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Ryther v. KARE II and the Eighth Circuit Standard for Summary Judgment in Age Discrimination Cases

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RYTHER V. KARE 11 AND THE EIGHTH CIRCUIT STANDARD FOR SUMMARY JUDGMENT IN AGE DISCRIMINATION CASES

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I. INTRODUCTION ................................................................. 1104

II. BACKGROUND: THE U.S. SUPREME COURT STANDARD ...... 1107

A. The McDonnell Douglas Burden-Shifting Approach ...... 1108
B. The Hicks Clarification of McDonnell Douglas .......... 1110

III. THE EIGHTH CIRCUIT SPLIT POST-HICKS ...................... 1112

A. Gaworski v. ITT Commercial Finance Corp.............. 1113
B. Rothmeier v. Investment Advisors, Inc. ................. 1115

IV. RYTHER V. KARE 11 ....................................................... 1116

A. The Facts ................................................................. 1116
B. The Decision ............................................................ 1117
C. The Majority Opinion ............................................. 1118
   1. Application of the McDonnell Douglas Standard .... 1119
   2. The Standard for Judgment as a Matter of Law .... 1120
D. The Dissenting Opinion .......................................... 1120
   1. Application of the McDonnell Douglas Standard .... 1121
   2. The Standard for Judgment as a Matter of Law .... 1121
E. Analysis ................................................................. 1122

V. APPLICATION OF THE EIGHTH CIRCUIT STANDARD POST- 
RYTHER .............................................................................. 1123

A. The “Pretext-Only” Standard ...................................... 1123
B. The “Pretext-Plus” Standard ...................................... 1124
C. Eighth Circuit Cases Post-Ryther ............................... 1125
D. Stanback v. Best Diversified Products, Inc. ............... 1128

VI. AN ALTERNATIVE SOLUTION ........................................ 1131

A. The Standard for Summary Judgment and Ryther .... 1132

VII. CONCLUSION ............................................................... 1133

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I. INTRODUCTION

The Eighth Circuit opinions in age discrimination cases on appeal from summary judgment or judgment as a matter of law have been inconsistent in recent years. One reason is that the standard for summary judgment under Federal Rule of Civil Procedure 56 does not fit neatly with the circumstantial nature of proof in age discrimination cases. Further, the burden-shifting approach of producing evidence in age discrimination cases, first outlined in the U.S. Supreme Court decision McDonnell Douglas Corp. v. Green, highlights the he-said/she-said character

1. See infra Part III, Part V. The Eighth Circuit is not alone in this conflict. As one article opined:

The federal courts of appeals disagree on the amount of evidence that an employee must present in employment discrimination cases to survive an employer's motion for summary judgment or judgment as a matter of law. The First Circuit, the Second Circuit en banc, the Fifth Circuit en banc, and the Eighth Circuit en banc hold that to survive an employer's motion, an employee must raise a genuine issue of fact as to whether the employer intentionally discriminated. The Third Circuit en banc, the Seventh Circuit, the Tenth Circuit en banc, and the Eleventh Circuit hold employers to a lower evidentiary burden. The effect is that district courts in these latter circuits, as a practical matter, are precluded from granting an employer's motion for judgment based on insufficiency of the evidence. The D.C. Circuit, having just heard this issue en banc, stands ready to join the fray.


2. See Fed. R. Civ. P. 56, Summary Judgment. The nature of proof in age discrimination cases is predominantly circumstantial. Because the standard for summary judgment and judgment as a matter of law is virtually identical, this article does not distinguish between summary judgment and judgment as a matter of law when discussing the issues raised by the awkward fit of Rule 56 to disparate treatment claims. See id.; see also Haynes v. Bee-Line Trucking Co., 80 F.3d 1235, 1238 (8th Cir. 1996) (outlining the standard for a ruling in a motion for a judgment as a matter of law); Lynne C. Hermle, 27th Annual Institute on Employment Law: Summary Judgment Motions in Discrimination Cases: Bringing, Defending and Appealing, 592 PLI/Lit. 1127, 1163-66 (1998).

of these cases. As a result, nearly every age discrimination case presents an issue of material fact regarding discrimination that should preclude summary judgment. Even so, defendants have an equal right to dispensation of their claims on summary judgment where reasonable minds could not ultimately infer discrimination. This balancing of interests has in the past and continues to create conflict within, and among, the federal circuit courts.

In 1997, the Eighth Circuit attempted to "unify and clarify [its] understanding of the Supreme Court's standard" for summary judgment in age discrimination cases in Ryther v. KARE. The court recognized that it had applied inconsistent standards in reviewing these kinds of summary judgment motions and sought reconciliation by analyzing the nature and scope of proof required in age discrimination cases. The hope was that this opinion would resolve the historical conflict in the Eighth Circuit on this issue.

In fact, the Ryther court, sitting en banc, produced an ambiguous opinion. In it, nine judges concurred with the majority's analysis and

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5. See infra notes 30-31 and accompanying text. But cf. Acosta & Von Vorys, supra note 1, at 290 ("There are many examples of cases that raise an [sic] genuine issue of fact regarding the proffered reason but do not raise a genuine issue of fact regarding discrimination.").
7. See sources cited supra note 1.
8. 108 F.3d 832, 836 (8th Cir. 1997).
9. See id. at 836 (stating that it is reviewing the standard in order to provide "guidance to the bar and district courts").
10. See Tang & McMillian, supra note 6, at 538.
result. 12 Eight judges also concurred with the standard for summary judgment the dissent applied in its analysis. 13 While the dissent insisted it applied the same standard as the majority, 14 this paper will show that in application, this assertion is not true. 15 In fact, this paper will show that the Eighth Circuit has consistently split on this issue, and continues to apply diverging standards on what constitutes a material fact for purposes of summary judgment. 16

The dissent and majority standards are irreconcilable when applied to the standard for summary judgment. 17 In effect, the opinion created two standards within the Eighth Circuit on motions for summary judgment. 18 Because the court is not unified in its approach on this issue, subsequent panel opinions require different standards to invoke or surpass summary judgment. 19 Lower courts and the legal community remain unsure of which standard to argue and apply to summary judgment motions. 20 Until the U.S. Supreme Court grants certiorari to answer this question and end inter-circuit and intra-circuit confusion, the Eighth Circuit must address the conflict within its own jurisdiction by granting another hearing en banc to clarify the Ryther opinion.

This article briefly will discuss the standard of proof originally set forth by the U.S. Supreme Court on this issue. 21 It then will highlight the conflict that arose within the Eighth Circuit post-St. Mary’s Honor Center v. Hicks 22 that prompted the need to clarify the Eighth Circuit standard set in

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12. See id. at 834.
13. See id. at 834, 847-48.
14. See id. at 848. Judge Loken purported to agree with the court’s application of the legal standards but dissented as to the result it reached. See id.
15. See infra Part III, IV and V.
16. See infra Part III, IV and V.
17. See infra Part IV.
18. See infra Part IV.
19. See infra Part V; see also Stanback v. Best Diversified Prods., Inc., 180 F.3d 903, 912 (8th Cir. 1999) (R. Arnold, J., concurring) (stating that since Ryther, panels of the Eighth Circuit have gone both ways on the issue of whether the plaintiff’s offer of pretext alone will suffice to create a genuine issue of material fact appropriate for jury resolution and thus survive summary judgment) (citing Brandt v. Shop’N Save Warehouse Foods, Inc., 108 F.3d 935 (8th Cir. 1997) and Maschka v. Genuine Parts Co., 122 F.3d 566 (8th Cir. 1997)); Tang & McMillian, supra note 6, at 538 (“Much depends on the particular judge or judges deciding these difficult summary judgment issues, and the conclusions reached by different judges as to whether an inference of discrimination is in genuine dispute will inevitably vary.”).
20. See infra Part V.
21. See infra Part II.A (discussing McDonnell Douglas v. Green, 411 U.S. 792, 802-04 (1973)).
22. 509 U.S. 502, 511 (1993); see also infra Part II.B.
Next, the article analyzes the Ryther opinion and its proposed resolution to the conflict. The article then will address the confusion Ryther caused in the legal community by analyzing some Eighth Circuit decisions. Finally, this article suggests a solution to the post-Ryther split within the Eighth Circuit by proposing alternative solutions that reconcile the Eighth Circuit standard of proof for summary judgment in age discrimination cases.

II. BACKGROUND: THE U.S. SUPREME COURT STANDARD

Age discrimination cases such as Ryther often are classified under the larger heading of disparate treatment claims. Disparate treatment essentially amounts to less favorable treatment by an employer toward an employee "because of the [employee's] race, color, religion, sex or national origin." Cases alleging disparate treatment largely involve circumstantial, rather than direct, evidence. The U.S. Supreme Court, in McDonnell Douglas v. Green, clarified the order and allocation of proof in disparate treatment cases.

23. See infra Part III.
24. See infra Part IV.
25. See infra Part V.
26. See infra Part VI.
27. See Developments in the Law: Employment Discrimination, 109 HARV. L. REV. 1579, 1580 (1996) ("Disparate treatment cases concern employment practices or incidents that intentionally subject people to impermissible discrimination.") [hereinafter Developments in the Law]; see also Tang & McMillian, supra note 6, at 520 n.9 ("The methodology for analyzing age discrimination disparate treatment cases is the same as that which applies under Title VII.") (citation omitted). The Age Discrimination in Employment Act (ADEA) was adopted in 1967, three years after Title VII. See 29 U.S.C. § 623 (1994); 42 U.S.C. § 2000e (1994). The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age." 29 U.S.C. § 623(a)(1).
29. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.").
31. See id. at 800-01. The McDonnell Douglas opinion also addressed the issue, in part, because:

The two opinions of the [Eighth Circuit] Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.
A. The McDonnell Douglas Burden-Shifting Approach

The McDonnell Douglas framework sets up a system of evidential presentation in three phases. First, the plaintiff presents a prima facie case of discrimination. Second, once the plaintiff produces prima facie evidence of discrimination, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the adverse employment action. If the defendant produces a reasonable motivation, then the

Id. at 801 n.12.

32. See id. at 802-04. The McDonnell Douglas opinion specifically addressed a Title VII action, although later courts have expanded this approach to include ADEA claims. See e.g., Susan Childers North, Does Pretext Plus Age Equal the Sum of the Judgment?, 31 U. Rich. L. Rev. 847, 851 nn.30-35 (noting that the U.S. Supreme Court did not decide whether the McDonnell Douglas paradigm applied to ADEA cases, but stating also that "it did not disparage the notion, despite the opportunity to do so") (citing O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996)).

33. See McDonnell Douglas, 411 U.S. at 802. The Court set forth elements by which a complainant in a Title VII action may present a prima facie case. See id. They are:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants [sic] from persons of complainant’s qualifications.

Id. In a later case, the Court noted this was not an “onerous” burden of proof. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Rather, the prima facie case functions to eliminate common nondiscriminatory reasons for termination. See id. at 253-54. The effect of the prima facie case is to create “a presumption that the employer unlawfully discriminated against the employee.” Id. at 254.

In an ADEA case, the elements are similar, with age replacing racial minority. See O’Connor, 517 U.S. at 310-12 (listing the elements of the prima facie case in a racial discrimination context and discussing what elements must be shown in an age discrimination case to meet the elements of a prima facie case). The O’Connor Court noted that in establishing a prima facie case for age discrimination, the complainant need not prove that she was replaced by someone outside the protected age group under the ADEA. See id. at 312. Rather, the complainant must show that she was replaced by someone younger. See id.

34. See McDonnell Douglas, 411 U.S. at 802 (implying that a non-discriminatory reason is one that is reasonable). If the employer offers no reason, and remains silent, the case is over, as there is no issue of fact remaining. See Burdine, 450 U.S. at 254. However, once the defendant offers any explanation, that rebuttal must be reasonably believable so as to create “a genuine issue of fact as to whether it discriminated against the plaintiff.” Id; see also St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (“The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the

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presumption created by the prima facie case "drops from the picture." The burden shifts back to the plaintiff, who must provide evidence that the defendant's proffered reason for the adverse employment action was false and merely a pretext for discrimination.

Cases following McDonnell Douglas raised a number of issues with the burden-shifting process. In Texas Department of Community Affairs v. Burdine, one issue was whether the plaintiff's proof of pretext necessitated judgment in its favor as a matter of law. Circuit courts split, creating the
"pretext-only" and "pretext-plus" standards of proof. Courts that applied the "pretext-only" standard found that when the plaintiff produced pretextual evidence, he or she did not need to produce any additional evidence. The finding of pretext alone allowed the court to infer discrimination and grant judgment as a matter of law in favor of the plaintiff.

Other courts applied the "pretext-plus" standard. These courts found that upon a showing of the falsity of the defendant's proffered reason, the plaintiff must in addition prove by a preponderance of the evidence that defendant's behavior was in fact motivated by intentional discrimination. Thus, a finding of pretext alone did not necessitate judgment in favor of the plaintiff. The U.S. Supreme Court addressed this conflict in St. Mary's Honor Center v. Hicks.

B. The Hicks Clarification of McDonnell Douglas

The Court addressed the specific issue raised by the inter-circuit split
and the emerging "pretext-only" versus "pretext-plus" standards. It specifically answered the question of whether a finding must be made in favor of plaintiff if the trier of fact does not believe the employer's proffered reason for the employer's action. In a 5-4 opinion, the Court declared that the finding of pretext alone does not support a finding of discrimination as a matter of law. The plaintiff always carries the burden of persuasion to support its intentional discrimination claim. This burden is not relieved simply because the defendant's proffered reason is unbelievable.

The court indicated that the plaintiff need not produce additional evidence specifically designed to support its claim of intentional discrimination. The plaintiff may rely on its prima facie case, on its proof of pretext, or it may produce additional evidence. Ultimately, the trier of fact must find intentional discrimination.

The *Hicks* case came to the Court after a full bench trial and appeal to the Eighth Circuit. Thus, the Court established its findings based on evidence produced to a factfinder. This left open the possibility for

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46. See supra notes 33-40 and accompanying text; see also *Hicks*, 509 U.S. at 502.
47. See *Hicks*, 509 U.S. at 502.
48. See id. at 503 ("Any doubt created by a dictum in *Burdine* that falsity of the employer's explanation is alone enough to sustain a plaintiff's case was eliminated by Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)."). That is, "[t]he trier of fact's rejection of an employer's asserted reasons for its actions does not entitle plaintiff to judgment as a matter of law." *Hicks*, 509 U.S. at 502.
49. See id.
50. See id.
51. See id. at 511 ("[T]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.").
52. See id.
53. See id. at 518.
54. See id. at 505.
55. See id. The court did state in dictum that after the prima facie case and defendant's burden of production are established, the court is asked to decide whether an issue of fact remains for a factfinder:

None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—i.e., has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action.

Id. at 509. The Court continued by stating that "[i]f the defendant has failed to sustain its burden but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a
conflict within and among the circuits, including the Eighth Circuit, of how the *Hicks* standard applied to motions for summary judgment.\(^{56}\)

### III. THE EIGHTH CIRCUIT SPLIT POST-*HICKS*

In two notable opinions, the Eighth Circuit attempted to draw some conclusions regarding the *Hicks* standard of proof as applied to motions for summary judgment in disparate treatment cases.\(^{57}\) In fact, these opinions gave rise to a new split within the Eighth Circuit.\(^{58}\)

question of fact *does* remain, which the trier of fact will be called upon to answer.” *Id.* at 509-10 (emphasis added). The Court further noted that in the event that the defendant carries its burden of production, then the *McDonnell Douglas* framework is no longer relevant. *See id.* at 510. The Court specifically stated that the trier of fact is called upon to make the ultimate finding of discrimination. *See id.*

56. *See* Tang & McMillian, *supra* note 6, at 528-30. Further, some scholars have noted that the language supplied by the *Hicks* Court was vague enough to create a circuits-split on its interpretation. *See Developments in the Law, supra* note 27, at 1593 (“The efficacy of *Hicks* as a vehicle to resolve intercircuit conflict seems highly questionable, given the persisting division among the circuits. . . . Moreover, entirely new questions have arisen from the permissive reading of *Hicks*.”). *See* Acosta & Von Vorys, *supra* note 1, at 208-09 (stating that the passage in *Hicks* is the source of confusion among circuits on “how [the McDonnell-Douglas] burden-shifting scheme affects an employer’s motion for judgment”). The exact quote under dispute is: “The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.” *Hicks*, 509 U.S. at 511.

57. *See infra* notes 55-78 and accompanying text.

58. In Kobrin v. University of Minn., 34 F.3d 698, 703 (8th Cir. 1994), the Eighth Circuit held that the plaintiff “may overcome summary judgment by producing evidence that, if believed, would allow a ‘reasonable jury to reject the defendant’s proffered reasons for its actions.” (quoting Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1109 (8th Cir. 1997)); *cf.* Krenik v. County of LeSueur, 47 F.3d 953, 958 (8th Cir. 1995) (“To survive summary judgment at the third stage of the *McDonnell Douglas* analysis, a plaintiff must demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant’s proffered reason is pretext and that the real reason for its action was intentional discrimination.”); *see also* Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 777 (8th Cir. 1995) (following *Krenik*); Nelson v. Boatmen’s Bancshares, Inc., 26 F.3d 796, 801 (8th Cir. 1994) (stating that the employee “must do more than simply discredit an employer’s nondiscriminatory explanation; he must also present evidence capable of proving the real reason for his termination was discrimination based on age”).

Later, Circuit Judge McMillian specially concurred in the denial of the suggestion for rehearing en banc of *Boatmen’s Bancshares, Inc.* and wrote specially to emphasize the panel opinion’s use of the mixed-motive analysis set forth in *Boatmen’s Bancshares, Inc.*, and relying upon Radabough v. Zip Feed Mills, Inc., 997 F.2d 444 (8th Cir. 1993). *See* Nelson v. J.C. Penney Corp., 79 F.3d 84, 85 (8th Cir. 1996). He noted that the panel’s use of these cases “in what is purportedly a
A. Gaworski v. ITT Commercial Finance Corp.\textsuperscript{59}

This age discrimination case came on appeal from the district court’s denial of defendant’s motion for judgment as a matter of law.\textsuperscript{60} In a divided opinion, the Eighth Circuit affirmed the district court’s finding.\textsuperscript{61} It held that a reasonable jury could have found defendant’s proffered reason for termination was in fact pretext for discrimination.\textsuperscript{62}

The majority relied upon \textit{Hicks} and stated that “if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant’s proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred . . . .”\textsuperscript{63} The court held that the jury verdict could not be overturned if there was any reasonable basis for the jury’s conclusion.\textsuperscript{64} In essence, the \textit{Gaworski} majority gave utmost deference to the province of the jury by applying the standard for judgment as a matter of law strictly to the evidence before it.\textsuperscript{65}

The dissent stated that in order to prevail, the plaintiff needed to

\begin{itemize}
  \item \textit{Id.} at 1109. The court determined that sufficient evidence existed in this case based on the findings that while ITT claimed a reduction in force, it showed no evidence of a need for one. \textit{See id.} at 1118 (Gibson, J., dissenting). Gaworski was the highest paid and oldest employee, as well as the only one who was eligible for pension benefits. \textit{See id.} at 1107. Further, ITT’s reason for retaining a younger employee was pretextual, and in fact the younger employee replaced Gaworski’s position, for which Gaworski was more qualified. \textit{See id.} at 1110.
  \item \textit{Id.} at 1108. (stating the standard of review from the denial of a motion for judgment as a matter of law and noting that the court of appeal must “affirm the denial of the motion for judgment as a matter of law if reasonable persons could differ as to the conclusions to be drawn from the evidence,” and further noting that the standard on review is “highly deferential”).
  \item \textit{See id.} at 1110. Gaworski presented a prima facie case of age discrimination, and enough evidence existed for a reasonable jury to reject defendant’s reasons, therefore the jury verdict should not be overturned. \textit{See id.}
\end{itemize}
present evidence not only of pretext, but specific evidence that intentional discrimination motivated the termination. The dissent analyzed the findings in detail, and concluded that no reasonable jury could have found that age motivated ITT's decision to terminate Gaworski.

The Gaworski dissent stated that the majority placed too great a weight on the initial prima facie case and its presumption of discrimination. The dissent found that when the defendant's proffered reason withstands and the burden shifts to the plaintiff to prove pretext, Hicks maintained that the record must be viewed as a whole to determine whether enough evidence exists to prove intentional discrimination.

The Gaworski case exemplifies the issue before the Eighth Circuit in reviewing motions for summary judgment. The Hicks Court, while clarifying a narrow issue, did not directly address the brewing conflict within the Eighth Circuit. That is, if the plaintiff proves a reasonable prima facie case of discrimination, and the defendant proffers a reasonable, nondiscriminatory reason for its action, what constitutes a "full and fair opportunity" for the plaintiff to prove pretext for discrimination? Because five of the sitting judges would have considered a rehearing en banc on this case, one may infer that a split had emerged within the Eighth Circuit at this point. The Eighth Circuit again faced the opportunity to clarify its position in Rothmeier v. Investment Advisors, Inc.

66. See id. at 1120 (Gibson, J., dissenting).
67. See id. at 1122.
68. See id. at 1117-18.
69. See id. at 1117.
70. See supra notes 29-33 and accompanying text on the McDonnell Douglas requirement that plaintiff receive a full and fair opportunity to prove pretext for discrimination.
71. See Kehoe v. Anheuser-Busch, Inc., 96 F.3d 1095, 1102 (8th Cir. 1996) ("[D]ecisions subsequent to Gaworski have been careful to emphasize that the Supreme Court in Hicks mentioned, even where the employee has refuted the employer's proffered reasons for the adverse employment action, the plaintiff cannot prevail unless he has introduced 'evidence that will suffice to show intentional discrimination.'" (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)); see also Boatmen's Bancshares v. Nelso, 26 F.3d 796 (8th Cir. 1994) ("[E]vidence that an employer's proffered nondiscriminatory explanation is wholly without merit or obviously contrived might serve double duty."). The "double duty" scenario exists where the proof of pretext both discredits the defendant's proffered reason and permits an inference of intentional discrimination. See id. The court in Boatmen's Bancshares held that in all other cases, the plaintiff "must do more than simply discredit an employer's nondiscriminatory explanation; he must also present evidence capable of proving that the real reason for [the adverse employment action] was discrimination based on [a prohibited criterion]." Id.
72. 85 F.3d 1328 (8th Cir. 1996).
B. Rothmeier v. Investment Advisors, Inc.\textsuperscript{73}

In \textit{Rothmeier}, the Eighth Circuit squarely addressed the issue of proof at the summary judgment stage.\textsuperscript{74} It noted the inconsistency in the Eighth Circuit, post-\textit{Hicks}, on this issue, and specifically attempted to reconcile \textit{Gaworski}.\textsuperscript{75}

The court stated that "[w]e believe that \textit{Hicks} allows a trial judge to decide on a motion for summary judgment that the evidence is insufficient for a reasonable trier of fact to infer discrimination even though the plaintiff may have created a factual dispute as to the issue of pretext."\textsuperscript{76} Instead, the court concluded that "the rule in this Circuit" is that a plaintiff could avoid summary judgment only if it (1) produced evidence of pretext sufficient to create a fact issue; and (2) created a "reasonable inference" that age discrimination was the motivating factor for termination.\textsuperscript{77}

The court found that Rothmeier did not produce sufficient evidence for a factfinder to conclude that discrimination was a determinative factor in the decision.\textsuperscript{78} However, some later courts have cited \textit{Rothmeier} only for the narrow proposition that summary judgment will be granted only when plaintiff's proof of pretext is inconsistent with or wholly unsupportive of

\textsuperscript{73} Circuit Judges Bowman and Loken, and District Judge Schwarzer sat on the panel. See \textit{id.} at 1330. Note that in \textit{Gaworski} above, Bowman declined to participate in that decision, and Loken would have granted a rehearing en banc. See \textit{Gaworski}, 17 F.3d at 1104.

\textsuperscript{74} See \textit{Rothmeier}, 85 F.3d at 1331. In this case, Rothmeier was the president of Investment Advisors, Inc. (IAI) from 1989, when he began working at IAI, until his termination in 1993. See \textit{id.} at 1330. He was 43 years old when hired, and 46 when terminated. See \textit{id.} Rothmeier claimed that he was terminated because IAI wanted to cover up some SEC problems that Rothmeier knew about. See \textit{id.} at 1337. He alleged that because he was older, he was more ethical and would have told someone about the cover-up. See \textit{id.} The District Court granted summary judgment in favor of IAI, because "the record was 'bereft of any suggestion that there was any age based animus involved in the decision of IAI . . . to terminate Rothmeier.'" Id. at 1331.

\textsuperscript{75} See \textit{id.} at 1336 ("Post-\textit{Hicks}, our Circuit's pronouncements on this issue have not been models of apparent consistency."). The court noted that \textit{Gaworski} could be reconciled by interpreting it solely to mean that "[i]n some cases, evidence that an employer's proffered nondiscriminatory explanation is wholly without merit or obviously contrived might serve double duty; it might serve the additional purpose of permitting an inference that age discrimination was a motivating factor in a plaintiff's termination." Id. (quoting \textit{Boatmen's Bancshares}, 26 F.3d at 801).

\textsuperscript{76} \textit{Id.} at 1335.

\textsuperscript{77} See \textit{id.} at 1336-37.

\textsuperscript{78} See \textit{id.} at 1337.
discrimination. Other courts have cited Rothmeier for much more than this limited proposition.

The conflict between these two cases remained apparent, even after Rothmeier attempted to reconcile them. The issue pre-Ryther could be summarized as follows: where the plaintiff produces evidence of pretext that is not inconsistent with discrimination, can summary judgment be granted even though the showing of pretext creates a contradictory inference from defendant's proffered reason for termination? In other words, may a court sit as factfinder at summary judgment and weigh evidence to determine whether a jury ultimately may find intentional discrimination?

IV. RYTHER V. KARE 11

A. The Facts

In Ryther, a sportscaster sued a television station, alleging KARE 11's refusal to renew his contract violated the ADEA. KARE 11 stated that Ryther's low ratings in market research prompted the adverse business decision. Ryther alleged the termination was in fact based on his age—he was fifty-three years old when he left KARE 11. The primary issue at

79. See Ryther v. KARE 11, 108 F.3d 832, 837 n.4 (8th Cir. 1997); Keathley v. Ameritech Corp., 187 F.3d 915, 922 (8th Cir. 1999), reh'g and reh'g en banc denied, (Sept. 20, 1999).


81. One of the sources of confusion may be that in mixed motive and reduction in force cases, direct proof of discrimination is required. See Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448 (8th Cir. 1993); see also Nelson v. J.C. Penney Co., 79 F.3d 84, 85 (8th Cir. 1996) (Circuit Judge McMillian specially concurring in the denial of suggestion for rehearing en banc). While the correct standard was ultimately applied, Judge McMillian noted in his concurrence in the denial of suggestion for rehearing en banc that the panel opinion in the earlier Boatman's Bancshares, Inc. case relied upon dicta that "will cause confusion to the district courts and attorneys of [the Eighth] circuit." Id. The panel opinion in Boatman's Bancshares, Inc. relied upon mixed motive cases in stating the standard for review, even though the allegation was clearly age discrimination and the Hicks burden-shifting approach should have been used. See Nelson v. Boatman's Bancshares, Inc., 26 F.3d 796, 800 (8th Cir. 1994) (citing that panel's use of Radabaugh).

82. 108 F.3d 832 (8th Cir. 1997) (en banc), cert. denied, 521 U.S. 1119 (1997).

83. See id. at 834.

84. See id. at 835.

85. See id.
trial was whether KARE 11’s proffered reason for termination was in fact pretext for age discrimination against Ryther.  

B. The Decision

The jury returned a verdict in favor of Ryther. The district judge denied KARE 11’s post-trial motion for judgment as a matter of law. In denying defendant’s motion, the court reviewed the evidence presented at trial and concluded that a reasonable jury could have found for the plaintiff based on the evidence presented.

On appeal, the Eighth Circuit affirmed the district court’s order.

86. See id.
87. See id. at 834.
88. See id.; see also Ryther v. KARE 11, 864 F. Supp. 1510 (D. Minn. 1994). The district court’s opinion in Ryther provides an excellent analysis of the burden-shifting evidentiary analysis in light of a motion for judgment as a matter of law. See id. at 1516-19.

The court stated the elements of the prima facie case as follows: “Ryther must show that: (1) he was within the protected age group, (2) his job performance was satisfactory; (3) his contract was not renewed; and (4) defendants assigned a younger person with no better credentials to do the same work.” Id. at 1516-17 (citing Haglof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 493 (8th Cir. 1990)). According to the lower court opinion, KARE 11 contended in part that Ryther did not even establish a prima facie case for age discrimination. See id. at 1517. This issue was not raised again on appeal. See Ryther v. KARE 11, 84 F.3d 1074 (8th Cir. 1996). Defendant argued that because Ryther did poorly in market ratings, he did not perform his job satisfactorily. See Ryther, 864 F. Supp. at 1517. Judge Doty dismissed this argument as irrelevant to the prima facie showing, stating rather that this argument went to defendant’s business decision for terminating Ryther and noting that Ryther produced sufficient evidence to find his performance was satisfactory. See id. Defendant further alleged that Ryther did not meet the fourth prong of the above-listed test, because he was not replaced by a younger person. See id. However, the court found that viewing the evidence in the light most favorable to Ryther, a reasonable jury could find that Jeff Passolt replaced Ryther by “assuming his former duties as lead sports anchor.” Id.

89. See Ryther, 108 F.3d at 834-35; Ryther, 864 F. Supp. at 1519. Among the evidence used to make this determination were the findings that the station decided not to renew Ryther’s contract before the market research was conducted; Ryther’s duties changed and were given to younger people at the station; despite positive performance reviews, Ryther was not given feedback in his performance reviews to suggest there were any deficiencies in his work; the market research conducted was designed against Ryther’s favor; and evidence suggesting age bias in his workplace. See Ryther, 108 F.3d at 835-36; Ryther, 864 F. Supp. at 1519.

90. See Ryther, 84 F.3d at 1076 (Judge Lay writing for the majority) (Judge Loken dissenting). The panel opinion on Ryther gives clear insight into the dichotomy of the latter Ryther en banc opinion, as Judge Lay wrote the majority for and Judge Loken wrote the dissent for both the panel and en banc opinion. See id. In his majority opinion, Judge Lay focused primarily on the deference given to the
KARE 11 then moved for, and was granted, rehearing *en banc* on the issue of whether Ryther failed as a matter of law to present sufficient evidence of age discrimination to the jury. In a divided opinion, the Eighth Circuit affirmed the district court's order again, finding sufficient evidence to support the jury's verdict.

**C. The Majority Opinion**

The majority attempted to detail the Eighth Circuit's standard for deciding motions for judgment as a matter of law in age discrimination cases. In essence, it renewed the analysis set forth in *Gaworski*. Central to its discussion was (1) the application of the *McDonnell Douglas* burden-shifting approach and the *Hicks* analysis to the facts before the court, and (2) that evidence in light of the standard for judgment as a matter of law.

plaintiff on review of a jury verdict. See *id.* at 1078. He noted that the record on review is considered in the light most favorable to Ryther, all conflicts in the evidence are resolved in Ryther's favor, and the court must give Ryther the benefit of all favorable inferences that may reasonably be drawn from the facts. See *id.* Keeping this extremely high burden in mind, the majority concluded that "[t]he plaintiff produced overwhelming evidence as to the elements of a prima facie case, and strong evidence of pretextuality, which, when considered with Ryther's work environment's indications of age-based animus, clearly provide sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination." *Id.* at 1086-87.

On the other hand, Judge Loken's dissent is just as adamant about the lack of showing of a submissible case of age discrimination. See *id.* at 1090-92 (Loken, J., dissenting). He averred that either judgment as a matter of law, or at the least a new trial should be granted KARE 11. See *id.* at 1092.

91. See *Ryther*, 108 F.3d at 834. The Eighth Circuit granted a rehearing because they "deem[ed] this issue to be the significant claim on appeal, and in order to clarify the standard to be followed in this circuit in age discrimination cases." *Id.*

92. See *id.*

93. See *id.* at 835. Note that this analysis applies equally to summary judgment motions.

94. See *supra* notes 59-72 and accompanying text.

95. See *supra* notes 59-72 and accompanying text.

96. See *supra* notes 59-72 and accompanying text. Under dispute in earlier Eighth Circuit opinions (and the opinions of other courts of appeal) was the notion that once a defendant offered a reason for discharge, plaintiff's burden was simply to prove that reason was pretextual, or false. See Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328, 1333 (8th Cir. 1996). If a plaintiff could prove this falsity, many courts believed that the plaintiff was then entitled to judgment as a matter of law. *See supra* notes 59-72 and accompanying text.
1. Application of the McDonnell Douglas Standard

The majority quoted Hicks to mean that, in the third stage of the McDonnell Douglas burden-shifting process, plaintiff's evidence of pretext may serve two duties. First, the evidence challenges defendant's proffered reason for termination. Second, the evidence may support a reasonable inference of discrimination.\(^97\) Notably, the court emphasized the U.S. Supreme Court's dictum in Furnco Construction Corp. v. Waters,\(^98\) that "[w]hen 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 reasons, based his decision on an impermissible consideration such as [age]."\(^99\)

The majority found support in the Third Circuit's opinion in Sheridan v. E.I. DuPont de Nemours & Co.\(^100\) The Third Circuit opinion often has been cited in support of the "pretext-only" view of evidence at the summary judgment stage.\(^101\) However, the majority in Ryther did acknowledge, where Sheridan did not, that there are some circumstances where plaintiff's proof of pretext alone will not suffice to permit an inference of age discrimination.\(^102\) The court narrowed these

\(^97\) See Ryther, 108 F.3d at 837. "We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." Id. "[T]he plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination." Id. at 837-38. In a footnote to this statement, the court explained further: "It is not enough, in other words, to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 838 n.5 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993)).


\(^99\) Ryther, 108 F.3d at 836 (quoting Furnco Constr. Corp. v. Waters, 43 U.S. at 567, 577 (1978)). The Ryther majority used this quote to support its analysis of finding intentional discrimination. See id. However, a look at the context of the original quote shows that the U.S. Supreme Court, when it made this pronouncement, spoke in terms of the prima facie case. See Furnco Constr. Corp., 438 U.S. at 577. This means simply that the elimination of other plausible reasons for the defendant's employment decision is not the same as an affirmative finding of discrimination, nor should it be construed so. See Hicks, 509 U.S. at 514-15.

\(^100\) See Ryther, 108 F.3d at 836-37

\(^101\) See Paul W. Mollica, American Bar Ass'n Center for Continuing Legal Education National Institute on Age Discrimination: Summary Judgment in Employment Discrimination Cases: Recent Case Law About Disparate Treatment, Harassment, and Reasonable Accommodation (1998); see also Hermle, supra note 2, at 1154-54.

\(^102\) See Ryther, 108 F.3d at 837 n.2 (citing Rothmeier Inc. v. Adusas, Inc., 85 F.3d 1238 (8th Cir. 1996) as an example, where the proof of pretext is inconsistent with discrimination).
circumstances to cases like *Rothmeier*, where the evidence of pretext is inconsistent with age discrimination.\(^{104}\)

The majority's analysis is summarized as follows: where the plaintiff presents sufficient evidence to establish a prima facie case and offers evidence of pretext that is not inconsistent with a finding of intentional discrimination, the evidence may permit a jury to find for the plaintiff.\(^{104}\) While the plaintiff must still prove discrimination, this finding is for the jury, not the court.\(^{105}\)

2. The Standard for Judgment as a Matter of Law

The majority placed great emphasis on the province of the jury to weigh the evidence and find discrimination.\(^{106}\) It reiterated the U.S. Supreme Court's standard, stating that "[o]nly where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."\(^{107}\) The court further noted that it does not stand in the shoes of the jury and reweigh evidence, nor does the court interject its own opinion of the outcome into its analysis.\(^{108}\) If the court finds conflicting evidence from which a reasonable jury could find discrimination, the jury verdict must be upheld.\(^{109}\)

D. The Dissenting Opinion

Eight of the twelve then-active Eighth Circuit judges concurred with the dissenting opinion in *Ryther*.\(^{110}\) In essence, the dissent renewed the *Rothmeier* analysis within the facts of *Ryther*.\(^{111}\)

The dissent declared that it agreed with the standards the majority applied, but that on the facts of the *Ryther* case, KARE 11 should have prevailed.\(^{112}\) In fact, the dissenting opinion simply reiterated the *Rothmeier* analysis above,\(^{113}\) which differs from both *Gaworski* and the *Ryther*
majority.  

1. Application of the McDonnell Douglas Standard

The dissent cited Hicks for a different proposition than the majority. It found that Hicks held only that plaintiff's proof of pretext does not compel a finding for plaintiff. The opinion emphasized the importance of finding intentional discrimination in fact, and of not treating discrimination cases differently from other kinds of cases. The dissent concluded its analysis of Hicks by inferring that the majority's interpretation of the Hicks language was "implausible," and reiterated the U.S. Supreme Court's admonition "not to dissect the sentences of the United States Reports as though they were the United States Code."

The dissent also challenged the soundness of Sheridan (and thus indirectly undermined the majority's reliance on that opinion). It stated that the Eighth Circuit has consistently held against the Sheridan viewpoint, finding judgment as a matter of law appropriate in circumstances "even if plaintiff has some evidence of pretext[,] if that evidence, for one reason or another, falls short of proving intentional discrimination."

2. The Standard for Judgment as a Matter of Law

The dissent summarized its view of the Eighth Circuit standard as follows:

[w]hile plaintiff may rely on the same evidence to prove both

114. See supra notes 59-71 and accompanying text for Gaworski analysis; see supra notes 93-108 and accompanying text for Ryther majority analysis. The Ryther dissent states that Rothmeier is the law of the Eighth Circuit. See Ryther, 108 F.3d at 848 (citing the majority opinion at Part II, final paragraph as confirming this statement). But see id. at 838. However, the majority and the dissent seem to interpret the meaning of Rothmeier differently. Compare id. at 837 ("[w]e emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination"), with id. at 848 n.13 (Loken, J., dissenting) ("[A] trial judge may decide on a motion for summary judgment or JAML that the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination, even if plaintiff has presented some evidence of pretext.").

115. See Ryther, 108 F.3d at 848.

116. See id.

117. See id.

118. Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993)).

119. See id.

120. Id.
pretext and discrimination, that evidence must be sufficient to prove that the employer is guilty of intentional discrimination. Therefore, a trial judge may decide on a motion for summary judgment or [judgment as a matter of law] that the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination, even if plaintiff has presented some evidence of pretext. We review rulings on such motions under our traditional summary judgment and [judgment as a matter of law] standards. 121

E. Analysis

One of the issues raised with these conflicting analyses is the attention given to the fact-finder's role. The majority inferred that the evidence must go to the jury in all cases where pretext is not inconsistent with discrimination. 122 This analysis gives great weight to the prima facie case and the evidence of pretext. 123 The burden-shifting process itself thus necessarily creates a genuine issue of material fact for a jury. 124 The jury alone weighs evidence and credibility, pursuing the ultimate question of intentional discrimination. 125

The dissent relied on the continued validity of summary judgment in age discrimination cases and the business judgment of the defendant. 126 The dissent gave less deference to the evidence presented through the burden-shifting process. 127 Instead, it focused primarily on finding intentional discrimination, and stated that the court may dismiss a case on summary judgment if it does not find intentional discrimination at that stage. 128

The majority did not disagree with the dissent's emphasis on finding intentional discrimination. 129 As discussed below, the main difference was in the weight given to the evidence presented during the burden-shifting process. That is, the courts disagreed on the stage at which a conclusive finding of intentional discrimination must be found. 130

As a result of the Ryther opinion and its continued reliance on the

121. Id. at 848 n.13. Note that this language is identical to Rothmeier's language. See supra notes 71 and 76 and accompanying text.
122. See Ryther v. KARE 11, 108 F.3d 832, 837-38 nn.2-6 (8th Cir. 1997).
123. See id.
124. See supra notes 34-36.
125. See Ryther, 108 F.3d at 837-38.
126. See id. at 848 (Loken, J., dissenting).
127. See id. at 848-49.
128. See id.
129. See id. at 837-38.
130. Compare id. at 837-38, with id. at 848.
pre-Ryther schools of analyses, the Eighth Circuit has split again, this time, on the meaning and interpretation of Ryther.

V. APPLICATION OF THE EIGHTH CIRCUIT STANDARD POST-RYThER

The Eighth Circuit split actually re-characterizes the pre-Hicks inter-circuit division of the “pretext-only” and “pretext-plus” standards. The bottom line is what constitutes a “reasonable inference” of discrimination for summary judgment purposes.

A. The “Pretext-Only” Standard

The “pretext-only” view espoused by the Ryther majority holds that summary judgment in favor of the defendant will prevail only when the plaintiff’s proof of pretext is inconsistent with intentional discrimination. In every case where the plaintiff produces evidence that reasonably rebuts

131. Applying the “pretext-only”/”pretext-plus” labels to this analysis requires some explanation. By “pretext-plus,” the analysis means to point out that in reviewing motions for summary judgment or judgment as a matter of law, this standard gives less deference to resolving all inferences in favor of the plaintiff. See id. at 848-49. A “pretext-plus” analysis would mean that the plaintiff, at the summary judgment stage, must produce sufficient evidence of discrimination to create a genuine issue of material fact as to the discrimination issue in order to continue to trial. See id. The plaintiff would not need to produce additional evidence of discrimination, but may be precluded from going to trial on the merits if she does not produce enough evidence. See id. This standard gives great discretion to the court, which both makes findings of fact and weighs evidence at the summary judgment stage. See id. at 849. In addition, a court that applies the “pretext-plus” standard may be more apt to give deference not to the plaintiff’s claims, but rather to the defendant’s business judgment in terminating the employee. Therefore, summary judgment or judgment as a matter of law for the defendant will be affirmed more often using the “pretext-plus” analysis.

To the contrary, the “pretext-only” analysis would resolve all inferences in favor of the plaintiff, and more likely than not will reverse summary judgment or judgment as a matter of law where there is any possibility that the circumstantial facts create a genuine issue of material fact as to the employer’s reason for terminating the employee. See id. at 836. If any does arise, the resolution must be left for the trier of fact (i.e., the jury) to resolve. See id. at 837. In a “pretext-only” analysis, the parties do not create a genuine issue of material fact only in those circumstances where plaintiff’s proof of pretext is inconsistent with discrimination. See id. at 837-38. In all other cases, if the plaintiff produces some valid evidence that raises an eyebrow at defendant’s proffered reason for termination, the “pretext-only” analysis will find that it is an issue of fact for the jury to decide. See id. at 839-40. In sum, the “pretext-only” judges place more emphasis on the role of the factfinder, who listens to testimony and weighs the parties’ evidence regarding termination, where the “pretext-plus” judges place more emphasis on the value of the employer’s business judgment and on matters of judicial economy. See id. at 836.
the defendant's proffered reason for termination that does not contradict a finding of discrimination, the conflicting inferences raise a genuine issue of material fact and the evidence must be weighed by a trier of fact.

The "pretext-only" view does not discount an ultimate finding of intentional discrimination. It merely states that the finding of discrimination is one for the trier of fact, not the court. Therefore, the "pretext-only" view hastens to encroach on the province of the jury and reserves summary judgment only for those cases where no reasonable factfinder could infer discrimination.

B. The "Pretext-Plus" Standard

The "pretext-plus" view espoused by the Ryther dissent implies that if plaintiff's proof of pretext somehow falls short of a reasonable inference of discrimination, summary judgment may be granted. This view supports the contention that the finding of discrimination is no different than any other issue of fact presented to the court on summary judgment.

The "pretext-plus" position looks at the record as a whole to
determine whether a finding of discrimination ultimately may be made.135 This requires a higher standard of proof for the plaintiff at the summary judgment stage.136 The plaintiff must prove pretext as well as discrimination.137 This view does not hold that additional evidence must be produced to prove discrimination.138 It does state that plaintiff’s rebuttal evidence of defendant’s proffered reason does not in itself create a genuine issue of material fact.139

However, with this “pretext-plus” view, the court does not seem to resolve all reasonable inferences in favor of the nonmoving party. In fact, the court itself sits as the trier of fact, weighing evidence and making conclusions based on the evidence. Where the “pretext-only” view gives great deference to the jury, the “pretext-plus” view gives deference to the employer’s business decision-making process.140

C. Eighth Circuit Cases Post-Ryther

In Brandt v. Shop’N Save Warehouse Foods, Inc.,141 decided just weeks after Ryther, two judges reversed a jury’s verdict in favor of an employee, while one dissented.142 The majority opinion applied the “pretext-plus” view.143 The court found that the employee’s evidence was not sufficient to maintain a judgment in her favor.144 The court concluded that “[a]n employer’s business decision concerning hiring need not be a good decision to withstand a challenge for sex discrimination.”145 That is, although the plaintiff produced evidence of pretext,146 the court found it

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135. See id. at 849.
136. See id.
137. See id. at 848 n.13.
138. See id.
139. See id. at 850-51.
140. There is less support for this contention within the Eighth Circuit, as well as in other circuits. See supra Part V.A and notes 132-33.
141. 108 F.3d 935 (8th Cir. 1997), reh’g and suggestion for reh’g en banc denied, (May 6, 1997) (Chief Judge R. Arnold, Judges McMillian and Hansen would grant the suggestion).
142. See id. at 939. Judge Wollman concurred with the Ryther majority in its entirety, while Judges Bowman and Heaney did not sit on the Ryther panel. See id.
143. See id. at 937. Brandt sued based on gender discrimination, alleging that Shop’n Save hired a male meat cutter over her, even though her qualifications were higher and she had more education than the male candidate. See id. at 936-37.
144. See id. at 936-37.
145. Id. at 938. That is, even though the facts do not suggest a motivation contrary to, or inconsistent with, discrimination, the facts do not support discrimination either. As the majority stated, the jury’s finding could not be sustained because there is insufficient evidence to support it. See id.
146. See id. at 937.
insufficient to avoid judgment as a matter of law.\textsuperscript{147}

Given the \textit{Ryther} majority's strong preference for upholding jury verdicts where reasonable minds could reach differing results,\textsuperscript{148} it may be inferred that if the "pretext-only" view would have been applied, the jury verdict would have been upheld.\textsuperscript{149}

The \textit{Brandt} dissent favored this approach.\textsuperscript{150} It stated that if the proof was inconsistent with intentional discrimination, the trier of fact cannot infer discrimination.\textsuperscript{151} Therefore the dissent would have affirmed the lower court's judgment.\textsuperscript{152} However, as the dissent points out, the majority "speculate[d]" as to the employer's actual motivation and in essence reweighed the evidence to overturn the jury's verdict.\textsuperscript{153}

In \textit{Kneibert v. Thomson Newspapers, Michigan Inc.},\textsuperscript{154} decided approximately six months later, the court affirmed summary judgment in favor of the employer.\textsuperscript{155} The panel opinion again split.\textsuperscript{156} The majority applied the "pretext-plus" view, and held that Kneibert did not establish a connection between his demotion and his age.\textsuperscript{157} Therefore, summary

\begin{itemize}
\item \textsuperscript{147} See \textit{id.} at 938.
\item \textsuperscript{148} See \textit{Ryther v. KARE 11}, 108 F.3d, 832, 845 (8th Cir. 1997).
\item \textsuperscript{149} That is, when looking at the evidence presented in this case, some judges in the Eighth Circuit may find that since the evidence did not contradict a finding of discrimination, the jury was free to infer discrimination from the facts presented. See \textit{id.}
\item \textsuperscript{150} See \textit{Brandt}, 108 F.3d at 939-41 (Heaney, J., dissenting).
\item \textsuperscript{151} See \textit{id.} at 941. Judge Heaney follows the majority's reasoning in \textit{Ryther}, that where the plaintiff produces evidence of pretext and evidence of discrimination (which may or may not be the same evidence), there is sufficient evidence for a factfinder to weigh evidence and either find or not find discrimination. See \textit{id.}
\item \textsuperscript{152} See \textit{id.}
\item \textsuperscript{153} See \textit{id.}
\item \textsuperscript{154} 129 F.3d 444, 456 (8th Cir. 1997), \textit{reh'g and suggestion for reh'g en banc denied}, (Jan. 7, 1998) (Chief Judge R. Arnold, Judges Theodore, M. Arnold, and Murphy would grant the suggestion). Judges Bowman, Gibson and M. Arnold sat on the panel. See \textit{id.} at 448. Judge M. Arnold filed a partially dissenting opinion. See \textit{id.} at 456 (M. Arnold, J., partially dissenting).
\item \textsuperscript{155} See \textit{id.} at 448.
\item \textsuperscript{156} See \textit{id.} at 444, 456.
\item \textsuperscript{157} See \textit{id.} at 454. The \textit{Kneibert} majority cites \textit{Ryther} for two important propositions. First, the Eighth Circuit rule that in order for an employee's action to survive summary judgment, the evidence must (1) create a genuine issue of material fact as to whether the employer's reasons for its actions were pretextual, and (2) create a "reasonable inference" that discrimination was the determinative factor for the employer's action. See \textit{id.} at 452. Second, the majority quoted \textit{Ryther} as stating that "evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." \textit{Id.} at 454 n.6. However, the \textit{Kneibert} court misapplies the words of the \textit{Ryther} majority. What \textit{Ryther} stated was that a plaintiff must persuade
judgment should stand in favor of the employer. 158

The dissent, in contrast, stated that the rule in Ryther was that unless the evidence was inconsistent with discrimination (and the evidence here was not), the judgment should stand. 159

In 1998, in Vaughn v. Roadway Express, Inc., 160 the Eighth Circuit again published a divided opinion in an age-discrimination case. 161 Again, the majority applied the “pretext-plus” view to uphold summary judgment in favor of the employer. 162 The plaintiff did not produce sufficient evidence to create a reasonable inference of age discrimination. 163

Espousing the “pretext-only” standard, the dissent stated that in

the jury that the employment decision was based on intentional discrimination. See Ryther v. KARE 11, 108 F.3d 832, 837-38 (8th Cir. 1997). Ryther did not state that this is appropriate at the summary judgment stage, nor did it imply it, based on its deference to the jury. See id.

158. See Kneibert, 129 F.3d at 454-55. In support of this conclusion, the majority found that the problems between the plaintiff and defendant had to do with their business relationship, not Kneibert’s age. See id. In support of finding that Kneibert did not establish a connection between his demotion and his age, the court cited the proposition that “[f]ederal courts do not sit as a super-personnel department that reexamines an entity’s business decisions.” Id. at 454 (quoting Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 973 (8th Cir. 1994)). However, an examination of the court’s opinion shows the court doing exactly that. See id. at 455-56.

159. See id. at 456 (M. Arnold, J., dissenting). Judge M. Arnold dissented because he believed that the majority “has incorrectly applied the principles ... announced in Ryther.” Id. The Kneibert dissent cited Ryther for the “pretext-only” proposition that where the plaintiff makes out a prima facie case and produces evidence of pretext, as long as the pretextual reason is not inconsistent with discrimination, the jury must be given a chance to weigh the evidence. See id. More pointedly, Judge M. Arnold stated that “Kneibert is not asserting that he is entitled to summary judgment ... [only] that [the defendant] is not entitled to summary judgment.” Id. This point is precisely where the Eighth Circuit split stands today.

160. 164 F.3d 1087 (8th Cir. 1998), rehe’d and rehe’d en banc denied, (Feb. 8, 1998).
161. See id. at 1087-88 (Judges M. Arnold, Gibson and District Judge Nangle sat on the panel). Judge M. Arnold filed a dissenting opinion. See id. at 1092 (M. Arnold, J., dissenting).
162. See id. at 1090-91. The court outlined the evidence raised by the employee (including that Vaughn’s falsification of computer data produced more accurate results than the company’s computer program, that the new data did not harm his employer or benefit the employee, that the company’s lack of discipline toward other employees did not extend to him in a less grievous situation, and other evidence of general age bias), and articulated that it was insufficient. See id. However, rather than allow a jury to weigh this evidence, it appears that the majority seems to apply the rule that where there is no direct evidence of discrimination per se, or where the evidence itself does not point to one conclusion (that being discrimination), summary judgment is proper. See id.
163. See id. at 1091.

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applying *Ryther* to these facts, the judgment should have been reversed.\(^{164}\) The dissent cited *Ryther*, and stated that where the plaintiff presents a prima facie case, and presents evidence of pretext that is not inconsistent with discrimination, the trier of fact should be allowed to weigh the evidence and find discrimination.\(^{165}\)

The issue arose again in 1999, in *Kiel v. Select Artificials, Inc.*\(^ {166}\) The majority opinion affirmed summary judgment for the employer on the basis that the plaintiff could not provide direct evidence of discrimination.\(^ {167}\) However, as the dissent correctly pointed out, direct evidence is not the only means by which a plaintiff may prove discrimination in disparate treatment cases.\(^ {168}\)

**D. Stanback v. Best Diversified Products, Inc.\(^ {169}\)**

This recent opinion of the Eighth Circuit highlights the growing conflict within the circuit on this issue. While all of the judges on the three-member panel concurred in the result that favored summary judgment for the defendant, each wrote separately to express disagreement with the analysis that supported that conclusion.\(^ {170}\) Circuit Judge Richard Arnold applied the "pretext-only" view, while Circuit Judge Hansen applied the "pretext-plus" position.\(^ {171}\)

The "pretext-only" position supported by Judge Richard Arnold differs from the *Stanback* majority’s formulation of the burden-shifting process under *McDonnell Douglas*.\(^ {172}\) The majority stated that "[i]f the employer meets [the] burden of production, then the plaintiff must show that the employer’s proffered reason is pretextual, and that discrimination

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164. See id. at 1092. Implied in Judge M. Arnold’s dissent is that the plaintiff does not need to produce, at the summary judgment stage, actual evidence of discrimination as long as the prima facie case and evidence of pretext that is not inconsistent with discrimination are present. See id. Since Vaughn did present evidence not inconsistent with discrimination, summary judgment should have been denied. See id.

165. See id. (citing Ryther v. KARE 11, 108 F.3d 832, 836-37 (8th Cir. 1997)).

166. 169 F.3d 1131 (8th Cir. 1999).

167. See id. at 1136.

168. See id. at 1139 (M. Arnold, J., dissenting).

169. 180 F.3d 903 (8th Cir. 1999).


171. See id.

172. See id. at 912.
'was the real reason' behind the discharge decision." Judge Arnold disagreed. He interpreted *Ryther* to mean that:

once the plaintiff has introduced evidence that, if believed, would justify a rational jury in finding that the reason given by the employer was not the real reason, the plaintiff will always (with an exception not here relevant) be able to survive summary judgment, or to get her case to the jury, as the case may be.\(^\text{174}\)

That is, the plaintiff does not need to prove intentional discrimination at the summary judgment stage. He or she need only produce evidence that would create a genuine issue of material fact for a jury. The trier of fact must always make the ultimate finding of discrimination.

In a separate concurrence, Judge Hansen applied the "pretext-plus" view to disagree with this analysis.\(^\text{175}\) Judge Hanen stated that "[i]n *Ryther*, eight of the then active judges of the court (including [Hansen]) joined in Part I.A. of Judge Loken's dissenting and concurring opinion which rejected the argument that evidence of pretext is enough to defeat an employer's summary judgment motion."\(^\text{176}\)

This statement seems to propose that the standard in the *Ryther* dissent reflects the Eighth Circuit view on this issue, not the *Ryther* majority opinion.\(^\text{177}\) However, many of the same judges that concurred with the majority opinion also concurred with the dissent's standard. Which is the standard to apply in the Eighth Circuit?

\(^{173}\) *Id.* at 908.

\(^{174}\) *Id.* at 912. Judge R. Arnold noted that courts have gone both ways on this issue (citing Brandt v. Shop 'N Save Warehouse Foods, Inc., 108 F.3d 935 (8th Cir. 1997) and Maschka v. Genuine Parts Co., 122 F.3d 566 (8th Cir. 1997)). *See id.* (R. Arnold, J., concurring).

\(^{175}\) *See id.* at 912-13.

\(^{176}\) *Id.* at 912.

\(^{177}\) *See id.* Judge Hansen proposed this again in McCullough v. Real Foods, Inc., 140 F.3d 1123 , 1128 (8th Cir. 1998) (quoting Loken's dissent, *Ryther* v. KARE 11, 108 F.3d, 832, 848 n.13 (8th Cir. 1997) as the standard the *Ryther* court articulated en banc). The exact quote is stated in Part IV.D.2 of this note. This is a tricky play on words, and seems to invoke a greater degree of precedent than is afforded a dissenting opinion. Judge Hansen implies, in fact, that the dissent, rather than the majority opinion, is the law of the Eighth Circuit. *See McCullough*, 140 F.3d at 1128. This is not the case. *See Brandt*, 108 F.3d at 939 (opinion by Judge Bowman) (citing the *Ryther* dissent, and noting in a parenthetical that Judge Loken commanded a majority of the Court en banc in a partial separate concurrence).
According to Judge Hansen, in order for an employee to survive summary judgment, she must show pretext for discrimination. This is the "pretext-plus" view. According to Judge Arnold, in order for an employee to survive summary judgment, she must simply introduce evidence of pretext that creates an issue of material fact.

While the difference in standards applied did not affect the outcome of the Stanback decision, in closer cases the "pretext-only"/"pretext-plus" view makes all the difference in surviving summary judgment. Some Eighth Circuit district courts have expressed discomfort with the Eighth Circuit's precedent since Rothmeier and Ryther. Further, other courts and scholars have disagreed about the meaning of Ryther.

179. See id. at 912.
180. See id. While Judge Hansen disagreed with the "pretext-only" standard as explicated by Judge Arnold, he concurred in the judgment nonetheless. See id.
181. See, e.g., Raddatz v. Standard Register Co., 31 F. Supp. 2d 1155, 1160 (D. Minn. 1999) ("Eighth circuit opinions subsequent to Rothmeier contain somewhat differing articulations of when or how often the prima facie case plus pretext evidence is sufficient alone to create an inference of discrimination."); Graham v. Rosemount, Inc., 40 F. Supp. 2d 1093, 1099 (D. Minn. 1999) ("In short, under Eighth Circuit precedent, it is not clear whether the double-duty scenario addressed in Rothmeier and Ryther should be considered the exception or the norm.").
182. For example, one analysis suggested by the District of Columbia Circuit in Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1290 (D.C. Cir. 1998), is that Ryther stands for the proposition that "there are at least some situations in which genuine issues of material fact as to the falsity of the employer's explanation will not suffice alone to avoid summary judgment." The Aka court distinguishes the Ryther approach from that in Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996), which it believes stands for the proposition that "a plaintiff can always succeed in fending off summary judgment if he can demonstrate a genuine issue of material fact as to whether the employer's stated reason for its employment decision is the real reason." Aka, 156 F.3d at 1289. Note that the actual language supplied in Sheridan does not support this finding. See Sheridan, 100 F.3d at 1066-67 ("We have understood Hicks to hold that the elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.") This language in Sheridan directly contradicts the stated language in the Ryther opinion. The majority opinion in Ryther explicitly finds support for its view in Sheridan, stating that the Third Circuit case sets forth the same standard and interpretation of Hicks that the majority does in Ryther. See Ryther, 108 F.3d at 836-37. However, the court in Ryther did state explicitly what Sheridan did not, namely, that "evidence of pretext does not always support an inference of intentional discrimination." Id. at 837 n.2.

In one article, the author interprets a portion of the majority opinion in Ryther to mean that the Eighth Circuit adopts the "pretext plus" standard simply because the majority noted that "[t]his is not to say that, for the plaintiff to succeed, simply proving pretext is enough." North, supra note 32, at 864 (citing...
VI. AN ALTERNATIVE SOLUTION

Some courts and scholars have noted that applying labels to these two standards causes confusion. As one article notes, the question really

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Ryther, 84 F.3d at 1078).

In another, the author proposes that Ryther stands for the proposition that the prima facie case together with evidence of pretext will usually preclude summary judgment. See Hermle, supra note 2, at 1158. This article continues by pointing out that Ryther is consistent with other circuits that will usually but not always find summary judgment precluded where the plaintiff presents a prima facie case and where the plaintiff's evidence of pretext creates a genuine issue of material fact. See id.

Yet a third author, in an article co-written by Eighth Circuit Judge Thomas McMillian, points out that Ryther stands for a number of things, not the least of which is that "in order to make a submissible case for the jury, the plaintiff is not required to produce direct proof of discrimination." Tang & McMillian, supra note 6, at 536.

The Tang article espouses four important implications of Ryther on the disposition of issues arising in the summary judgment context. See id. at 535-36. First, Ryther supports the Rothmeier holding. See id. at 536. Second, Ryther reaffirms that the plaintiff is not required to produce direct proof of discrimination in order to make a case for the jury. See id. Third, Ryther outlined and underscored the uncontroverted principles behind the role of the jury versus that of the judge. See id. at 536. Fourth, the facts of Ryther establish some standards for cases at the summary judgment stage. See id.

One practitioner implies confusion in even determining which part of the opinion carries more precedential weight. See MOLLICA, supra note 101 (citing Ryther for the proposition rather than the majority's holding). In his discussion of the Eighth Circuit pretext standard, Mollica explains the majority opinion and notes that eight judges out of 12 joined this part of the opinion. See id. He then points out that a different group of eight judges also joined in separate partial concurrences. See id.

This confusion is indicative of the conflict surrounding the Ryther case. When others reading the opinion must scratch out a head count in order to determine what view controls in the Eighth Circuit, regardless of the existence of a majority opinion, resolution is in order.

183. See Tang & McMillian, supra note 6, at 524-26. For a more detailed analysis of how each circuit stands on the standard of proof in summary judgment cases concerning disparate treatment, see Hermle, supra note 2, at 1151-63; MOLLICA, supra note 101, at Part B.

As one scholar notes, the best way to reconcile the courts' view on the standard is to "rate the courts' receptiveness to Hicks' permissive passage." Developments in the Law, supra note 27, at 1602 n. 89. The "permissive passage" of which this author writes is the infamous Hicks passage: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

However, this approach is not conclusive. According to one court, the Fourth, Seventh, Eighth, Ninth and Eleventh Circuits apply the "pretext-only" standard. See Waldron v. SL Indus. Inc., 849 F. Supp. 996, 1004-05 n.11 (D. N.J.
may be how deeply the courts involve themselves in determining whether the record supports a finding of discrimination. 184

That is, some courts will leave any conflicting inferences to the trier of fact for resolution. 185 These courts generally will allow a case to go to the trier of fact to determine discrimination, as long as the plaintiff presents a genuine issue of material fact with its evidence of pretext in the prima facie case. 186

Other courts require a review of the record as a whole to determine whether the employer's proffered reason for its action masks its true motivation—that of intentional discrimination. 187

Any categorization of courts into "camps" necessarily comes up short. There is no real way to document a given court's interpretation of Hicks in any meaningful way in order to make predictions or create categories into which future cases may fall. Not only do the sheer numbers of disparate treatment claims make such an analysis administratively burdensome, the nature of the claim is almost entirely fact-sensitive.

The best that one could hope for in a circuit court's analysis is application of the uncontroverted standard for summary judgment to disparate treatment cases, keeping one eye on judicial economy and two eyes on the vital role of the jury in resolving issues of fact.

A. The Standard for Summary Judgment and Ryther

The different approaches discussed in the preceding paragraphs have important implications in conjunction with summary judgment motions. The standard for summary judgment is clear. The court resolves all conflicting inferences in the light most favorable to the non-

184. See MOLLICA, supra note 101, at Part A (noting, however, that "it is devilishly tricky to pin down where the circuits are on this issue").
185. See id. at Part B. The article cites the Third, Sixth and Ninth Circuits for this proposition. See id.
186. See id.
187. See id. The article notes that the First, Second, Fourth, Fifth and Eighth Circuits all require this heightened review of the evidence. See id; cf. Mullin v. Raytheon Co., 2 F. Supp.2d. 165, 169 (D. Mass. 1998). "In the Second, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, if a genuine issue of material fact as to pretext exists at the summary judgment stage, the fact that an employer's legitimate, non-discriminatory reason for the adverse job action may be pretextual is sufficient to carry the case to the jury." Id. at 169 n.2; see also Judith Olans Brown et al., Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue, 46 EMORY L.J. 1487, 1524 (1997) (noting that in the First, Fourth, and Fifth Circuits, however, the simple existence of this factual issue is not sufficient, of itself, to ward off summary judgment).
moving party.\textsuperscript{188} It then must determine whether reasonable minds could differ in the conclusions drawn from the evidence.\textsuperscript{189}

If deference is given to the plaintiff's evidence and the province of the jury, the \textit{Ryther} majority view should prevail. Summary judgment generally should not be granted as long as the evidence of pretext does not contradict discrimination. In those cases it is quite clear that no reasonable fact-finder could infer discrimination.

However, if deference is given to the defendant's proffered reason, its business judgment and the ultimate finding of discrimination, the \textit{Ryther} dissent view should prevail. Summary judgment should generally be granted in those cases regardless of whether evidence of pretext does not support a finding of discrimination. In these cases it is clear that plaintiff has not met the required burden of persuasion.

The \textit{Ryther} majority and dissent both agree that the necessary conclusion drawn in age discrimination cases is one of intentional discrimination.\textsuperscript{190} However, because of the circumstantial nature of the evidence in age discrimination cases, conflicting inferences naturally arise. This raises the difficult issue of balancing the plaintiff's right to have a jury weigh evidence and credibility against the defendant's right to procedural efficiency.

\textbf{VII. CONCLUSION}

Because the issues raised by this conflict create uncertainty in the legal community, a resolution is in order. If the goal is to reserve judicial resources for those cases where the plaintiff produces sufficient evidence of discrimination to conclusively prove its case, then the court should

\begin{itemize}
  \item Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.
  \footnotesize \textit{Id.}
  \item \textbf{189. } See id. A genuine issue of material fact exists where reasonable juries could find for either the plaintiff or the defendant. See id. ("[T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor.").
  \item \textbf{190. } See Ryther v. KARE 11, 108 F.3d 832, 837-38 (8th Cir. 1997) (stating that the plaintiff must persuade the jury "that the employment decision was based upon intentional discrimination"); see also id. at 848 (concurring that the applicable legal standard is proof of intentional discrimination) (Loken, J., dissenting).
\end{itemize}
adopt the "pretext-plus" view. That is, the court should give deference to the defendant's business-decision making process. It should deny summary judgment only in those cases where the court, by weighing the evidence, is able to predict that the plaintiff will ultimately prevail. This is not, however, consistent with the policy of summary judgment.\footnote{191}

A better approach would be to adopt the "pretext-only" standard, as modified by the \textit{Ryther} majority. That is, where the plaintiff produces evidence of pretext that is not inconsistent with or wholly unsupportive of a finding of intentional discrimination, the case should survive summary judgment. This does not undermine the ultimate finding of discrimination. It does, however, provide the plaintiff with a "full and fair opportunity" to prove pretext for discrimination, as suggested in \textit{McDonnell Douglas}.\footnote{192}

In employment discrimination cases, the evidence presented is predominantly circumstantial. This does not suggest that summary judgment should be granted so sparingly that unmeritorious claims get to a jury.

However, unless and until the U.S. Supreme Court grants certiorari to resolve the awkward fit of Rule 56 to the \textit{McDonnell Douglas} burden-shifting presentation of proof, the Eighth Circuit should adopt the modified "pretext-only" standard. The Eighth Circuit must give equal deference to the role of the factfinder to weigh the evidence and determine whether the employer did \textit{in fact} intentionally discriminate against the employee. This is the standard drawn from \textit{McDonnell Douglas}, \textit{Hicks}, and their progeny.

\footnotesize{191. See supra Part V.A and accompanying notes.}

\footnotesize{192. See McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973).}