Employment Law: O'Connor v. Consolidated Coin Caterers Corp. -- Eliminating the Replacement Outside the Protected Class Element in ADEA Hiring and Replacement Cases

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Employment Law: O'Connor v. Consolidated Coin Caterers Corp. — Eliminating the Replacement Outside the Protected Class Element in ADEA Hiring and Replacement Cases

I. Introduction

Discrimination based on age negatively affects not only those discriminated against but also society as a whole by placing a premium on a presumption of decreased productivity, rather than continued ability. As life expectancies continue to rise, discrimination against older Americans will become an even greater issue in American society. By the year 2010, an expected one-half of the American workforce will be over the age of forty. Unlike other protected classes, such as race and gender, the protected class for discrimination based on one's age is a milestone that all Americans may reach. As more individuals come within the protected class of the Age Discrimination in Employment Act of 1967 (ADEA), it is likely that more suits alleging discrimination based on age will be filed.

In order to appropriately handle these types of cases, a three-part burden shifting scheme is used, which includes as its first prong the making of a prima facie case by the plaintiff. Essentially, a prima facie case of age discrimination is established if: (1) the plaintiff is in the age group protected by the ADEA; (2) the plaintiff is discharged or demoted; (3) at the time of the discharge or demotion, the plaintiff was performing at a level that met his employer's legitimate expectations; and (4) following the discharge or demotion, the plaintiff was replaced by someone with comparable qualifications. A concrete statement of the fourth element is difficult to achieve based on irregular application in the United States Circuit Courts of Appeals. However, the United States Supreme Court recently sought to resolve this irregularity.

On April 1, 1996, the United States Supreme Court unanimously held in O'Connor v. Consolidated Coin Caterers Corp. that in hiring and replacement cases brought under the ADEA, a plaintiff is no longer required to show that his replacement was outside the protected class in order to make a prima facie case of age discrimination. In eliminating this requirement, the Supreme Court cleared up the disparity among two divergent groups of the United States Courts of Appeals which have considered the issue. One group of circuit courts required a

3. See infra notes 35-43 and accompanying text.
5. See id. at 1310.

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plaintiff to show that the replacement was outside the protected class, while the other group required some variation of a "younger replacement" standard. However, in resolving the confusion on the issue of what need not be shown about the replacement, the O'Connor Court may have created more disarray for the lower courts as they will now search for the proper standard to use as the fourth element in determining a prima facie case of age discrimination.

This note will analyze the Court's decision in O'Connor. Part II of this note will consider the historical background of the ADEA and how the prima facie scheme is used in ADEA cases. Part III will give the facts, lower court treatment, and holdings of O'Connor. Part IV will analyze O'Connor from two perspectives. First, the Supreme Court's decision will be appraised in terms of the correctness of the decision. Second, the implications from the O'Connor decision will be examined. This note will conclude that although O'Connor was correctly decided and will in fact eliminate some lower court confusion, the Court's failure to set forth a uniform standard for the fourth element may allow continued disparity in the lower courts.

II. Historical Background

A. The ADEA

The ADEA was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." The ADEA prohibits age discrimination at all stages of the employment process, including hiring and firing. Discriminatory practices concerning benefits and privileges of employment are also prohibited. The prohibitions of the ADEA are "limited to individuals who are at least forty years of age." Although the ADEA originally placed the minimum permissible mandatory retirement age at sixty-five, the ADEA Amendments of 1978 raised the retirement age to seventy. Eight years later Congress again strengthened the protections of the ADEA by eliminating altogether the mandatory retirement age for most workers.

6. See infra notes 111-12 and accompanying text.
7. See infra notes 113-20 and accompanying text.
9. Id. § 621(b).
10. See id. § 623(a)(1).
11. See id.
12. See id. § 631.
Prior to passage of the ADEA, Congress directed the Secretary of Labor to engage in a study of the factors which contribute to age discrimination in employment and the consequences of that discrimination.\textsuperscript{15} The results of the study were reported to Congress by the Secretary of Labor.\textsuperscript{16} The report focused on the widespread misconception that older workers necessarily have reduced productivity. This misconception resulted in emotional, physical, and financial impact on the individuals affected. In addition, this misconception was found to affect society as a whole by draining national resources as older workers leave the workplace.\textsuperscript{17} The ADEA was enacted by Congress as a result of this report.

Just three years prior to the enactment of the ADEA, the Civil Rights Act of 1964 addressed discrimination on the grounds of race, sex, religion, or national origin.\textsuperscript{18} The legislative history of the ADEA suggests that Congress intended to provide the same protections in the employment context to persons over the age of forty as were given gender, racial, ethnic, and religious minorities under Title VII of the Civil Rights Act of 1964 (Title VII).\textsuperscript{19} With the exception that "age"\textsuperscript{20} replaces "race, color, religion, sex, or national origin,"\textsuperscript{21} the language of Title VII and the ADEA is identical.

The similarities between the ADEA and Title VII have not gone unnoticed by the courts.\textsuperscript{22} The similarities have allowed courts to employ methods of proof created in Title VII cases in actions based on the ADEA.\textsuperscript{23} Because of the usefulness of Title VII methods in proving discrimination under the ADEA, an exploration of the history of Title VII methods is helpful.

\textbf{B. Title VII Methods of Proof}

\textit{1. Disparate Impact}

A violation of Title VII can generally be proved in one of two ways. The first method is the disparate impact theory. Disparate impact is not based on an employer's intentional discrimination. Rather, it is proved when the employer has adopted a facially neutral policy that disproportionately affects workers within the

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\textsuperscript{16} See Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (1965).

\textsuperscript{17} See id.


\textsuperscript{22} See Lorillard v. Pons, 434 U.S. 575, 584 (1978)("[T]he prohibitions of the ADEA were derived \textit{in haec verba} from Title VII."); Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979) (observing that the ADEA and Title VII "share a common purpose, the elimination of discrimination in the workplace").

\textsuperscript{23} See Loeb v. Textron, 600 F.2d 1003, 1015-17 (1st Cir. 1979).
\end{flushleft}
protected group and which cannot be justified by a business necessity.\textsuperscript{24} In \textit{Griggs v. Duke Power Co.},\textsuperscript{25} the United States Supreme Court explained that any practice not related to job performance but which excludes a certain race is prohibited.\textsuperscript{26} The \textit{Griggs} Court reasoned that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds'."\textsuperscript{27}

Based on \textit{Griggs}, a three-part system of proof is used in disparate impact cases. First, the plaintiff must make a prima facie case of disparate impact, which is often done through the use of statistical evidence.\textsuperscript{28} Second, if the prima facie case is made by the plaintiff, the burden of production shifts to the defendant to enunciate why the practice is a business necessity.\textsuperscript{29} If the defendant proves that a business necessity does exist, the dispute then enters the third and final step of the proof scheme by shifting the burden of proof back to the plaintiff.\textsuperscript{30} In this third phase, the plaintiff must prove that some alternative practice exists which is not as discriminatory as that which the employer uses.\textsuperscript{31}

The United States Supreme Court has never held that the disparate impact theory of recovery is also available to ADEA plaintiffs. Some circuits have, however, held that the disparate impact theory is applicable under the ADEA.\textsuperscript{32} Despite the general acceptance of the disparate impact theory under the ADEA, the United States Circuit Court of Appeals for the Tenth Circuit has recently expressly disallowed its use in ADEA cases.\textsuperscript{33}

2. Disparate Treatment

The second method of proof in Title VII cases is based on a theory of disparate treatment. Disparate treatment occurs when an employer intentionally discriminates against an employee on a prohibited basis.\textsuperscript{34} An example of disparate treatment occurs when an employee suffers some adverse employment decision based on a protected characteristic of that employee. While the disparate impact method is most often used by an entire group of employees who are members of the same protected class, the disparate treatment test typically involves an individual plaintiff. For example, if an employer's female workers wanted to challenge a policy which tends to make it more difficult for women to be promoted than men, the disparate impact theory would be used. An individual female worker who believes that she was denied a promotion because of her gender would attempt to

\begin{enumerate}
  \item 401 U.S. 424 (1971).
  \item See id. at 431.
  \item Id. at 432.
  \item See id. at 430-31.
  \item See id. at 431.
  \item See id. at 432.
  \item See id.
  \item See Monroe v. United Airlines, Inc., 736 F.2d 394, 404 (7th Cir. 1984).
  \item See Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996).
\end{enumerate}
prove her case using the disparate treatment theory. The focus of a court's examination in disparate treatment cases under the ADEA is whether age was a determining factor in the decision.35

a) The McDonnell Douglas Tripartite Scheme

In McDonnell Douglas Corp. v. Green,36 a Title VII race discrimination case, the United States Supreme Court set forth a tripartite scheme of proof for disparate treatment cases under Title VII, similar to the one used in cases alleging disparate impact. Under the first phase, the plaintiff carries the initial burden of stating a prima facie case of discrimination. The McDonnell Douglas court held that a prima facie case could be made by showing: "(i) that [plaintiff] belongs to a racial minority; (ii) that [plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [plaintiff's] qualifications, [plaintiff] was rejected; and (iv) that, after [plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications."37 The McDonnell Douglas Court recognized, however, that those precise elements do not apply to every conceivable fact situation.38 If the plaintiff is able to make a prima facie case, the examination then moves into the second phase of the proof scheme. In the second phase, the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."39 If the defendant cannot or does not articulate a nondiscriminatory reason for the plaintiff's rejection, the presumption of discrimination created by the establishment of plaintiff's prima facie case will result in a judgment for the plaintiff.40

The analysis moves into the third and final phase only if the employer articulates a legitimate nondiscriminatory reason for plaintiff's rejection. At this final stage, the plaintiff "must . . . be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext."41 There are two ways in which a plaintiff can meet the burden of proving pretext.42 The plaintiff may attempt to show that the stated reason is not credible, or the plaintiff may try to prove that the protected characteristic more likely than not motivated the employer.43 In other words, plaintiff will attempt to show that the stated reason was not the only consideration, and that age was a motivating factor.

37. Id. at 802.
38. See id. at 802 n.13.
39. Id. at 802.
40. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).
43. See, e.g., Montana v. First Fed. Sav. and Loan Ass'n, 869 F.2d 100, 105 (2d Cir. 1989).
b) Refining the McDonnell Douglas Standard

Although *McDonnell Douglas* remains the preeminent case on the disparate treatment theory, the United States Supreme Court has devoted its efforts since *McDonnell Douglas* to refining the way the proof scheme is applied. Most notably, the Supreme Court has focused on what effect should be given to a prima facie case once it is established. The progeny of *McDonnell Douglas* attempt to sharpen the lines of the application of the scheme of proof.

In *Texas Department of Community Affairs v. Burdine*, the United States Supreme Court considered the narrow question of whether the establishment of a prima facie case of disparate treatment shifted the burden of persuasion to the defendant. In holding that it did not, the *Burdine* Court stated that the ultimate burden of persuasion on the issue of discrimination "remains at all times with the plaintiff." Continuing, the Court further stated that "[t]he burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons." If the defendant meets this burden of production, the presumption raised by the prima facie case is rebutted. At this point, "the factual inquiry proceeds to a new level of specificity."

The level of specificity to which the inquiry would proceed was addressed by the Supreme Court in *St. Mary's Honor Center v. Hicks*. The *Hicks* Court explained that the *McDonnell Douglas* framework "is no longer relevant" if the employer meets the burden of production in the second phase. The *Hicks* Court reasoned that producing evidence of a nondiscriminatory reason, even if ultimately unpersuasive, should place the defendant in a better position than if no attempt was made to give a reason. The presumptions will have served their purpose by forcing the defendant to offer up a response. The presumptions will then "drop out of the picture." The trier of fact must then proceed to the ultimate question: whether the plaintiff has proved that the defendant has discriminated against him based on his protected status.

Because the establishment of the prima facie case of discrimination is most often what is at issue in disparate treatment cases, the case with which a prima facie case can be made must be noted. The *Burdine* Court stated that the burden is "not

45. See id. at 250.
46. Id. at 253.
47. Id. at 254.
48. Id. at 255.
50. Id. at 510.
51. See id. at 509.
52. Id. at 510-11.
53. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
The reason for this relatively low litigation hurdle is because of the important role that the prima facie case serves. The prima facie case eliminates the two most common nondiscriminatory reasons for a plaintiff's rejection. The two reasons include a lack of qualifications and the absence of a vacancy in the job sought. In *Furnco Construction Corp. v. Waters*, the Court stated that the prima facie case raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration.

The purpose of the prima facie case is not to make a final determination on the ultimate issue, but to simply allow the case to reach the next stage of analysis under the *McDonnell Douglas* scheme of proof.

There is a compelling reason why a prima facie case of discrimination under Title VII is not an "onerous" standard. Rarely will a Title VII plaintiff have a "smoking gun" — direct evidence — that points to prohibited discrimination. The *McDonnell Douglas* approach allows a plaintiff in the most common situations to establish a case of discrimination through a set of presumptions based on the behavior of the employer. The external actions of the employer which are adverse to the plaintiff may often be the only evidence of which the plaintiff has any knowledge. In such a situation, the *McDonnell Douglas* framework allows a plaintiff to get his case off the ground.

c) Applicability of the *McDonnell Douglas* Framework in ADEA Disparate Treatment Cases

Although originally constructed for use in Title VII cases, courts have routinely held that the *McDonnell Douglas* framework is applicable to cases which are brought under the ADEA. Although the United States Supreme Court has never

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54. Id.
55. See id. at 253-54.
58. Id. at 577 (citation omitted).
59. See Loeb v. Textron, Inc., 600 F.2d 1003, 1008 (1st Cir. 1979); Pena v. Brattleboro Retreat, 702 F.2d 322, 323-24 (2d Cir. 1983); Rodriguez v. Taylor, 569 F.2d 1231, 1239 (3d Cir. 1977); Smith v. Flax, 618 F.2d 1062, 1066 n.3 (4th Cir. 1980); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1212 (7th Cir. 1985); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978); Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir.
explicitly held that *McDonnell Douglas* was applicable to ADEA cases, the Court has assumed the applicability of *McDonnell Douglas* in dicta.\(^{60}\)

The United States Court of Appeals for the First Circuit examined the issue in *Loeb v. Textron, Inc.*\(^{64}\) Noting that *McDonnell Douglas* is a "sensible, orderly way to evaluate the evidence" in employment discrimination cases,\(^{62}\) the *Loeb* court found no reason why the *McDonnell Douglas* scheme would not be as helpful in a discrimination case based on age as in Title VII cases.\(^{63}\) Finding nothing in the legislative history of Title VII or the ADEA indicating any intent to the contrary, the *Loeb* court reasoned that the similarities between the two statutes indicate that "one naturally might expect to use the same methods and burdens of proof under the ADEA as under Title VII."\(^{64}\) Additionally, the Tenth Circuit acknowledged the applicability of *McDonnell Douglas* in ADEA cases in *Kentroti v. Frontier Airlines, Inc.*\(^{65}\)

Although the general consensus does seem to be that the *McDonnell Douglas* framework applies to ADEA cases, one court has noted that the *McDonnell Douglas* framework should not be adopted wholesale and rigidly applied to ADEA cases. In *Laugesen v. Anaconda Co.*,\(^{66}\) the Sixth Circuit stated that while it may be reasonable to assume that *McDonnell Douglas* can be applied in age discrimination cases, "it would be inappropriate simply to borrow and apply [the *McDonnell Douglas* framework] automatically" because the ADEA and Title VII are separate statutes with independent histories.\(^{67}\) However, the *Laugesen* court stated that it would be reasonable to assume that in a proper case, the *McDonnell Douglas* framework could be applied.\(^{68}\) The Sixth Circuit has in fact applied *McDonnell Douglas* in subsequent decisions.\(^{69}\) However, the apprehensions of the *Laugesen* court may be allayed by the fact that courts have consistently opined that the *McDonnell Douglas* framework is not "inflexible,"\(^{70}\) and that the framework was not intended to be applied in a manner that is "rigid, mechanized, or ritualistic."\(^{71}\)

\(^{60}\) 1981; Kentroti v. Frontier Airlines, Inc., 585 F.2d 967, 969 (10th Cir. 1978); Buckley v. Hosp. Corp. of Am., 758 F.2d 1525, 1529 (11th Cir. 1985).
\(^{64}\) See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). TWA claimed that the respondents had failed to make out a prima facie case of age discrimination under *McDonnell Douglas*. The Court rejected this argument reasoning that the *McDonnell Douglas* framework is "inapplicable where the plaintiff presents direct evidence of discrimination." *Id.*
\(^{61}\) 600 F.2d 1003 (1st Cir. 1979).
\(^{62}\) *Id.* at 1014 (quoting Furnco Constr. Corp v. Waters, 438 U.S. 567, 577 (1978)).
\(^{63}\) *See id.* at 1015.
\(^{64}\) *Id.*
\(^{65}\) 585 F.2d 967, 969 (10th Cir. 1978).
\(^{66}\) 510 F.2d 307 (6th Cir. 1975).
\(^{67}\) *Id.* at 312.
\(^{68}\) *See id.*
\(^{69}\) *See, e.g.*, LaGrant v. Gulf & Western Mfg. Co., 748 F.2d 1087, 1090 (6th Cir. 1984).
\(^{70}\) *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1008 (1st Cir. 1979).
Despite the acceptance of the use of the McDonnell Douglas framework in ADEA disparate treatment cases, confusion among the United States Circuit Courts of Appeal has caused the fourth element of the McDonnell Douglas framework to be applied irregularly. The McDonnell Douglas conception of the fourth element requires an examination of whether the position remained open to applicants of the plaintiff's qualifications. However, in ADEA cases the fourth element has been used to examine the characteristics of the plaintiff employee's replacement. The United States Supreme Court eliminated some of this confusion in the decision of O'Connor v. Consolidated Coin Caterers Corp. In O'Connor, the Court considered the question of whether a showing of a replacement outside the protected class was a proper element of the McDonnell Douglas prima facie case. In holding that this was not a proper element, the Court brought the Fourth and Sixth Circuits within the majority of other Circuits. However, although the O'Connor decision may appear to eliminate this confusion in the lower courts, the lack of a clear statement by the O'Connor Court as to a uniform way in which to apply the fourth element may allow some disparity to continue in the future.

III. O'Connor v. Consolidated Coin Caterers Corp.

A. Facts

James O'Connor began his employment with Consolidated Coin Caterers Corporation (Consolidated) in 1978. Consolidated operated cafeterias and vending machines which were primarily used in industrial plants, schools, businesses, and other facilities. In 1986, O'Connor was serving Consolidated in the capacity of general manager for Consolidated's northern region, known as "4C's North." Under the management of O'Connor, 4C's North showed "significant improvement in financial performance" during 1989. During the same year, O'Connor's performance rating also increased, to a "commendable minus." In addition, O'Connor earned the largest incentive bonus in the company for that year.

Despite the satisfactory performance of 4C's North during 1989, the 4C's South region was not operating as profitably. In December 1989, O'Connor accepted Consolidated's offer to transfer to 4C's South as general manager in an effort to make that region more profitable. O'Connor continued to be directly supervised by Consolidated's President, Ed Williams.

In July 1990, a chain of events were set into motion which eventually led to the loss of O'Connor's job. Part of O'Connor's 4C's South region was assigned to 4C's North, effectively reducing O'Connor's territory. Williams claimed that this was

73. See id. at 1308.
74. See id. at 1309-10.
77. Id.
78. See id.
due to O'Connor's "slow responses in reacting to individual problem accounts" and
the fact that O'Connor "had not timely responded to a problem involving food
delivery in unrefrigerated trucks."79 However, Williams conceded that O'Connor
had "made progress with individual accounts and [4C's] South made some
improvement."80

A second major event also took place later that month. Williams consolidated
all of 4C's operations, reducing the number of regional divisions from four to two.
Alan Hunter, age fifty-seven, was demoted from a regional manager position to a
commission salesman. O'Connor, age fifty-six, was terminated. The two
employees retained to oversee the new regional operations were Ted Finnell, age
forty, and Mike Kisor, age thirty-five.81 Finnell's new region included what was
formerly known as 4C's South, O'Connor's area.82

Finnell took over the region formerly covered by O'Connor despite a disparity
in O'Connor's and Finnell's performance ratings for the previous year. O'Connor
had earned a "commendable minus" in 1989, which was a higher rating than the
"competent minus" earned by Finnell.83 The performance ratings were made by
Williams, who supervised both O'Connor and Finnell.

Williams had made various comments indicating that O'Connor's age was a
problem. Williams made a statement early in the summer of 1990 while some
Consolidated employees were in a company conference room watching the Monday
playoff at the U.S. Open golf tournament. O'Connor stated that he "couldn't walk
that many rounds of golf for five days to play 18 holes for five days."84 This
comment drew a response from Williams that O'Connor was just "too old."85

Approximately two weeks prior to O'Connor's discharge, Williams stated:
"O'Connor you are too damn old for this kind of work."86 In response to this
statement by Williams, O'Connor asked the Human Relations Manager, seated in
another office but within earshot, if she had heard the statement. The Human
Relations Manager responded by telling Williams that he "shouldn't say things like
that."87

Two days before O'Connor's discharge, Williams made another similar
statement. In response to another Consolidated employee's statement that he was
approaching his fiftieth birthday, Williams stated "[i]t's about time we get some
young blood in this company."88 This statement was made while O'Connor,
Williams, and the other employee were riding in a company car.

79. Id.
81. See id. at 544.
82. See id.
83. O'Connor v. Consolidated Coin Caterers Corp., 829 F. Supp. 155, 159 (W.D.N.C. 1993); Brief
of Petitioner at 2, O'Connor (No. 95-354).
84. O'Connor, 56 F.3d at 549.
85. Id.
86. Id. at 549.
87. Brief of Petitioner at 5, O'Connor (No. 95-354).
88. O'Connor, 56 F.3d at 548.
Additionally, Williams called a Consolidated salesman into his office the day after O'Connor was fired. When the salesman asked why O'Connor had been fired, Williams said "that all of us were getting old, that [O'Connor] was getting old, and that there were three other persons around the office who were turning [fifty]." When Williams learned that the salesman was telling others that O'Connor was fired because he was too old, Williams confronted the salesman. The salesman informed Williams that he only repeating what Williams had told him, to which Williams made no reply.

B. Lower Court Treatment

O'Connor brought suit against Consolidated in the United States District Court for the Western District of North Carolina for violating the ADEA. O'Connor attempted to rely on the McDonnell Douglas framework for disparate treatment as a means of making a prima facie case of age discrimination. Consolidated moved for summary judgment. Noting that the Fourth Circuit precedent required proof of "replacement outside the protected class" as the fourth element of the prima facie case, the district court held that O'Connor could not make out a prima facie case. Finnell, O'Connor's replacement, was forty years of age, and therefore O'Connor could not meet the fourth element of the McDonnell Douglas scheme. The district court also considered whether O'Connor could make his case using direct evidence — the various statements by Williams. The court concluded that O'Connor could not establish a nexus between the statements and the employment decision. Because O'Connor could not make out a prima facie case using the McDonnell Douglas scheme and could not present traditional direct or indirect evidence, Consolidated's motion for summary judgment was granted.

The Fourth Circuit Court of Appeals also concluded that O'Connor could not establish a prima facie case because he was not replaced by someone outside the protected class. Additionally, the Fourth Circuit agreed with the lower court that the statements which O'Connor relied on were "simply stray comments that do not establish evidence of age discrimination." Despite an interesting opinion by Senior Circuit Judge Butzner, who concurred in part and dissented in part, the

89. Brief of Petitioner at 5-6, O'Connor (No. 95-354).
90. See Brief of Petitioner at 6, O'Connor (No. 95-354).
93. See id. at 158.
94. See id.
95. See id.
96. See id. at 160.
98. Id. at 550.
99. See id. at 550-51 (Butzner, J., concurring in part and dissenting in part). Judge Butzner "reluctantly concurred" with the conclusion that O'Connor could not make out a prima facie case because he was not replaced by someone outside the protected class. Opining that "[s]uch an absolute requirement . . . has no justification in law or policy," Judge Butzner pointed to the majority of circuits which have eschewed such a requirement. Judge Butzner dissented from the conclusion that O'Connor
Fourth Circuit affirmed the district court judgment.100

C. The United States Supreme Court Decision

The only issue considered by the Supreme Court on appeal was whether a plaintiff alleging a discharge in violation of the ADEA must show that the plaintiff's replacement was under the age of forty to establish a prima facie case based on the McDonnell Douglas scheme.101 The application of Title VII framework to ADEA cases was not contested by the parties. Although the Court did not decide whether the application was correct, it was so assumed.102 In an opinion by Justice Scalia, writing for a unanimous Court, the O'Connor Court held that replacement by someone outside the protected class is "not a proper element of the McDonnell Douglas prima facie case."103

The O'Connor Court noted that the ADEA prohibits discrimination based on an individual's age, but limits the protected class.104 Elaborating on the need to focus on the characteristics of the affected individual, the O'Connor Court opined that "[t]he fact that one person in the protected class has lost out to another person outside the protected class is thus irrelevant, so long as he lost out because of his age."105 The Court attempted to put this statement in more "concrete" terms by stating that "there can be no greater inference of age discrimination . . . when a [forty] year-old is replaced by a [thirty-nine] year old than when a [fifty-six] year-old is replaced by a [forty] year-old."106

The O'Connor Court reasoned that the Fourth Circuit's rule was likely adopted to prevent the creation of a prima facie case in an instance when a sixty-eight year old is replaced by a sixty-five year old.107 However, this "utterly irrelevant" element is not the "proper solution."108 Because the ADEA prohibits discrimination based on age and not class membership, "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."109 The O'Connor Court did not explicitly set forth what should constitute the fourth element. One must assume that the O'Connor Court either intended to leave the question open or intended its "substantially younger" language to provide some guidance to the lower courts.

failed to raise an inference of discrimination using ordinary methods of proof based on the many statements by Williams. See id. 100. See id. at 550.
102. See id. at 1309-10.
103. Id. at 1310.
104. See id.
105. Id.
106. Id.
107. See id.
108. Id.
109. Id.
IV. Analysis

A. Confusion Among the Courts of Appeal: The Need for O'Conner

The malleable nature of the McDonnell Douglas framework can be illustrated when applied to ADEA cases based on "hiring and replacement" situations. Courts seem to uniformly apply the first three elements. In some form or another, the plaintiff is required to show that he was within the protected class (over forty), that he was discharged or demoted, and that at the time of the adverse event he was performing at a level that met the employer's legitimate expectations.110

The irregularity in the application of the McDonnell Douglas scheme to hiring-and-replacement cases is exemplified in requirements that the United States Circuit Courts of Appeal have used for the fourth element. The Fourth and Sixth Circuits require that a plaintiff must have been replaced by someone outside the protected class in order to be able to carry the fourth element.111 Although other courts have also required this showing,112 the Fourth and Sixth Circuits have been the most ardent users of the standard.

However, close to a majority of United States Courts of Appeals do not require a showing of replacement outside the protected class.113 Even among the rest of the United States Circuit Courts that do not require a replacement outside the protected class, the fourth element has still not been uniformly applied. In Roper v. Peabody Coal Co.,114 the Seventh Circuit applied the fourth element by stating that "the disparity in age must be sufficient to create an inference of age discrimination."115 In Rinehart v. City of Independence,116 the Eighth Circuit stated that the plaintiff does not have to show replacement by someone outside the protected class, but only that he was "replaced by someone younger."117 The First Circuit in Loeb v. Textron, Inc.118 implied that a prima facie case of age discrimination could be made even if no one else was brought in to perform the same work after the discharge.119 The Loeb court even suggested that a prima facie

111. See id.; LaPointe v. UAW Local 600, 8 F.3d 376, 379 (6th Cir. 1993). Additionally, the 11th Circuit has used the "replacement outside the class" standard, but has refused to strictly apply it. See, e.g., Walker v. Nationsbank of Fla., N.A., 53 F.3d 1548, 1556. But see Carter v. City of Miami, 870 F.2d 578, 583 (11th Cir. 1989) (holding that age discrimination plaintiff's inability to show that she was replaced by someone outside the protected class was not an absolute bar to establishment of a prima facie case).
113. See Kralman v. Illinois Dept. of Veterans' Affairs, 23 F.3d 150, 155 (7th Cir. 1994); Lowe v. Commack Union Free School Dist., 886 F.2d 1354, 1374 (2d Cir. 1989); Freeman v. Package Mach. Corp., 865 F.2d 1331, 1335 n.2 (1st Cir. 1988); Maxfield v. Sinclair Int'l, 766 F.2d 788, 792 (3d Cir. 1985); Douglas v. Anderson, 656 F.2d 528, 532-33, (9th Cir. 1981).
114. 47 F.3d 925 (7th Cir. 1995).
115. Id. at 927; see also Kralman, 23 F.3d at 156.
116. 35 F.3d 1263 (8th Cir. 1994).
117. Id. at 1265.
118. 600 F.2d 1003 (1st Cir. 1979).
119. See id. at 1014.
case of age discrimination could be made if the replacement was older than the discharged employee opining that "the replacement could have been hired . . . to ward off a discrimination suit."120

The way in which the fourth element of the prima facie case is applied could drastically affect whether a plaintiff can make a prima facie case. While a plaintiff may be able to show that he was replaced by someone younger, he may not be able to show that he was replaced by someone substantially younger. Depending on the court, the plaintiff may or may not survive the first stage of the McDonnell Douglas scheme of proof. Likewise, a plaintiff in a jurisdiction that does not consider the age of the replacement, like Loeb, would likely be able to meet the prima facie case if he met the first three elements. Clearly, a need for uniformity in the fourth element's application exists.

B. Evaluation of the O'Connor Decision

The decision of the United States Supreme Court in O'Connor appears to be the correct one. The O'Connor Court correctly noted that the ADEA prohibits discrimination based on age, not class membership.121 In this sense, the central issue is whether the age of the terminated employee was determinative in the decision.122 In essence, this investigation is little more than a "but for" test. Based on the plain language of the ADEA, the investigation should necessarily focus on characteristics of the employee who received the adverse employment decision.123 The McDonnell Douglas framework examines the situation with emphasis on the employee discharged, not the replacement. The original McDonnell Douglas framework as applied in Title VII cases looked only at the class the employee was in, whether he was qualified, whether he was fired, and whether the position remained open after the discharge.124 Thus, it seems that a consideration of characteristics of the replacement employee should be irrelevant to the establishment of a prima facie case under the ADEA.

Although McDonnell Douglas instructs that the characteristics of the replacement are not considered, consideration of the replacement's characteristics could potentially be quite helpful. When employing the McDonnell Douglas framework in the hiring and replacement context, the fact that the replacement is outside the protected class will often be the most probative evidence of age discrimination. The probative nature of this kind of evidence cannot be denied. The purpose of the McDonnell Douglas prima facie case is to create an inference of discrimination. Although replacement characteristics are undoubtedly probative, the application of the Fourth Circuit's rule in O'Connor does not necessarily create a stronger inference of discrimination, as the O'Connor Court accurately

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120. Id. at 1013 n.9.
123. See 29 U.S.C. § 623(a)(1). The statute provides: "It shall be unlawful for an employer: to fail or refuse to hire or discharge any individual . . . because of such individual's age." Id. (emphasis added).
124. See supra note 36 and accompanying text.
notes. 125

If the purpose of the McDonnell Douglas prima facie case is to create an inference of discrimination, one might attempt to evaluate the effectiveness of the test in a case where discrimination has arguably occurred. In O'Connor, the plaintiff attempted to use both the prima facie case and traditional methods of proof to prove discrimination. The Fourth Circuit's rulings in O'Connor, that no inference of discrimination could be created through the prima facie case and that there was not enough direct or indirect evidence to prove discrimination, 126 show that a prima facie standard which includes an outside the protected class element is not effective. Despite the fact that there was direct evidence of "ageist" statements by O'Connor's supervisor on four occasions in the months surrounding O'Connor's termination, the district court in O'Connor found that there was insufficient evidence to create a inference under the prima facie system. Regardless of the relative connection of the statements to the ultimate employment decision, a bald examination of the facts indicates that it is quite likely that O'Connor was terminated because of his age. O'Connor was a fifty-six-year-old man with a good work record who was terminated and replaced by someone sixteen years younger. Both O'Connor and the replacement, whose employment record was of a lower caliber than O'Connor's, were supervised by the individual who made derogatory statements about O'Connor's age on repeated occasions. For the prima facie system to contain an element which would not allow the creation of an inference of discrimination based on these facts justifiably calls the element's effectiveness into question based on the stated purpose of the prima facie framework.

The elimination of the replacement outside the protected class rule was proper because of the lack of application to all situations of age discrimination. In management and professional situations, it is unlikely that a person outside the protected class could be found with sufficient experience and qualifications to fill some positions. This scenario could manifest itself through two situations. First, an employee could be terminated and, if the employer is unable to find a replacement with suitable qualifications under the age of forty, the employer might again fill the position with someone over forty. 127 Second, the employer might intentionally hire from within the protected class to eliminate suspicion of an age-based decision to terminate. The latter is an example which was first set out in Loeb v. Textron, Inc. 128

Although there are certain professional situations that are conceivable in which a replacement below forty could be just as qualified, they are few. Doctors, lawyers, nurses, business people, and engineers are all professions in which

125. See supra notes 106-09 and accompanying text.
126. See supra notes 97-98 and accompanying text.
128. 600 F.2d 1003, 1012 n.9 (1st Cir. 1979).
experience greatly increases one's occupational value. Further, rarely in these fields will an employer be able to find an individual with such qualifications and experience unless that person has been engaged in that profession for many years. As the level of experience and expertise increases, so does the likelihood that the terminated employee is within the protected class. Accordingly, the likelihood that a person under forty possesses comparable experience and expertise decreases.

What the younger replacement may lack in experience may be more than made up in his economic value to the company. Regardless of the quality of the replacement's work, it is possible that a determinative factor in the hiring decision is the amount of money that can be saved by his employment. A younger employee's advantages might be a lower salary, less accrued paid vacation, smaller bonuses based on length of time with the company, and a perception of the lower costs of medical benefits for younger employees. In situations in which one's experience contributes greatly to occupational value, it is difficult at best to justify a decision to replace a protected employee with someone younger based solely on economic factors.

Admittedly, nonprofessional and unskilled occupations exist in which an individual with relatively little experience could perform at a level similar to that of a more experienced person. However, it is difficult to justify the "outside the protected class" rule based solely on the fact that some occupations exist in which it is likely that a replacement might be outside the class. The mere ability to conjure hypotheticals is no justification for keeping the "outside the protected class" element.

Under the ADEA, a court's duty is to determine whether the employee was discharged because of his age. Whatever the usefulness of the outside the class element in some situations, application of that element could clearly lead to the ineffective application of the prima facie standard in that the element precludes an inference of discrimination from being created in a case with considerable evidence of discrimination. The ADEA could not be fairly administered in all cases of disparate treatment unless the outside the protected class requirement is eliminated.

C. Implications of O'Connor

The United States Supreme Court in O'Connor spoke to what standard should not be used for the fourth element; unfortunately, the Court did not speak to what standard should be used for that element of a prima facie case. The outside the protected class standard was compared to and found to be a less reliable indicator of age discrimination than a "substantially younger" replacement. Assuming that the disparity in age must be substantial enough to create an inference of discrimination, the substantially younger replacement standard is also problematic for two reasons. First, the substantially younger standard still considers characteris-

129. See Brief of Petitioner at 20, O'Connor (No. 95-354).
130. See supra notes: 122-23.
tics of the replacement. This ignores the fact that a person in the protected class might be terminated because of his age but may still be replaced by someone who may not be "substantially" younger, if younger at all. The substantially younger rule might still potentially lead to ineffective application of the prima facie framework because it removes the focus from whether age was the determining factor in the employment decision.

Second, the potential for uneven application of this standard is great because the outcome will necessarily be tied to a court's concept of "substantial". A court could interpret "substantially younger" in two different ways. A court may require a showing that the replacement is substantially younger in a literal sense. Alternatively, substantially younger could be interpreted as merely requiring that the age difference be "substantial" enough to create an inference of discrimination. Whichever way the courts interpret the substantially younger standard could have a great effect on the end result of the litigation. For example, a five-year age difference would probably not be substantial in a literal sense but might be substantial enough to create the inference of age discrimination to move the case along to the next stage of the McDonnell Douglas framework.

What, then, should the standard for the fourth prong of the prima facie test be? A plaintiff should be able to survive the prima facie phase merely by showing that he was replaced. This conclusion is supported by two reasons. First, the original McDonnell Douglas standard as applicable to Title VII cases only required that an employer continue to seek applicants for the position. By not considering the characteristics of the eventual replacement, the most even-handed application was assured. Admittedly, the Court since McDonnell Douglas has added a replacement outside the class standard in Title VII cases. However, this standard

132. Although considering the characteristics of the replacement is undoubtedly probative, the ADEA expressly provides that the central issue is whether the plaintiff was discriminated against "because of [plaintiff's] age". 29 U.S.C. § 623(a)(1) (1994). When the ADEA was introduced in the Senate, it was stated that "the Bill specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination has to be in favor of someone younger than forty. In other words, if two individuals age 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man age 52, then he will have violated the law". 113 CONG. REC. 31,255 (daily ed. Nov. 6, 1967) (statement of Sen. Javits).

133. In McDonnell Douglas, the plaintiff was a black man who sought to be rehired, but was denied. The Court held that the plaintiff could establish a prima facie case by showing that the employer continued to seek applicants for position. See supra note 37 and accompanying text.

134. Not considering the replacement's characteristics ensures that a plaintiff may avail himself to the ADEA's protections even if replaced by a fellow member of the protected class. See 29 C.F.R. § 1625.2(a) (1996) ("If two people apply for the same position, and one is 42 and the other is 52, the employer may not lawfully turn down either one on the basis of age, but must make the decision on the basis of some other factor."); Maxfield v. Sinclair Int'l, 766 F.2d 788, 792 (3d Cir. 1985) ("If no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class . . . ").

135. See Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995)("To establish a prima facie case . . . under Title VII, a plaintiff must prove . . . (4) after being discharged, her employer replaced her with a person who is not a member of the protected class."); Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1247 (6th Cir. 1995)(Under Title VII, the fourth prong is satisfied "by
should not be extended to ADEA cases. Title VII protects characteristics which are immutable, and not ones of degree like age. Although the replacement outside the protected class rule may be effective when judging binary characteristics like being female or Native American, the rule loses its effectiveness in the age context because an "old versus not old" distinction is entirely too slippery.

Second, a rule which requires only mere replacement is consistent with the stringency of the prima facie standard. Courts have repeatedly described the prima facie standard as one which is "not onerous" to indicate the ease in which a plaintiff should be able to meet the standard. An employee over forty who is performing at a satisfactory level but who is still terminated and replaced should be able to survive the first phase of the framework, especially considering the probability that the plaintiff will have no access to evidence of any discriminatory intent.

One possible argument against the O'Connor decision is that by eliminating the replacement outside the class element, an increase in age discrimination cases which survive the prima facie stage will result. Indeed, this is quite possible. If, as statistics show, one out of every two workers will be forty or over by the year 2010, it will become even less likely that a replacement could be from outside the class. This assumes that the increase in the raw numbers of employees in the protected class will also lead to an increase in number of situations in which a protected individual is replaced by another protected individual. As America ages, claims of discrimination by protected employees replaced by another within the protected class could becoming an increasing trend.

In assessing whether this trend will have a negative effect on private employers, two things must be remembered. First, the purpose of the prima facie case itself is partly to weed out meritless claims, which is accomplished by eliminating the most common reasons for an employee's termination — lack of qualification or satisfactory performance and lack of a position. Employers will still have some solace, although admittedly very little, in the fact that an employee will first have to meet the prima facie case.

Second, employers are still going to be able to offer a legitimate, non-discriminatory reason if the employee survives the prima facie stage. The closer the ages of the employees, the weaker the inference of discrimination. Employers might be able to defeat such a claim with a minimal business justification.

This brings the discussion to the "bottom line" in the private employment sector. Although employers may argue that this change will burden them and possibly increase the amount of time that they spend defending litigation, one must

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136. See supra notes 113-20.
137. See supra note 54 and accompanying text.
138. See supra note 1 and accompanying text.
139. See supra notes 55-56 and accompanying text.
remember that the employer, at least in part, controls his own destiny. An employer will be relatively safe from liability based on age discrimination if the employer will simply not make employment decisions based on the age of an employee. Just as importantly, employers should take an affirmative duty to educate its employees in two regards. First, employees must be implored to keep from making employment decisions based on age. Second, employers must deter other employees from making "ageist" statements which could lead an adversely affected employee to believe the decision was based on his age.

The Tenth Circuit Court of Appeals has sided with the majority in not requiring a showing of a replacement outside the protected class as an element of the prima facie case.140 Although the O'Connor decision will not explicitly contravene the decisions of the Tenth Circuit which consider the ADEA in the hiring and replacement context, it does however leave the door open for disparity among the circuits. Because the O'Connor Court did not set forth what the standard should be, the lower courts must necessarily decide for themselves. Considering the differences among the United States Circuit Courts of Appeal in how they applied the majority rule, it is certainly foreseeable that they will again differ on how the fourth element should be applied. O'Connor no doubt resolved some confusion among the Circuits; we can only hope that it did not create more.

V. Conclusion

The McDonnell Douglas framework is an invaluable resource to ADEA plaintiffs. Because age discrimination is often a matter of degree, the framework gives plaintiffs an opportunity to prove their case despite the fact that no direct or indirect evidence exists. Undoubtedly, the prima facie standard should be constructed in such a way that will not provide for arbitrary or irrational application. The United States Supreme Court has eliminated some of this arbitrariness with its decision in O'Connor. The ADEA unequivocally prohibits discrimination based on one's age. Although probative, characteristics of a replacement should not be required as a part of the prima facie case. However, in eliminating this requirement, the O'Connor Court failed to give us a concrete requirement in its place, which may lead to more disparity among the circuits. Cases which are seemingly identical factually may produce different results depending on how courts chose to apply the fourth element. Potentially, courts might try to follow the limited guidance in O'Connor, but will then have to wrestle with the amorphous "substantial" standard. Alternatively, courts might construe the lack of guidance in O'Connor as a green light to apply the fourth element standard of their choice, which plainly could result in a judicial disaster. Only time will tell exactly what impact the O'Connor decision has on employers, employees, and the courts.

David G. Harris

140. See Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir. 1988).
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