facie case shifted to the defendant a risk of nonpersuasion on the fact presumed. See E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 80-81 (1956); 9 Wigmore, Evi-
be accorded a fair opportunity to show that the employer's stated reason for the plaintiff's rejection was in fact pretext.\(^3\) The burden that reshifts to the plaintiff when the defendant establishes reasons is a burden to present evidence, beyond the prima facie showing, that tends to establish the defendant's improper motivation.\(^4\) The Court in \textit{McDonnell Douglas} indicated that this additional evidence of illegal motivation might consist of proof that in the past the articulated reasons have not been uniformly applied, that the defendant has expressed specific prejudice against plaintiff's class, or that the defendant's general employment patterns show a discriminatory mind-set.\(^1\) At this point, therefore, the defendant's articulation of a legitimate reason places on the plaintiff an immediate burden to present evidence on the issue of motivation. The prima facie case alone is no longer sufficient to support a verdict in favor of the plaintiff. In addition, the defendant's articulation places on the plaintiff the ultimate risk of nonpersuasion. A plaintiff not only must present evidence of illegal motivation, but must convince the trial court by a preponderance of the evidence that the defendant was motivated by factors made illegal by Title VII.\(^4\)
The focal point in the three-step minuet of disparate treatment analysis is whether the defendant has carried its burden of establishing the existence of a 'legitimate nondiscriminatory' reason. Should the defendant fail to carry its burden, the plaintiff's prima facie showing is unrebuted and the plaintiff as a matter of law must prevail. There is no need to proceed to the third step of the plaintiff proving illegal motivation. If the defendant presents a legitimate reason, the issue will then proceed to a new level specifically addressing the evidence of motivation. Because 'legitimate' and 'nondiscriminatory' are legal norms, the resolution of whether a reason is legitimate and nondiscriminatory is a question of law. The focus of this Article is the proper definition of these norms.

II. LEGITIMACY DEFINED: THE BROAD PARAMETERS

A. Introduction: The Premise

The analytical basis of the decision in McDonnell Douglas, which was reaffirmed by the Court in Furnco Construction Corp. v. Waters and United States Postal Service v. Aikens, is that the ultimate issue in a disparate treatment case is motivation, which is, and should be, addressed by the use of the inferences defined by the Court in McDonnell Douglas. A plaintiff's prima facie case raises an inference of illegal motivation that must be placed in issue by the defendant. Thus, the defendant's burden is to establish facts from which a fact finder could infer that it was the articulated reason, rather than illegal factors, which motivated the defendant's treatment of the plaintiff. The defendant's failure to carry its evidentiary burden of creating a permissible inference of legal motivation will result in a judgment for the plaintiff. At this point, there is no need for the plaintiff to present additional evidence that the articu-

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44. See Harris v. Birmingham Bd. of Educ., 712 F.2d 1377, 1381-82 (11th Cir. 1983); Paxton v. Union Nat'l Bank, 688 F.2d 552, 558-59 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983).
olated reason is pretext. It is this concept of the defendant’s burden that should define the term ‘legitimate.’ If the reason is capable of supporting an inference that it motivated the defendant’s treatment of the plaintiff, the reason is ‘legitimate.’ If the reason, however, is incapable of supporting an inference of legal motivation, the reason lacks legitimacy.

From the holdings and implications of the Court’s decisions we can be relatively certain of legitimacy’s two parameters. On one hand, to be legitimate, a reason need not be absolutely ‘necessary’ to the defendant’s safe and efficient operation. A rational reason, far short of ‘necessary,’ would permit a fact finder to infer that the rational reason motivated the action. On the other hand, to be legitimate, a reason must at least be legal. An illegal reason cannot carry a permissible inference of legal motivation. Between these relatively clear extremes of legality and necessity lies the uncertainty. Application of the premise that a reason is legitimate only if it is capable of supporting an inference of legal motivation would result in a relatively clear definition of the term, a definition that would lie midway between the extremes of legality and necessity. It would result in ‘legitimacy’ being defined as ‘business rationality.’ A reason will be ‘legitimate’ only if it has a rational relationship to bona fide business concerns. Reasons that are arbitrary or irrational cannot support an inference that arbitrariness or irrationality, rather than proscribed factors, motivated the defendant, and absent the capacity of an articulated reason to support an inference of legal motivation, the reason cannot be legitimate.

Such analysis is supported by sound policy. Since a plaintiff’s prima facie showing creates a relatively weak inference of illegal motivation, it would improperly tip the delicate evidentiary balance to require the defendant to come forward with reasons that are absolutely necessary for its continued operation. On the other hand, the burden on the defendant to create a factual issue should not be so meaningless that it deteriorates into a pleading fiction. It will be a rare defendant who cannot dredge up some reason for acting as it did. If the reason is not scrutinized to determine whether it has sufficient rationality to carry an inference of legal motivation, the delicate balance will be tipped dramatically in favor of the defendants. The plaintiff will be prematurely deprived of the inference of illegal discrimination drawn from his prima facie case.

Until legitimacy is defined as business legitimacy, trial courts may commit serious analytical errors. In many nonjury cases, the error might not be fatal to sound results. If a defendant articulates a reason that is totally unreasonable, regardless of the court’s conception of ‘legitimacy,’ the court probably will conclude that an arbitrary reason is unworthy of be-
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The court will award judgment to the plaintiff. In such cases the failure of the court to define legitimacy will not affect the proper result. The situation might arise, however, in which, notwithstanding the irrationality of the articulated reason, the trial judge still might not be convinced that the defendant was illegally motivated. If the court has a view that the articulation of any reason shifts the burden of persuasion on the issue of motive to the plaintiff, the defendant inevitably and improperly will prevail. The error will be the result of the court's failure to define 'legitimacy' in terms of the reason's inference-bearing capacity. If the reason articulated by the defendant is incapable of supporting an inference of legal motivation, the plaintiff's prima facie case has not been placed in issue. Because the defendant has failed to come forward with evidence that will 'meet and refute' the plaintiff's evidence of illegal motivation, the inquiry must end at this point, and the plaintiff is entitled to a judgment as a matter of law. It would be improper to place a burden of persuasion on the plaintiff.

In jury trials the proper definition of 'legitimacy' is a necessity. First, in every case juries must have some instruction on the evidentiary significance of the articulated reasons. Presumably, the evidentiary strength of the reason will increase with the level of the reason's specificity and its rationality. Second, and of primary importance, if the defendant fails to articulate a reason that is capable of carrying an inference of legal motivation, it will be improper for the court to submit the factual issue of motivation to the jury. When the plaintiff's prima facie case is unchallenged by a counter-inference, the court must direct a verdict for the plaintiff.


48. A court that fails to properly analyze the evidence, however, could reason as follows: I believe that the reason articulated by the defendant is outrageous and unbelievable. However, the plaintiff has failed to convince me that, notwithstanding the arbitrary reason articulated by the defendant, that the defendant was actually motivated by factors made illegal by the statute. As the plaintiff has failed to carry her burden of persuasion, judgment must be for the defendant. Such a conclusion would be wholly improper in that it places too little of an evidentiary burden on the defendant and consequently too great a burden on the plaintiff. The appeals court could review the reason for its legal sufficiency. See Player, supra note 36, at 32-37.

B. The First Boundary—Legality: The Threshold of Legitimacy

The Court in *McDonnell Douglas* held that defendant's burden to refute an inference of discriminatory motive required it to articulate a reason that was both 'legitimate' and 'nondiscriminatory.' The very terms 'legitimate' and 'nondiscriminatory' presupposed that the reason relied upon by defendant was legal. 50 Clearly, the reason articulated would not be legally sufficient if it violates Title VII. For example, if a plaintiff alleged in her original charge to the Equal Employment Opportunity Commission (EEOC) that she was a victim of race discrimination, the employer could not carry its burden of going forward, that is, of articulating a legitimate, nondiscriminatory reason, by offering proof that it had discriminated against the plaintiff not because of her race, but because of her sex. To allow such an illegal and discriminatory 'reason' to carry the defendant's burden would frustrate the enforcement of the Act. 51 A rational interpretation of the statute will not allow the defendant to defend one allegation of illegality by proving that it violated another section of the same statute.

The employer, however, might be tempted to assert that its treatment of the plaintiff was not because of race, sex, national origin, or religion, but because of the employee's union activity (a violation of the National Labor Relations Act), 52 because of the plaintiff's age (a violation of the ADEA), 53 because the plaintiff had a physical or mental handicap (a violation of the Rehabilitation Act), 54 or because the employee complained

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50. *WEBSTER’S THIRD NEW INT’L. DICTIONARY* 1291 (Unabridged, 1967). "Legitimate"... "Accordant with law or with established legal forms and requirements." *Id.* The Court in *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977), addressing defendant's burden in a 'pattern or practice' suit, held that the employer must demonstrate that the individual applicant was denied an employment opportunity for *lawful reasons*. 51. *cf.* *Lyford v. Schilling*, 750 F.2d 1341, 1345 (5th Cir. 1985). The judicial complaint can only cover allegations made in a charge initially filed with the EEOC. Thus, if the charge alleged race discrimination, a plaintiff may not be allowed to litigate and secure a remedy for sex discrimination. *See Shah v. Mt. Zion Hosp. & Medical Center*, 842 F.2d 268, 271-72 (9th Cir. 1981); *Beamon v. W.B. Saunders Co.*, 413 F. Supp. 1167, 1173-76 (E.D. Pa. 1970). The relatively short time limitation for filing a charge with the EEOC (180 days in a nondeferral state, 300 days in a jurisdiction with an EEO statute (42 U.S.C. § 2000e-5(e) (1982))), would time-bar any new charge filed with the EEOC alleging the admitted sex discrimination. Thus, a plaintiff might be unable to secure relief for an admitted violation of the statute. 52. The relevant portion of 29 U.S.C. § 158(a)(3) (1982) states: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* 53. *See 29 U.S.C. §§ 621-634 (1982).* 54. 29 U.S.C. § 793(a) (1982) requires federal agencies that have contracts with suppliers of goods and services to include in those contracts a clause obligating the contractor to
about a safety violation (a possible violation of the Occupational Safety and Health Act). An employer may argue that since Title VII only proscribes discrimination based on race, color, religion, sex, or national origin, if the defendant used factors not forbidden by Title VII, even if those factors are illegal under other statutes, the court is powerless in a Title VII proceeding to order a remedy.

Should this argument be accepted, a defendant, at the very least, may postpone liability, a policy not to be encouraged. More significantly, however, inconsistent statutes of limitation, lack of private enforcement power in other statutes, and the spectre of inconsistent verdicts may take affirmative action to employ and advance in employment qualified handicapped individuals . . . . The United States Department of Labor, which is charged with enforcing this provision, has implemented regulations proscribing discrimination.” Id. See 41 C.F.R. § 60-741 (1983). 29 U.S.C. § 794 (1982) provides that “no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id.


56. The employer could also argue that it would involve the court in collateral issues if it had to resolve whether or not the other, noncharged statutes were actually violated by defendant. See Smith, Employment Defenses in Employment Discrimination in Litigation: A Reassessment of Burdens of Proof and Substantive Standards (following Texas Dep’t of Comm. Affairs v. Burdine), 56 TEMPLE L.Q. 372, 372 (1982).

57. The NLRA requires charges to be filed with the National Labor Relations Board within six months from the unfair labor practice, 29 U.S.C. § 160(b) (1982). Under the ADEA the plaintiff, in addition to filing a timely charge with the EEOC, must file a suit within two years from the date of the alleged discrimination. 29 U.S.C. § 626(e) (1982). Title VII adopts an entirely different system of time limitations. As long as a timely charge is filed with the EEOC there is no statutory time in which suits by the EEOC must be filed. Subject only to the equitable doctrine of laches, the EEOC may file a Title VII suit at any time. See Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 360-73 (1977). Title VII also allows the individual to file a private action. Following a timely charge with the EEOC the charging party is entitled to await the outcome of the EEOC conciliation effort. These efforts may take years. Only after the EEOC has indicated that conciliation efforts have failed and has granted to the charging party the ‘right to sue’ does the statute impose a time limitation on the plaintiff. Suit must then be filed within ninety days from the receipt of the ‘notice of the right to sue.’ See Kirk v. Rockwell Int’l Corp., 578 F.2d 814, 817-20 (9th Cir.), cert. denied, 439 U.S. 1004 (1978). Obviously, by the time Title VII litigation has been completed, the time limitations for filing actions under other statutes such as the NLRA or the ADEA may have lapsed. It is unlikely that the filing of a Title VII charge will toll the running of these other statutory time periods. See International Union of Elec. Radio & Machine Workers Local 790 v. Robbins & Myers, 429 U.S. 229, 236-40 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462-67 (1975).

58. There is no private enforcement of rights created by § 503 of the Rehabilitation Act of 1973, amended by 29 U.S.C. § 794 (1976). See Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1237-44 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1078 (5th Cir. 1980). Similarly, complaints under the NLRA and OSHA are filed administratively with the enforcing agency, and only the enforcing agency has power to invoke the statutory enforce-
make it possible for an employer to avoid liability under any statute. Such a result patently undercuts public policy. Furthermore, the logic of the defendant's position is based upon the premise that each of the employment statutes is a pocket of legislation totally independent of other statutes. Such a view, however, is unduly myopic. These acts constitute a body of law that should be interpreted as an interrelated whole, securing

ment mechanisms. Vaca v. Sipes, 386 U.S. 171, 182 (1967) (NLRA General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint); Taylor v. Brighton Corp., 616 F.2d 256, 259 (6th Cir. 1980) (Secretary of Labor has exclusive enforcement power under OSHA). Thus, if a defendant in a Title VII action is permitted to rely on a reason that is potentially a violation of the NLRA, the Rehabilitation Act, or OSHA an employee seeking relief under these statutes might not secure an adjudication because the agency charged with exclusive enforcement powers might fail or refuse to institute proceedings. (This possibility prompted the Court in Vaca to retain the private right of action to enforce the 'duty of fair representation' even though the Labor Board has assumed jurisdiction over such charges.)

59. For example, if the employer successfully defends the Title VII charge by arguing that it was anti-union bias that motivated the discharge, when charged before the Labor Board with a violation of the NLRA, the employer might deny anti-union bias and assert that it was the age of the plaintiff that caused the discharge. Although it might be asserted that concepts of collateral estoppel should bind the employer to the findings in the Title VII litigation, these concepts probably are not applicable between courts and administrative agencies enforcing different statutory schemes. See 2 K. Davis, Administrative Law Treatise §§ 18.04, .11 (1958 ed. & 1982 Supp.). Issues litigated under state fair employment statutes may have a res judicata effect on identical issues arising under Title VII. See Kremer v. Chemical Constr. Corp., 466 U.S. 461, 466-67 (1982). When similar issues are presented under different statutes, however, the courts uniformly have denied collateral estoppel effect. For example, in Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974), the Court refused to find that a prior contract arbitration award was binding in Title VII litigation. A judicial evaluation of contract issues would not bind the Labor Board in subsequent adjudication of the same issue under the NLRA. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 681-83 (1951). See generally In re South Atl. S.S. Co., 12 N.L.R.B. Dec. (CCH) 1367, 1370-80 (1939). Conversely, an NLRB adjudication will not bind the courts even in regard to identical issues arising under the NLRA. International Union of Operating Eng'rs Local 714 v. Sullivan Transfer, Inc., 650 F.2d 669, 675-76 (5th Cir. 1981). Concerning issues arising first under the NLRA that are later presented to courts in Title VII litigation, the courts have held that Labor Board adjudication of nondiscrimination is not binding in regard to Title VII issues. Peters v. Missouri Pac. R.R., 483 F.2d 490, 497 (5th Cir.), cert. denied, 414 U.S. 1002 (1973); Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125, 128-30 (6th Cir. 1971).

Furthermore, the court in its Title VII judgment might not make a positive finding that it was 'age' or 'unionism' that motivated the employer. The court is more likely to enter a negative finding, holding simply that it was not race, sex, national origin, or religion that motivated the employer's action. Absent a positive finding by the trial court that it was 'age' or 'unionism,' or a 'handicap,' collateral estoppel could not be invoked. Of course, the official admission or other finding might be used in the subsequent litigation and would often have considerable, although not conclusive, persuasive effect. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).
for employees a broad charter of employment protections.\textsuperscript{60} It is true that the numerous statutes were enacted at different times to remedy particular problems, and that procedurally they have been considered independent of each other. Nonetheless, substantively they are bound together by a common theme, which is to protect employees in their employment relationship from a wide range of employer discrimination. Each statute adds one or more pieces to the mosaic, but the pattern they form is clear; federal law provides a code of employee rights. This code must be interpreted in a manner that serves the underlying spirit of employee protection in the work place. Congress could not have intended that the rights it specifically granted to employees would be frustrated by an interpretation that allows an employer to play one statute against another in a way that effectively denies employees all protection of law.\textsuperscript{61}

When this view of the statutory scheme is taken, the broad doctrine of estoppel may be invoked to protect that policy by requiring that a defendant be estopped from asserting its own act of illegality as a basis for avoiding liability. The defendant should not be allowed to avoid the law's commands by proving that it acted illegally.\textsuperscript{62}

Finally, the basic premise of the decision in \textit{McDonnell Douglas}, reinforced by the decision in \textit{Furnco}, was that the defendant, to meet its bur-

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den, must create an inference of legal motivation sufficient to counter the plaintiff's prima facie case. The defendant can create such an inference only by articulating legal reasons. A court should not infer that one illegal reason motivated the defendant's action rather than the Title VII illegality inferred from the plaintiff's prima facie case.

A recent Ninth Circuit case\(^6\) illustrates, and by inference supports, the conclusion that illegal reasons cannot be 'legitimate.' In *Thorn v. City of El Segundo*,\(^4\) a qualified female was denied a position as a police officer. One articulated reason for her rejection was her involvement in a past sexual affair. The court found that inquiries into the applicant's private sex life that were used to deny her state employment violated her rights of association and privacy under the fourteenth amendment.\(^6\) Thus, one of the reasons the employer used to justify its rejection of plaintiff was illegal. The court addressed the Title VII claim of sex discrimination and found that the use of plaintiff's sexual history was pretextual because similar standards were not applied to male applicants.\(^6\) It is worthy of note, however, that the reason itself was not deemed legally sufficient, presumably, at least in part, because of its illegality. Thus, 'legitimacy' means at least 'legality.'\(^8^7\)

C. 'Necessity': The Outer Limit of Legitimacy

The Court in *Griggs v. Duke Power Co.*\(^6\) held that when selection criteria have an adverse impact on a class protected by the statute, the employer has the burden of establishing the 'business necessity' of the challenged criteria.\(^6\) Absent proof of 'necessity' a plaintiff will prevail.\(^7\) Although no precise definition of 'necessity' has been formulated by the

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\(^63\). *Thorn v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1982).
\(^64\). 726 F.2d 459 (9th Cir. 1982).
\(^65\). *Id.* at 471.
\(^66\). *Id.* at 466.
\(^67\). See *Curlier v. City of Fort Wayne,* 35 Fair Empl. Prac. Cas. (BNA) 717 (N.D. Ind. 1984) which held that an articulation of union activity could not be a legitimate reason sufficient to carry a defendant's burden in a Title VII case.
\(^69\). See *id.* at 432. See also *Dothard v. Rawlinson,* 433 U.S. 321 (1977); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).
\(^70\). The defendant's burden in an adverse impact case is not satisfied by merely articulating or coming forward with a reason; its burden is one of proof, of establishing to the satisfaction of the court the 'necessity' of the selection criteria. See *Walker v. Jefferson County Home,* 726 F.2d 1554, 1558 (11th Cir. 1984); *Johnson v. Uncle Ben's,* 657 F.2d 750, 752 n.2 (5th Cir. 1981), *cert. denied,* 459 U.S. 976 (1982); *Contreras v. City of Los Angeles,* 656 F.2d 1287, 1275-80 (9th Cir. 1981), *cert. denied,* 455 U.S. 1021 (1982); *Kirby v. Colony Furniture Co.,* 613 F.2d 696, 703 (8th Cir. 1980).
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Supreme Court, the term is generally agreed to contain three elements: (1) a strong or substantial employer interest; (2) a close or 'manifest' relationship between the employer purpose and the challenged criteria; and (3) no alternative practice that would have a less discriminatory effect. It is generally agreed that a defendant's burden of proving 'necessity' is relatively difficult.

Disparate treatment cases must be distinguished from situations that analyze the legality of a device that has an adverse impact on a protected class. The issues are totally different. That a reason may be strong enough to justify its use notwithstanding its impact on an entire class does not control the issue of disparate treatment. In disparate treatment cases the sole, underlying, and ultimate issue is the motivation of a single action. The concept of 'legitimacy' was created by the courts to focus the shifting burdens of addressing the motive of the action. Analysis of the term 'legitimate,' therefore, must focus on its relationship to inferences of motivation. The starting point is the inference of illegal motivation that follows from a plaintiff's prima facie showing. The prima facie case is easily created. As pointed out above, it merely requires the plaintiff to prove vacancy, qualification, application, and rejection. The inference of illegal motive that flows from such a showing is far from compelling, and can be countered by a similarly weak inference of proper motivation. The term 'legitimate' must be defined in this context. An inference of proper motivation that is sufficiently strong to refute the inference of improper motivation flowing from a prima facie showing can be

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71. See supra note 6.

72. "An overriding legitimate business purpose . . . sufficiently compelling to override any racial impact . . . effectively carry out the business purpose it is alleged to serve," and the presence of "no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971). See also Leftwich v. Harris-Stowe State College, 702 F.2d 666, 691-92 (8th Cir. 1983); Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835, 841 (10th Cir. 1981); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-80 (9th Cir. 1981); Green v. Missouri Pac. R.R., 523 F.2d 1290, 1297 (8th Cir. 1975). The burden of presenting evidence of a lesser discriminatory alternative was placed on plaintiff in Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Cf. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), which suggests that 'job relatedness' is the sole basis of 'necessity.'


74. "The burden of establishing a prima facie case is not onerous . . . . The prima facie case serves an important function in the litigation; it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). See also International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).
far short of proof that the reason was 'necessary' to the safe and efficient operation of the employer's business. To be 'legitimate' the reason need only be a rational explanation for the employer's action. It can be legitimate even if the employer's goals, interests, or concerns were less than compelling, and even if the relationship between the reason and the employer's goals and concerns is less than close, manifest, or proximate.

The decision in McDonnell Douglas confirmed this result. A former black employee was denied re-employment. The employer stated that the denial was because of plaintiff's participation in an illegal 'stall-in' civil rights demonstration conducted on the employer's premises. Relying on Griggs, the court of appeals applied a standard of 'business necessity' and demanded proof of actual work relatedness. Because defendant could not establish the 'necessity' or 'work relatedness' of the reason for not rehiring plaintiff, plaintiff's prima facie case of racial discrimination was said by the court of appeals to be unrefuted. The Supreme Court unanimously reversed, holding that the 'necessity' burden placed on defendant was too great. The Court held that defendant's burden was only to articulate a legitimate, nondiscriminatory reason. Without further elaboration the Court concluded that, as a matter of law, the employer's reason was legitimate since it could refuse to "rehire one who has engaged in such deliberate, unlawful activity against it." The case was remanded to the trial court to take evidence on whether the reason proffered by defendant was a pretext to cover a racially discriminatory motive.

Two conclusions can be drawn from this result. First, to be legitimate the reason need not rise to the level of 'business necessity.' The court of appeals' application of the 'business necessity' standard, drawn from Griggs was expressly rejected. Second, the reason can be legitimate even

75. 411 U.S. at 796.
76. Id.
77. Id. at 797-98.
78. Id. at 802.
79. Id. at 803.
80. Id. at 804.
81. Id. at 805-06. The difference between the business rationality that will suffice to carry a defendant's burden in a disparate treatment case, and the business necessity required in an adverse impact case is illustrated by an example of an employer who utilizes past criminal conviction records as a selection device. If the employer utilizes a 'no-conviction' rule as a blanket disqualification, the adverse impact of the rule on minorities will require the employer to justify the application of the rule in terms of business necessity. In jobs not requiring a high level of trust or honesty, it will be difficult for the defendant to carry the burden of proving that the rule is 'necessary.' See Green v. Missouri Pac. R.R., 523 F.2d 1290, 1297 (8th Cir. 1975). Cf. Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 981 (5th Cir. 1972). In making individual hiring decisions, however, the employer may utilize the existence or nonexistence of a criminal record in deciding which competing applicants to employ. The reason of 'no-criminal record' can be
if not directly related to the applicant's actual or projected ability to perform job duties. It was this lack of 'job relatedness' that particularly prompted the court of appeals to rule in favor of plaintiff. By its reversal the Supreme Court necessarily established that a reason may be legitimate even if not proved to be directly related to actual or projected job performance.

In *Furnco*, the court of appeals held that if the employer could have used available alternative devices that would have produced similar or better employment results without the same foreseeable class-wide impact on women or minority applicants, this could suggest that the reason used to reject the plaintiff was 'discriminatory.' The Court rejected this argument and held that possible impact on a protected class will not make a reason 'discriminatory,' nor will the existence of 'better' devices or 'lesser discriminatory alternatives' undercut the legitimacy of the reason.

In *Furnco*, defendant gave as its reason for not employing plaintiffs that they were 'walk-on' applicants, unknown to the job superintendent. Defendant had a rule against hiring such applicants. That rule was the 'reason' for plaintiff's rejection. The court of appeals held that defendant failed to establish the legitimacy of the reason because rather than simply rejecting those who were unknown to the job superintendent, defendant could have better served its goal of securing the most qualified workers by taking written applications and evaluating the relative qualifications of each applicant. Furthermore, the court of appeals believed that such a system of taking applications would have had a less discriminatory impact on minority employment opportunities. In addition, the presence of a better employment system that would have increased the number of minority employees kept the 'no walk-on' reason from being sufficiently rational to be 'legitimate.' See *Green v. Missouri Pac. R.R.*, 549 F.2d 1158, 1161 (8th Cir. 1977). Similarly, use of an educational requirement may not be 'necessary' because it lacks a close relationship to job performance. *Griggs*, 401 U.S. at 431-32. The use, however, of relative education as the factor in selecting between two competing employees will be sufficiently rational to be 'legitimate.' *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815-16 (8th Cir. 1983). Although a nonvalidated test will not be 'necessary' for efficiency, see, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-30 (1975), using a test score to reject a single applicant may be legitimate. *Herd v. County of Allegheny*, 30 Fair Empl. Prac. Cas. (BNA) 112, 118 (W.D. Pa. 1979). See also separate opinions of Justices Marshall and Brennan in *Furnco*, 438 U.S. at 581. Cf. also the majority and dissenting opinions in *Strecker v. Grand Forks County Social Serv. Bd.*, 640 F.2d 96, 100 (8th Cir. 1981) (overruled by *Robino v. Norton*, 682 F.2d 192 (8th Cir. 1982)).

82. 438 U.S. at 576.
83. *Id.* at 576-77.
84. *Id.* at 570.
85. *Id.*
86. *Id.* at 573-74.
The Supreme Court reversed. First, the Court was critical of any attempt by courts to evaluate the relative quality of employee selection methods. The Court said, "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." The Court then stated:

[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal and allow him to consider the most employment applicants. Title VII does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.

The decision in Furnco teaches that the legitimacy of a reason is not dependent upon the reason being the ‘best’ method for employer action; furthermore, the existence of alternative methods of selection that would not have a similar foreseeable impact on minority employment does not deprive the reason of its legitimacy. The Court did not totally discount the relevance of such factors, but indicated that their relevance goes not to legitimacy but to pretext; they are simply some evidence of the employer’s improper motivation.

The Court in Furnco was correct in holding that after the defendant makes a showing of the existence and apparent legitimacy of a reason, he has satisfied his immediate burden. The decision is subject to criticism, however, because it failed to identify the nature of the plaintiff’s reshifted burden, and because it commingled two distinct concepts that should remain distinct—legitimacy and pretext.

87. Id.
88. Id. at 581.
89. Id. at 588.
90. Id. at 577-78 (emphasis in the original).
91. Id. at 578.
92. The other shortcoming in the Furnco analysis was the Court’s holding that an employer need not use reasons that serve its purposes equally well but with less of a foreseeable impact on minority applicants. This holding runs counter to the well-established evidentiary principle that an employer is presumed to intend the natural and foreseeable consequences of its actions. Radio Officers v. NLRB, 347 U.S. 17, 45 (1954). If an employer has two methods that serve its employment goals equally well, and method A has a foreseeable impact on minority opportunities while method B has no such foreseeable impact, then when the employer selects method A (the more discriminatory method), we must presume that the employer intended those foreseeable consequences. The employer, who is presumably rational, must have selected method A because of the impact on the minority group. Thus, if the plaintiff counters the defendant’s articulated reason by establishing the presence of an obviously less discriminatory alternative, this should deprive an initially and

To be 'legitimate' a reason must not violate positive law. On the other hand, a reason is not deprived of its legitimacy merely because it is not necessary. A wide range exists between legality and necessity. It can be argued that the term 'legitimate' on its face means no more than that the reason is not prohibited by law. The term 'legitimate' does not suggest any level of rationality. It must be remembered, however, that the ultimate issue in disparate treatment cases is a defendant's motivation. After a plaintiff has established an inference of illegal motivation, the defendant's burden is to 'meet and refute' that inference by creating a counter-inference of legal motivation. Consequently, the defendant's articulated reason must be examined to determine whether it can be inferred from the existence of the reason that the employer was properly motivated.

A reason cannot be legitimate if it fails to carry a defendant's evidentiary burden. If the reason articulated by the defendant allows an inference of proper motivation to be drawn, and that inference is sufficiently strong to refute a plaintiff's inference of illegal motivation, the reason can be said to be legitimate. But if the reason articulated does not permit an inference of proper motivation to be drawn, or if drawn, the inference is so anemic that it does not effectively refute the plaintiff's inference, it must be concluded that the reason lacks 'legitimacy.' 'Legitimacy,' therefore, is a legal term of art, not to be defined in absolute terms of legality. It is a flexible term that must be judged in light of permissible motivational inferences.

Arbitrary or idiosyncratic reasons are not 'legitimate' because they fail to carry an inference of legal motivation. As rational beings, employers more often than not will use reasons that have some legitimate relationship to bona fide business concerns. It, therefore, cannot be inferred with any strength that an employer was motivated by a proffered reason that is bizarre, irrational, or wholly arbitrary.

If an employer actually makes a decision based on the fact that the

facially rational reason of its probative evidentiary value. Upon the plaintiff's proof, the absence of illegal motivation can no longer be inferred from the reason's existence.

93. See United States Postal Serv. v. Aikens, 460 U.S. 711, 716 (1983), in which the Court looked to plaintiff's evidence of illegal motivation and defendant's articulated reason to conclude that a factual issue of motivation was presented.

94. See McDonnell Douglas, 411 U.S. at 802. The requirement of actual reasons, as opposed to averments of good faith, was confirmed by the Court in subsequent litigation, particularly in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). Accord International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977); Alexander v. Louisiana, 405 U.S. 625, 632 (1972); White v. Vathally, 732 F.2d 1037, 1042 (1st Cir. 1984); Baylor v. Jefferson County Bd. of Educ., 733 F.2d 1527, 1533 (11th Cir. 1984).
applicant is left-handed, or green-eyed, or is a democrat, regardless of the irrationality of the reason, the employer will not be engaging in discrimination proscribed by the statute. Left-handedness, or green-eyedness, or political preference are not protected by the statute. The issue, however, is not whether arbitrary factors are proscribed by the Act. Absent a prima facie showing of illegally-motivated discrimination, the employer is free to use such devices. In the face of a prima facie case creating an inference of race, sex, or national origin discrimination, a defendant is obligated to articulate legitimate reasons from which proper motivation can be inferred. Some reasons (such as left-handedness or green-eyedness) are so weak that they will not allow a reasonable inference to be drawn that these reasons, rather than the statutorily prescribed reasons already inferred, actually motivated the employer. Proper motivation can be inferred only from reasons that a reasonable business person would employ under similar circumstances. If the reasons advanced by the defendant would not be used by a reasonable or rational businessperson similarly situated, it cannot be inferred with any strength that such proffered reasons, in fact, motivated the decision. Articulation of an arbitrary reason, thus, leaves the plaintiff's inference of illegal motivation unrefuted.

In McDonnell Douglas, the Court expressly required a 'reason,' indicating that mere denial of illegal motivation would not suffice. An arbitrary reason, however, is factually tantamount to a mere denial, since any employer could couple its denial with some reason. If any reason suffices to carry the burden assigned to a defendant, the burden becomes a meaningless shell, a fiction. The Court in McDonnell Douglas said that the reason must be 'legitimate.' Legitimacy surely presupposes some relationship to usual or reasonable employer purposes.

The Court in McDonnell Douglas was presented with a factual situation in which there existed a relatively close relationship between employer interests and the reason articulated for the employment decision. Plaintiff, while on the economic lay-off, was convicted of criminal trespass against the property of the employer. Plaintiff's activity was the culmination of a dispute with the employer over the employer's employment practices. The Court said: "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it." Although the Court rejected the argument that defendant may only use reasons that are directly related to job performance, the Court made it clear that defendant's reason was sufficient to carry its burden because defendant was acting nonarbitrarily within usual or ex-

95. 411 U.S. at 802.
96. Id. at 803.
97. Id. at 805-06.
The idea that a reason, to be legitimate, must have some rational nexus to bona fide employer interest finds confirmation in the language of the decision in *Furnco*. The Court upheld as legitimate the refusal to hire plaintiff pursuant to a rule that the employer would not consider ‘walk-on’ applicants unknown to the supervisor. The Court held that the refusal to consider unknown applicants for the job of bricklayer was “reasonably related to the achievement of some legitimate goal.” During its discussion of the relative burdens and the source of inferences, the Court strongly implied that a reason which appeared ‘arbitrary,’ particularly in the ‘business setting,’ would not refute the inference of racial motivation that flowed from the prima facie case.

The Equal Pay Act and Title VII must be interpreted in a compatible manner. Under the Equal Pay Act, once a plaintiff establishes equality of work and inequality of pay between workers of the opposite sex, the burden shifts to the defendant to prove that the pay difference is based on a “factor other than sex.” Courts that have interpreted the Equal Pay Act uniformly indicate that not any sex-neutral factor will suffice to carry the defendant’s burden. The Court in *Kouba v. Allstate Ins.*, said that: “The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.”

To secure consistency in result, a similar requirement of business rationality should be imposed upon a defendant in constructing burdens under Title VII and the ADEA. Certainly, the rationale of the Equal
Pay Act cases appears appropriate; all employment discrimination statutes are concerned with 'business practices.' Similarly, under the National Labor Relations Act, if a charging party establishes an inference that an employer's action was intended to encourage or discourage union membership or activity, the burden that is shifted to the employer is not met by simply presenting some reason. The burden is to show a "legitimate and substantial business justification." The lower courts appear to agree that legitimacy under Title VII requires some relationship to bona fide employer purposes. For example, the court in Miller v. WLFI Radio, Inc. indicated that the employer's burden was to produce evidence of 'business reasons.' The court in Green v. Missouri Pacific Railroad Co. allowed the use of criminal convictions to make individual employment decisions only if the convictions had some relationship to the nature of the job to be performed. Similarly, the court in United States v. City of Miami approved the use of lie detector results that had a valid relationship to bona fide employer concerns.

In summary, a defendant need not prove that the reason articulated for its treatment of a plaintiff was 'necessary.' The reason's legitimacy is not even defeated by a showing that the defendant could have used better, more effective, and less discriminatory methods. Not every reason, however, will be legally sufficient. The reason must be legal and not so devoid of rationality that it will not support an inference of legal motivation. A reason will be 'legitimate,' therefore, only if it rationally relates to bona

109. 687 F.2d 136 (6th Cir. 1982).
110. Id. at 138.
111. 549 F.2d 1158 (8th Cir. 1977).
112. Id. at 1160.
113. 614 F.2d 1322 (5th Cir. 1980), modified, 664 F.2d 435 (5th Cir. 1982).
114. 614 F.2d at 1346. Accord Carmichael v. Birmingham Seaworks, 738 F.2d 1126 (11th Cir. 1984); Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983); see EEOC v. Spokane Concrete Prod., Inc., 534 F. Supp. 518, 523 (E.D. Wash. 1982); Furnish, supra note 72, at 437. See also Lewis v. University of Pittsburgh, 725 F.2d 910, 927-28 (3d Cir. 1983) (Adams, J., dissenting). Judge Adams argued that it was reversible error for a trial court to exclude evidence that the manager of a university bookstore favored her niece over plaintiff because of the family relationship. Judge Adams argued that if nepotism was the reason for not selecting plaintiff, the articulated reason of relative qualifications was pretextual. Furthermore, Judge Adams argued that the nepotism practice itself would not be a legitimate reason and would not carry defendant's burden. See Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1302-03 (9th Cir. 1982), cert. denied, 104 S. Ct. 3533 (1984), suggesting the illegitimacy of using nepotism practices to make compensation and work assignment distinctions. Cf. Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 (1st Cir. 1979).
fide employer business concerns. In a phrase, to be legitimate, the reason must have business rationality.

III. 'LEGITIMACY' APPLIED: REFINING THE 'BUSINESS RATIONALITY' CONCEPT

The list of legal, nonarbitrary reasons that have some relationship to bona fide employer concerns is infinite. Some examples illustrate the vast range of legitimacy: Plaintiff rejected prior offers that would have broadened his experience. 115 Plaintiffs were rejected because they were unknown to the supervisor. 116 Plaintiff engaged in criminal misconduct on the employer's premises. 117 Personality conflicts and strained relationships caused the denial of a promotion and eventual discharge. 118 The person selected had a superior education. 119 The range of experiences and demonstrated abilities of the person selected were superior to those of the plaintiff. 120 Plaintiff was overqualified for the position. 121 Plaintiff had skills that could not be spared from his present assignment. 122 Plaintiff married a coworker. 123 Plaintiff was involved in a fight with a coworker, 124 or a customer. 125 Plaintiff carried a tear-gas pistol to work. 126 Plaintiff was allegedly involved in an off-duty assault. 127 Plaintiff falsely reported ill. 128 Plaintiff lacked proficiency in the English language. 129 The person selected was more 'articulate' than was plaintiff. 130 Plaintiff pro-

116. Furnco, 438 U.S. at 570.
120. Casillas v. United States Navy, 735 F.2d 338 (9th Cir. 1984); Verniero v. Air Force Academy School Dist. No. 20, 705 F.2d 388, 390 (10th Cir. 1983); Valentino v. United States Postal Serv., 674 F.2d 56, 63 (D.C. Cir. 1982).
122. Sweeney v. Research Found., 711 F.2d 1179, 1185-86 (2d Cir. 1983).
126. Jones v. Lumberjack Meats, Inc., 680 F.2d 98, 100 (11th Cir. 1982).
vided false information on his job application.\textsuperscript{131} Plaintiff was discharged for excessive absenteeism,\textsuperscript{132} or for violation of work rules.\textsuperscript{133} Plaintiff had a physical infirmity that prohibited lifting.\textsuperscript{134} Each of these reasons is legitimate because we can infer from the reason's existence that the employer was properly motivated.

Certain ostensibly reasonable factors, however, have been held to lack 'legitimacy.' For example, in a suit charging age discrimination, the reason that the person selected had more 'potential' than plaintiff is not a legitimate reason.\textsuperscript{135} Similarly, reasons such as 'one line of work too long,' or not 'current in knowledge,' or 'too many years since college' will not be legitimate.\textsuperscript{136} If an employer lays off older employees and uses the reason that the persons retained have less seniority, the reason is not legitimate.\textsuperscript{137} What makes these reasons illegitimate is that each reason directly translates into time, and time translates into age. Thus, each factor, although appearing to be legitimate, lacks legitimacy because it is inherently and unavoidably discriminatory on the basis of the proscribed criteria.\textsuperscript{138}

A female applicant may be rejected in favor of a male. The reason given may be that the male applicant 'appeared to have greater strength.' Although 'appearance of strength' may seem to be legitimate, one court has indicated otherwise.\textsuperscript{139} The reason was that a subjective evaluation was inherently and unavoidably discriminatory against women. The same can be said of using relative height or weight in selecting a male over a female.\textsuperscript{140} If a black is rejected in favor of a white, and the reason given is that the white was the personnel director's brother-in-law, this will seem to lack legitimacy if the employer is predominantly white. Past patterns of exclusion and segregation will necessarily and unavoidably make such a

\textsuperscript{131} Avant v. South Cent. Bell Tel. Co., 716 F.2d 1083, 1085 (5th Cir. 1983).
\textsuperscript{132} Kenyatta v. Bookey Packing Co., 649 F.2d 552, 553 (8th Cir. 1981).
\textsuperscript{133} Kellin v. ACF Indus., 460 F. Supp. 952, 954 (E.D. Mo. 1978), aff'd in relevant part, 629 F.2d 532 (8th Cir. 1980).
\textsuperscript{134} Daubert v. United States Postal Serv., 733 F.2d 1367, 1369 (10th Cir. 1984).
\textsuperscript{138} Economic factors, such as that older workers and women require greater employer costs, are rational; however, since they directly undercut the purposes of the statute they cannot be considered legitimate. Arizona Governing Comm. v. Norris, 103 S. Ct. 3492, 3495-97 (1983); EEOC v. City of Altoona, 723 F.2d 4, 6 (3d Cir. 1983), cert. denied, 104 S. Ct. 2386 (1984).
\textsuperscript{139} Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983).
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reason (nepotism) discriminatory.\textsuperscript{141}

This does not suggest that simply because the reason might be shown to have an adverse impact on a protected class it loses its legitimacy. The Court in \textit{Furnco} clearly rejected this argument. There is a distinction, however, between totally neutral criteria that may or may not have an adverse impact, which can only be proved by statistical data, and distinctions that necessarily and unavoidably are discriminatory. A factor that necessarily perpetuates race, gender, or age patterns cannot be said to be nondiscriminatory.

Ultimately the analysis depends upon an evaluation of whether it can be inferred from the existence of the reason that the defendant was properly motivated. If an older worker is rejected and the reason given is that he 'lacks potential' or that he has more seniority than the person retained, it cannot be inferred from these reasons that a factor other than age motivated the decision. An age-related reason does not refute an inference that age was a motivating factor, but instead tends to confirm the inference of age motivation. Similarly, if a woman is rejected in favor of a man because she is not as tall, not as heavy, or does not appear to have strength, can it be said that such a reason will carry an inference that a factor other than gender motivated the employer's decision? Again, since the reason does not refute, but rather confirms, sex motivation, the reason lacks legitimacy.

Vague, subjective reasons are suspect and are regularly held to lack legitimacy.\textsuperscript{142} When the nature of the job necessarily involves professional

\textsuperscript{141} See Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1302 (9th Cir. 1982), cert. denied, 104 S. Ct. 3533 (1984); Walker v. Jefferson County Home, 726 F.2d 1554, 1557-59 (11th Cir. 1984); Lewis v. University of Pittsburgh, 725 F.2d 910, 927-28 (3d Cir. 1983) (Adams, J., dissenting); Beavers v. International Ass'n of Bridge & Structural Ironworkers Local 1, 701 F.2d 601 (7th Cir. 1983); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1051-53 (5th Cir. 1969).

judgments or artistic ability, however, subjective evaluations of performances have been held to be legitimate.14 Ultimately, the distinction between subjective reasons that are legitimate, and subjective reasons that lack legitimacy is the ability of the reason, in the context in which it is found, to carry an inference of legal motivation. When objectivity readily could have been utilized to measure employee performance, the articulation of an unnecessarily subjective reason cannot carry an inference that the subjective reason, rather than impermissible factors, motivated the employer's action. In situations in which objective measurement and evaluation are virtually impossible, however, a subjective conclusion based on a reasonable and fair evaluation system can carry an inference of legal motivation. Thus, in order to determine the legitimacy of subjectivity the question must be asked: Can the reason carry the inference of proper motivation? If it can, the subjectivity is legitimate. If the subjectivity suggests rather than refutes the inference of illegal motive, however, the subjective conclusion cannot be legitimate.

IV. Conclusion

The landmark case of McDonnell Douglas established that once a prima facie case of disparate treatment has been established by a plaintiff, the defendant has a burden to articulate a 'legitimate nondiscriminatory reason' for the particular employment decision. Neither the decision in McDonnell Douglas nor subsequent decisions of the Court established a clear definition of the term 'legitimate.' Particular points, however, can be isolated. A reason, to be legitimate, must be legal. On the other hand, a reason can be legitimate even though it does not meet the more stringent standard of 'business necessity.'

Between the two extremes of 'legality' and 'necessity' the key to analysis is an appropriate appreciation of motivational inferences. A reason cannot be 'legitimate' if the reason cannot support an inference of legal motivation sufficiently strong to 'meet and refute' the plaintiff's prima facie case. Arbitrary or idiosyncratic reasons are incapable of supporting a

reasonable inference of legal motivation, and for this reason arbitrariness cannot be legitimate. To support an inference of legal motivation, the reason must be one that a rational businessperson can be expected to use, under the circumstances, in making neutrally based, bona fide business decisions.

The courts should not hastily accept any reason as being legitimate and proceed to analyze the evidence in terms of pretext. To do so without carefully analyzing the legitimacy of a defendant’s articulated reason would prematurely shift the burden of persuasion to the plaintiff and, thus, destabilize the delicate evidentiary balance envisioned by the decision in *McDonnell Douglas*.