

# Instructing the Jury in a Case of Circumstantial Individual Disparate Treatment: Thoroughness or Simplicity?

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## I. Introduction

Jury trials are held routinely in employment discrimination cases, especially for claims of individual disparate treatment based upon circumstantial evidence (circumstantial individual disparate treatment). In a case of circumstantial individual disparate treatment, which is the most common method of proving an employer's discrimination,<sup>1</sup> the plaintiff<sup>2</sup> has no direct evidence of the employer's discriminatory motive.<sup>3</sup> Rather, she uses inferential evidence<sup>4</sup> to prove her case to the fact finder.

The theory of individual disparate treatment first applied to cases arising under Title VII of the Civil Rights Act of 1964<sup>5</sup> (Title VII), which

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1. See generally *Ryther v. KARE* 11, 84 F.3d 1074, 1080 n.6 (8th Cir. 1996) ("[I]ntentional discrimination will frequently be proven by circumstantial evidence. . .").

2. This article assumes that the plaintiff is an aggrieved individual, although under certain circumstances a federal agency may bring suit.

3. See, e.g., *United States 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.); *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) ("[E]mployers rarely leave a paper trail—or "smoking gun" attesting to a discriminatory intent. . .").

If the plaintiff does have direct evidence of discrimination, and the employer argues that it would have taken the same adverse employment action in the absence of the alleged discrimination, a separate "mixed motive" analysis applies. See 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (1994); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 273 (1989) (O'Connor, J., concurring); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995) (discussing "mixed motive" jury instructions).

4. E.g., *Hollander*, 895 F.2d at 85 ("[D]isparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer.").

5. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)). In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569 (1978), a Title VII case, the Supreme Court noted that the disparate treatment theory had its genesis in another Title VII case, *McDonnell Douglas Corp. v. Green*. 411 U.S. 792 (1973).

prohibits employers from discriminating against individuals on the basis of race, color, religion, sex, or national origin. The theory applies equally, however, to claims brought under the Age Discrimination in Employment Act<sup>6</sup> (ADEA), which prohibits employers from discriminating against individuals at or over forty years of age; under the post-Civil Rights statute 42 U.S.C. § 1981<sup>7</sup> (§ 1981), which prohibits employers from discriminating against persons on the basis of race or ethnicity; and under certain state fair employment statutes.<sup>8</sup>

Jury trials have been allowed for decades in ADEA<sup>9</sup> and § 1981<sup>10</sup> litigation. More recently, in 1991, Congress amended Title VII<sup>11</sup> to allow jury trials where a plaintiff "cannot recover" under § 1981 and "seeks compensatory or punitive damages."<sup>12</sup>

In a jury trial of circumstantial individual disparate treatment, the instructions given to that jury are crucial. The plaintiff and the defendant will submit written proposals as to how the district court<sup>13</sup> will "instruct the jury on the law."<sup>14</sup> They must timely object to the court's giving, or failure to give, a particular instruction in order to preserve the issue on appeal.<sup>15</sup> The district court has wide, but not unfettered, discretion in formulating the final charge.<sup>16</sup>

If a party has properly preserved its objection, the circuit court will review the district court's instructions according to a "harmless error"

6. The Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)). See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (stating, "[T]he disparate treatment theory is of course available under the ADEA. . .").

7. 42 U.S.C. § 1981 (1994). Various lower courts have applied Title VII disparate treatment analysis to § 1981 claims. *E.g.*, *Melendez v. Illinois Bell Tel. Co.*, 79 F.3d 661, 669 (7th Cir. 1996) (The substantive standards governing liability for § 1981 claims and Title VII disparate treatment claims are identical.).

8. *E.g.*, *Gafford v. General Elec. Co.*, 997 F.2d 150, 166 (6th Cir. 1993) (following Title VII law in interpreting Kentucky fair employment statute).

9. The ADEA allows jury trials "on any issue of fact." 29 U.S.C. § 626(c)(2).

10. *E.g.*, *Novack Investment Co. v. Setser*, 454 U.S. 1064, 1064 (1981) (noting lower courts' uniformity that § 1981 "liability should be decided by a jury") (Stevens, J., concurring in denial of certiorari).

11. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).

12. 42 U.S.C. § 1977A(a)(1), (c)(1) (1994).

13. Although Title VII claims, ADEA claims, and § 1981 claims may be tried in state court, this article focuses on federal practice. See, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (concurrent subject-matter jurisdiction of ADEA claims); *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) (concurrent subject-matter jurisdiction of Title VII claims); *Keating v. Rhode Island*, 785 F. Supp. 1094, 1099 (D. R.I. 1992) (concurrent subject-matter jurisdiction of § 1981 claims).

14. FED. R. CIV. P. 51.

15. See *id.*

16. See, *e.g.*, *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 125 (5th Cir. 1992); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir.), *cert. denied*, 506 U.S. 1014 (1992).

standard.<sup>17</sup> If the party did not timely object, appellate review is even more limited; a circuit court will give "relief only to prevent a clear miscarriage of justice or otherwise to preserve the integrity of the judicial process."<sup>18</sup>

Under either standard of review, the circuit court examines the instructions "as a whole" to determine whether they state the applicable law to guide the jury in its deliberations.<sup>19</sup> One circuit court has noted "the artificiality of assuming that isolated passages in a lengthy set of instructions are apt to spell the difference between victory and defeat."<sup>20</sup>

In drafting jury instructions for a case of circumstantial individual disparate treatment, the district court typically chooses between two distinct options: charging the jury on a full tripartite formula<sup>21</sup> or limiting its charge to the ultimate issue of discrimination.<sup>22</sup> The district court seeks guidance from circuit court precedent, which, in light of the standard of review on appeal, may not provide a clear answer.

Some circuit court trends can be seen, however, with respect to these two options. The Sixth<sup>23</sup> and Tenth<sup>24</sup> Circuits retain the strongest acceptance of instructions on the full tripartite formula, though the case law is not uniform. The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the federal antidiscrimination statutes,<sup>25</sup> also has drafted model instructions incorporating the

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17. See FED. R. CIV. P. 61.

18. *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 941 (1st Cir. 1995); see also FED. R. CIV. P. 61 (limiting review, in the absence of a timely objection, to action "inconsistent with substantial justice").

19. See, e.g., *Slathar v. Sather Trucking Corp.*, 78 F.3d 415, 418 (8th Cir.), cert. denied, 65 U.S.L.W. 3261 (U.S. Oct. 8, 1996) (No. 96-128); *Fuller v. Phipps*, 67 F.3d 1137, 1144 (4th Cir. 1995); *Miller v. Cigna Corp.*, 47 F.3d 586, 591 (3d Cir. 1995) (en banc); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1424 (10th Cir. 1993); *Gafford v. General Elec. Co.*, 997 F.2d 150, 166 (6th Cir. 1993); *Lynch v. Belden and Co.*, 882 F.2d 262, 267 (7th Cir. 1989), cert. denied, 493 U.S. 1080 (1990); *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1010 (6th Cir. 1987).

20. *Lynch*, 882 F.2d at 267 (quoting *W.T. Rogers Co. v. Keene*, 778 F.2d 334, 342 (7th Cir. 1985)).

21. See *infra* notes 36-100 and accompanying text.

22. See *infra* notes 102-128 and accompanying text.

23. See, e.g., *Johnson v. Philip Morris, Inc.*, No. 94-5972/94-4928, 1995 U.S. App. LEXIS 37061, at \*13-17 (6th Cir. Nov. 29, 1995) (affirming instructions that contained the tripartite formula); *Gafford*, 997 F.2d at 160 n.9 (same); *Kitchen*, 825 F.2d at 1011-12 (affirming instructions that contained most of the tripartite formula). *But see* *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983) (affirming instructions that did not contain the tripartite formula).

24. See, e.g., *Touchet v. Halliburton Co.*, No. 94-8042, 1996 U.S. App. LEXIS 3353, at \*22-25 (10th Cir. Feb. 29, 1996) (affirming instructions that contained the tripartite formula); *Faulkner*, 3 F.3d at 1424-25 (same). *But see* *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308-09 (10th Cir. 1990) (affirming, but criticizing, instructions that contained the tripartite formula).

25. See 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(b) & (c)(1).

full tripartite formula.<sup>26</sup> In contrast, the Second,<sup>27</sup> Fourth,<sup>28</sup> Fifth,<sup>29</sup> and Ninth<sup>30</sup> Circuits prefer instructions limited to the ultimate issue of discrimination, although they will affirm full tripartite formula instructions under a harmless error standard. The case law in the First,<sup>31</sup> Third,<sup>32</sup> Seventh,<sup>33</sup> Eighth,<sup>34</sup> and Eleventh<sup>35</sup> Circuits is mixed.

This article examines the competing options for instructing the jury

26. *EEOC General Counsel's Memorandum on Supreme Court's Hicks Decision*, Fair Empl. Prac. Manual (BNA) 405:7151, 7156-58 (March 1994) [hereinafter *EEOC Memorandum*].

27. *See, e.g.*, *Cabrera v. Jakobovitz*, 24 F.3d 372, 381 (2d Cir.) (affirming, but extensively criticizing, instructions that contained the tripartite formula), *cert. denied*, 115 S. Ct. 205 (1994); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85-86 (2d Cir. 1983) (affirming instructions that did not contain the tripartite formula).

28. *See, e.g.*, *Fuller v. Phipps*, 67 F.3d 1137, 1144-45 (4th Cir. 1995) (affirming instructions that did not contain the tripartite formula); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1136-37 (4th Cir. 1988) (affirming, but criticizing, instructions that contained the tripartite formula); *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 207-08 (4th Cir. 1986) (affirming instructions that did not contain the tripartite formula).

29. *See, e.g.*, *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992) (affirming instructions that did not contain the tripartite formula), *cert. denied*, 507 U.S. 909 (1993); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992) (affirming, but criticizing, instructions that did not contain the tripartite formula).

30. *See, e.g.*, *Strong v. Judicial Review Monterey Peninsula*, No. 93-16126, 1995 U.S. App. LEXIS 13584, at \*13-14 (9th Cir. June 1, 1995) (affirming instructions that did not contain the tripartite formula); *Cassino v. Reichold Chems.*, 817 F.2d 1338, 1344-45 (9th Cir. 1987) (same), *cert. denied*, 484 U.S. 1047 (1988).

31. *See, e.g.*, *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 942 (1st Cir. 1995) (affirming, but criticizing, instructions that tracked neither option); *Rowlett v. Anheuser Busch, Inc.*, 832 F.2d 194, 200 (1st Cir. 1987) (affirming instructions that contained the tripartite formula); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-15 (1st Cir. 1979) (reversing instructions that contained the tripartite formula and extensively criticizing the language).

32. *See, e.g.*, *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1211-12 (3d Cir. 1995) (approving of instructions that focused on ultimate issue of pretext); *Miller v. CIGNA Corp.*, 47 F.3d 586, 591, 597 (3d Cir. 1995) (approving of instructions that did not contain the tripartite formula, but reversing and remanding due to misstatement of the law); *Seman v. Coplay Cement Co.*, 26 F.3d 428, 437-38 (3d Cir. 1994) (stating that "the district court well may have misled the jury to believe that [the plaintiff], merely by proving his prima facie case, satisfied his burden of proof.>").

33. *See, e.g.*, *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1349-50 (7th Cir. 1995) (affirming instructions that did not contain the tripartite formula); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 2612 (1995); *Lynch v. Belden and Co.*, 882 F.2d 262, 268 (7th Cir. 1989) (affirming instructions that contained the tripartite formula), *cert. denied*, 493 U.S. 1080 (1990).

34. *See, e.g.*, *Ryther v. KARE 11*, 84 F.3d 1074, 1087 (8th Cir. 1996) (affirming instructions that contained the tripartite formula); *Walker v. AT & T Technologies, Inc.*, 995 F.2d 846, 848-50 (8th Cir. 1993) (affirming instructions that contained the tripartite formula, but reversing for failure to give a business judgment instruction); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir.) (affirming instructions that did not contain the tripartite formula), *cert. denied*, 506 U.S. 1014 (1992); *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1057 (8th Cir. 1991) (same), *cert. denied*, 506 U.S. 825 (1992); *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985) (same).

35. *See, e.g.*, *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1050-51 (11th Cir. 1989) (affirming, but criticizing, instructions that contained the tripartite formula), *cert. dismissed*, 493 U.S. 1064 (1990); *Spanier v. Morrison's Management Servs.*, 822 F.2d 975, 979-80 (11th Cir. 1987) (affirming instructions that did not contain the tripartite formula).

in a case of circumstantial individual disparate treatment. It discusses the advantages and disadvantages of each option, as well as how the actual language of each instruction should be drafted. It concludes that the better option is to instruct the jury on the ultimate issue of discrimination, both because that option is more consistent with Supreme Court principles and because that option is more understandable for the jury. It also concludes that the instruction on the ultimate issue of discrimination must explain the role of the employer's business judgment, lest the jury be misled in deciding whether the plaintiff truly has proved discrimination.

## II. Instructions Containing the Full Tripartite Formula

The district court might instruct the jury on the full tripartite formula for proving circumstantial individual disparate treatment, usually because of tradition or familiarity. However, it must take great care in drafting the language of those instructions.

### A. *Overview of the Tripartite Formula for Proving Circumstantial Individual Disparate Treatment*

In *McDonnell Douglas Corp. v. Green*<sup>36</sup> and *Texas Department of Community Affairs v. Burdine*,<sup>37</sup> the Supreme Court propounded a tripartite formula for resolving claims of circumstantial individual disparate treatment, which requires a finding of intent to discriminate.<sup>38</sup> Under this tripartite formula, the plaintiff first bears the burden of proving a prima facie case by a preponderance of the evidence.<sup>39</sup> The classic prima facie case contains four elements: (1) that the plaintiff belongs to a class protected by the antidiscrimination statute; (2) that she was qualified for the position in question; (3) that she suffered an adverse employment action; and (4) that the employer then attempted to fill the position with another person.<sup>40</sup>

Second, if the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate, through admissible evidence, one or more legitimate, nondiscriminatory reasons for the adverse employment action.<sup>41</sup> The employer does not bear any burden of proof, but must raise only "a genuine issue of fact as to whether it discriminated against the plaintiff."<sup>42</sup>

Third, if the employer carries its burden of production, the plaintiff may prove, by a preponderance of the evidence, that the employer's

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36. 411 U.S. 792 (1973).

37. 450 U.S. 248 (1981).

38. See *Burdine*, 450 U.S. at 256 (the plaintiff has the "ultimate burden of persuading the court that she has been the victim of intentional discrimination").

39. See *McDonnell Douglas*, 411 U.S. at 802.

40. See *id.*

41. See *id.*; see also *Burdine*, 450 U.S. at 253.

42. *Burdine*, 450 U.S. at 254.

proffered reason was a pretext for intentional discrimination.<sup>43</sup> Thus, in a circumstantial individual disparate treatment case the plaintiff always bears the burden of proof.<sup>44</sup>

This tripartite formula remains the substantive law for claims of circumstantial individual disparate treatment, although the Supreme Court, in *St. Mary's Honor Center v. Hicks*,<sup>45</sup> increased the plaintiff's burden of proving pretext for discrimination.<sup>46</sup> In *Hicks*, the Court relied extensively on *United States Postal Service Board of Governors v. Aikens*,<sup>47</sup> a case that it had decided a decade earlier, to focus on "the ultimate factual issue . . . [of] whether the defendant intentionally discriminated against the plaintiff."<sup>48</sup> The *Hicks* Court held that a plaintiff cannot prevail on her claim simply by disproving the employer's articulated legitimate, nondiscriminatory reason; instead, she must convince the fact finder that the employer intentionally discriminated against her.<sup>49</sup> The Court went on to explain, however, that "the fact finder'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."<sup>50</sup>

#### B. *Why Courts Use Instructions Containing the Full Tripartite Formula*

The circuit courts that have endorsed instructions on the full tripartite formula have offered surprising little rationale for such endorsement. For example, the Sixth Circuit affirmed instructions containing the full tripartite formula, merely stating that "the district court did not commit reversible error by guiding the jury through a three-stage order of proof as opposed to instructing the jury solely on the ultimate issue of sex discrimination."<sup>51</sup> The Seventh Circuit similarly affirmed instructions on the full tripartite formula because they "accurately informed the jury of the parties' burdens under the indirect method of proving discrimination. . . ."<sup>52</sup> And the Eighth Circuit affirmed instructions on the tripartite formula, finding they "adhered to the *Hicks* stan-

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43. *See id.* at 253.

44. *See id.*

45. 509 U.S. 502 (1993).

46. For a discussion of *Hicks*' effect and a recommendation to abandon the tripartite formula, in part because of jury confusion, see Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (Fall 1995).

47. 460 U.S. 711 (1983).

48. *Hicks*, 509 U.S. at 519 (quoting *Aikens*, 460 U.S. at 715).

49. *Id.* at 511.

50. *Id.*

51. *Gafford v. General Electric Co.*, 997 F.2d 150, 167 (6th Cir. 1993) (interpreting Kentucky fair employment statute based on Title VII).

52. *Lynch v. Belden and Co.*, 882 F.2d 262, 269 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990).

dard,<sup>53</sup> without offering any further explanation. Moreover, the Tenth Circuit was constrained by its own precedent to affirm instructions on the full tripartite formula.<sup>54</sup>

Only the First Circuit, in *Rowlett v. Anheuser-Busch, Inc.*,<sup>55</sup> has explained the advantages of instructing the jury on the full tripartite formula. The court noted that although the formula “was considered complicated and cumbersome” when first introduced, “with repeated use courts have become more comfortable with it, both for their own use in ruling on Title VII claims and for the jury’s use in ruling on intentional discrimination.”<sup>56</sup> The court described the full tripartite formula as “a straightforward way of explaining how to consider whether there is intentional discrimination in situations where such discrimination is not likely to be overt.”<sup>57</sup>

Other circuit courts are less enthusiastic about full tripartite formula instructions, but have held that such instructions may convey enough about the ultimate issue of discrimination to avoid reversal on appeal. For example, in *Mullen v. Princess Anne Volunteer Fire Co.*,<sup>58</sup> the Fourth Circuit affirmed instructions that contained the full tripartite formula, although labelling them “overly complex.”<sup>59</sup> The court primarily approved of the summary instruction, which provided: “The plaintiff must prove that the defendant intentionally discriminated against him because of his race.”<sup>60</sup>

### C. Drafting the Instructions Under the Full Tripartite Formula

The district court must pay close attention to the language of instructions containing the full tripartite formula. As the Supreme Court warned in *Furnco Construction Corp. v. Waters*,<sup>61</sup> the formula “was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.”<sup>62</sup>

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53. *Ryther v. KARE* 11, 84 F.3d 1074, 1087 (8th Cir. 1996).

54. *See Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1309 (10th Cir. 1990) (noting that it had upheld a similar instruction in *Smith v. Consolidated Mut. Water Co.*, 787 F.2d 1441, 1442-43 (10th Cir. 1986)).

55. 832 F.2d 194 (1st Cir. 1987).

56. *Rowlett*, 832 F.2d at 200.

57. *Id.*

58. 853 F.2d 1130 (4th Cir. 1988).

59. *Mullen*, 853 F.2d at 1137.

60. *Id.* *See also Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1309 (10th Cir. 1990) (criticizing jury instructions that contained the tripartite formula, but nonetheless affirming: “The court’s instructions on the age discrimination issue directed the jury’s attention to the ultimate question—was age a determining factor in [the plaintiff’s] discharge.”); *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1012 (6th Cir. 1987) (affirming a version of tripartite formula instructions, with criticism, “[s]o long as the jury is instructed adequately on [the ultimate] issue”).

61. 438 U.S. 567 (1978).

62. *Furnco*, 438 U.S. at 577.

The instructions must be phrased in a neutral manner and devoid of extraneous material. For example, the Eighth Circuit rejected a contention that the district court should have instructed the jury on the "argumentative details of evidence, in order to better understand a party's theory of the case."<sup>63</sup> The court explained that "[i]t is not for the trial court, in instructing the jury, to emphasize the evidence favorable to one side over the other. This is especially true when the inferences to be drawn from the overall evidence are conflicting and could lead to different results."<sup>64</sup> It affirmed the following instructions on the full tripartite formula as applied to the ADEA:

Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts. In deciding whether plaintiff's age was a determining factor in defendants' decision, you should first consider whether the plaintiff has established the following facts by a preponderance of the evidence.

First, plaintiff was within the protected age group, that is he was 40 years of age or over.

Second, plaintiff's job performance was satisfactory.

Third, plaintiff was terminated from his job when his contract was not renewed.

Fourth, a younger person with similar credentials replaced plaintiff.

If plaintiff has failed to prove one or more of these facts, you must find for the defendants. If plaintiff has proven these facts, he has offered evidence from which you could conclude that defendants discriminated against him because of his age.

If you find that plaintiff has proven these facts, you must consider whether defendants have produced evidence of a reason, other than age, for not renewing plaintiff's contract.

Defendants have offered evidence of legitimate nondiscriminatory reasons for their actions.

Therefore, plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination.

You should not consider whether the reasons given by defendants constitute a good or bad business decision. You may not return a verdict for plaintiff just because you may disagree with defendants' decision or believe it was harsh or unreasonable.<sup>65</sup>

In drafting instructions that contain the full tripartite formula, the district court must remember that each portion of the formula presents linguistic challenges and creates the possibility of error.

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63. *Ryther v. KARE* 11, 84 F.3d 1074, 1088 n.15 (8th Cir. 1996).

64. *Id.*

65. *Id.* at 1087 n.14.

### 1. The Prima Facie Case

When drafting instructions as to the prima facie case, the district court must complete four key tasks.

First, the district court must decide whether to mention the phrase "prima facie case." Some district courts continue to use the phrase, without appellate criticism.<sup>66</sup> Additionally, the EEOC uses the phrase in the model jury instructions provided in its General Counsel's Memorandum regarding the *Hicks* decision.<sup>67</sup>

The better approach, however, is that applied by the First Circuit in *Loeb v. Textron, Inc.*<sup>68</sup> There the court stated that "the term prima facie case need never be mentioned to the jury . . . [as it is] legal jargon."<sup>69</sup> Rather, the elements of the prima facie case "should be defined in the charge, and the jury should be told that, in order to prevail, the plaintiff must prove each such element (if disputed). . . ."<sup>70</sup> For example, the district court could charge the jury: "[Y]ou must first consider whether the plaintiff has established each of the following elements by a preponderance of the evidence" and then simply list the elements.<sup>71</sup> Many district courts are using such language, without mention of the phrase "prima facie case."<sup>72</sup>

Second, the district court must consider whether all the elements of the prima facie case actually are in dispute. Thus, one district court instructed the jury: "In this case, the first element is not contested since the defendant admits that plaintiffs were over 40 and within the

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66. *E.g.*, *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 938 (1st Cir. 1995); *Gafford v. General Elec. Co.*, 997 F.2d 150, 167 n.9 (6th Cir. 1993); *Lynch v. Belden and Co.*, 882 F.2d 262, 265 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990).

67. *EEOC Memorandum*, Fair Empl. Prac. Manual (BNA) at 405:7157.

68. 600 F.2d 1003 (1st Cir. 1979).

69. *Loeb*, 600 F.2d at 1016; *see also* *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988) (stating that the jury "need never hear the term 'prima facie case'").

70. *Loeb*, 600 F.2d at 1018.

71. *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425 (10th Cir. 1993).

72. *E.g.*, *Ryther v. KARE 11*, 84 F.3d 1074, 1087 n.14 (8th Cir. 1996) (instructions stated: "In deciding whether plaintiff's age was a determining factor in defendant's decision, you should first consider whether plaintiff has established the following facts by a preponderance of the evidence"); *Touchet v. Halliburton Co.*, No. 94-8042, 1996 U.S. App. LEXIS 3353, at \*22 (10th Cir. Feb. 29, 1996) (instructions asked "if the plaintiff proved the four elements by a preponderance of the evidence. . ."); *Johnson v. Philip Morris, Inc.*, No. 94-5972/94-5928, 1995 U.S. App. LEXIS 37061, at \*14 (6th Cir. Nov. 29, 1995) (instructions stated: "To meet this standard, [the plaintiff] must have proved the following four elements by a preponderance of the evidence."); *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1307-08 (10th Cir. 1990) (instructions stated: "In order to prove the essential elements of plaintiff's claim . . . the burden is upon plaintiff to establish by a preponderance of evidence in the case the following facts. . .") (alteration in original); *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1011, n.2. (6th Cir. 1987) (instructions stated: "[T]he plaintiff must first prove that she was qualified for and applied for a promotion or a pay raise and that she was considered and denied that promotion or a pay raise and that other employees with similar qualifications were promoted or given a pay raise").

protected age group when they applied. You should concentrate on the other three elements."<sup>73</sup> Another district court charged: "Now it's stipulated that [the plaintiff] is a female, is a member of a class of persons protected under the [statute]. . . . So you shall consider this element proven."<sup>74</sup>

Third, the district court must avoid adding any extra elements to the prima facie case. Some district courts erroneously have included a fifth element, that the plaintiff sustained damages.<sup>75</sup> Others mistakenly require the plaintiff to prove that her replacement was less qualified than she.<sup>76</sup> Others leave the jury with the misimpression that the plaintiff can prevail on the strength of her prima facie case alone.<sup>77</sup> Still others incorrectly increase the plaintiff's burden by making her prove the ultimate issue of discrimination as part of the prima facie case.<sup>78</sup>

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73. *Faulkner*, 3 F.3d at 1425 n.3.

74. *Gafford v. General Elec. Co.*, 997 F.2d 150, 167 n.9 (6th Cir. 1993).

75. *E.g.*, *Strong v. Judicial Review Monterey Peninsula*, No. 93-16126, 1995 U.S. App. LEXIS 13584, at \*12 (9th Cir. June 1, 1995) (instructions stated, "(4) [sic] [the plaintiff] sustained damages as a result"); *Lynch v. Belden and Co.*, 882 F.2d 262, 265 (7th Cir. 1989) (instructions stated: "Fifth, that [the plaintiff] was damaged as alleged in his complaint"), *cert. denied*, 493 U.S. 1080 (1990).

76. *E.g.*, *Strong*, 1995 U.S. App. LEXIS 13584, at \*12-13 (affirming instructions but noting error in the following language: (4) the position was kept open or given to a less qualified person"); *Gafford*, 997 F.2d at 167 n.9 (affirming instructions but noting error in the following language: "E. That a person with lesser qualifications than [the plaintiff] was hired").

77. For example, in *Touchet v. Halliburton Co.*, No. 94-8042, 1996 U.S. App. LEXIS 3353, at \*22 (10th Cir. Feb. 29, 1996), the district court instructed the jury, "As I mentioned before, if you find that the plaintiff proved the four elements by a preponderance of the evidence, then you may, but need not, find for the plaintiff." The Tenth Circuit affirmed the instructions as a whole, but apparently agreed with the defendant that the above passage "erroneously states that the jury may find for the plaintiff simply based on [the plaintiff's] establishment of a prima facie case. . . ." *Id.* at \*24.

In *Seman v. Coplay Cement Co.*, 26 F.3d 428, 434-35 (3d Cir. 1994), the Third Circuit reversed and remanded for a new trial where the district court said that the plaintiff could "prove that age was a determining factor in his discharge [by showing] that younger employees were treated more favorably in the reduction in force." The circuit court believed:

Taken as a whole, the charge failed to convey that, once [the defendant] put forth a legitimate business explanation, [the plaintiff] had the ultimate burden of proving that [the defendant] intentionally discriminated on the basis of age. The jury could not, as it was instructed, find for [the plaintiff] simply on the basis that younger employees were retained by [the defendant]. It was not enough, in other words, to find [the defendant] liable for age discrimination under the ADEA merely on the basis of [the plaintiff's] prima facie case; [the plaintiff] had to prove intentional discrimination.

*Seman*, 26 F.2d at 437.

However, the Supreme Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993), has stated that the plaintiff can prevail on her claim by combining her prima facie case with "[t]he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity)."

78. In *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990), the district court essentially forced the plaintiff to prove the ultimate issue of discrimination as part of her prima facie case: "Third, That plaintiff's age was the determinative factor in whether he was to be retained or discharged." The Tenth Circuit affirmed the instructions, but noted the error.

Fourth, the district court must resolve certain issues of law regarding the plaintiff's replacement. For example, should the court require the plaintiff to prove that her replacement is outside her protected class? For ADEA cases, the Supreme Court has answered in the negative.<sup>79</sup> However, it has not spoken in the context of Title VII cases,<sup>80</sup> and the circuit courts are split.<sup>81</sup> Additionally, how should the district court explain the prima facie case when the adverse employment action was a workforce reduction and there was no replacement for the plaintiff? Some circuits require the plaintiff to provide evidence that employees outside her protected class were treated more favorably than she.<sup>82</sup>

## 2. The Employer's Burden of Production

When drafting the instruction regarding the employer's production of a legitimate, nondiscriminatory reason, the district court must decide whether to mention "burden shifting." The strong weight of authority opposes any such mention, although the EEOC's model instructions include language regarding the shifting burdens.<sup>83</sup> As the Fourth Circuit said in *Mullen*, "[t]he shifting burdens of production . . . are intended to aid the judge in organizing the evidence to be presented. They are beyond the function and expertise of the jury. . . ."<sup>84</sup>

Whether or not the district court employs the burden shifting language, it must not increase the minimal task required of the employer at this stage. The district court cannot state that the employer must prove or persuade the jury of a legitimate, nondiscriminatory reason; such a mistake is harmless error only if the remaining instructions in

79. See *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996) ("[T]he fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.").

80. See generally *Hicks*, 509 U.S. at 528 n.1 (This Court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today.) (Souter, J., dissenting).

81. Compare *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158-59 (7th Cir. 1996) (A [Title VII] "employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement") and *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 154-55 (1st Cir. 1990) ([W]e have never held that the fourth element of a prima facie discharge case can be fulfilled only if the complainant shows that she was replaced by someone outside the protected group) with *Johnson v. Philip Morris, Inc.*, No. 94-5972, 94-5928, 1995 U.S. App. LEXIS 37061, at \*14 (6th Cir. Nov. 29, 1995) (affirming instructions that required female plaintiff to prove "(4) That the job from which she was removed was filled by a male").

82. See, e.g., *Smith v. Cook County*, 74 F.3d 829, 831 (7th Cir. 1996); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir. 1994).

83. *EEOC Memorandum*, Fair Empl. Prac. Manual (BNA) at 405:7157.

84. 853 F.2d 1130, 1137 (4th Cir. 1988); see also *Strong v. Judicial Review Monterey Peninsula*, No. 93-16126, 1995 U.S. App. LEXIS 13584, at \*15 (9th Cir. June 1, 1995) (affirming instructions that did not discuss "shifting burden of defendant's articulation" because "The jury need not be 'confused . . . with legal definitions of the burdens of proof, persuasion, and production and how they shift. . . .'" (quoting *In re Lewis*, 845 F.2d 624, 634 (6th Cir. 1988)); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ([t]he burden shifting can and should be monitored by the judge).

the charge accurately state the law.<sup>85</sup> Nor should the district court require the employer to "show that [the plaintiff's protected status] played no role" in its action.<sup>86</sup>

The district court may choose from among a vast array of verbs in explaining the employer's task. "Produce"<sup>87</sup> is most commonly used by the courts, and the EEOC's model instructions also contain that verb.<sup>88</sup> Other choices include: "articulate,"<sup>89</sup> "rebut,"<sup>90</sup> "come forward,"<sup>91</sup> "raise,"<sup>92</sup> "present,"<sup>93</sup> "state,"<sup>94</sup> and "introduce."<sup>95</sup> Some courts also state that the employer need not prove its reason.<sup>96</sup> Many courts use multiple verbs, as did the Southern District of Indiana in *Lynch v. Belden and Co.*:<sup>97</sup>

If you find that plaintiff has proved each of these elements, then plaintiff has proved a prima facie case. A prima facie case means that the plaintiff has sufficiently established his cause of action by a preponderance of the evidence and is entitled to a verdict in his favor unless defendant *rebut*s such evidence.

Thus, it becomes your duty to determine the second issue, namely, did the defendant *introduce* evidence *showing* that there was a legitimate nondiscriminatory reason why it did not promote or transfer plaintiff.

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85. See, e.g., *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1050 (11th Cir. 1989) (affirming instructions as a whole, but finding that the district court erroneously "stated that the burden of proof shifts from the plaintiff to the defendant without distinguishing between the burdens of persuasion and production"; also warning that in the absence of other clarifying instructions, "we might be inclined to hold that this language may have produced a misunderstanding by the jury requiring a new trial"), *cert. dismissed*, 493 U.S. 1064 (1990); see also *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) (although not an issue on appeal, instructions erroneously stated that "the burden of proof shifts to the defendant to show some legitimate nondiscriminatory reason for the plaintiff's termination").

86. *Cabrera v. Jakobovitz*, 24 F.3d 372, 383 (2d Cir.), *cert. denied*, 115 S. Ct. 205 (1994).

87. See, e.g., *Ryther v. KARE 11*, 84 F.3d 1074, 1087 n.14 (8th Cir. 1996); *Touchet v. Halliburton Co.*, No. 94-8042, 1996 U.S. App. LEXIS 3353, at \*22-23 (10th Cir. Feb. 29, 1996); *Johnson v. Philip Morris, Inc.*, No.94-5972/94-5928, 1995 U.S. App. LEXIS 37061, at \*14 (6th Cir. Nov. 29, 1995); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425 n.3 (10th Cir. 1993).

88. *EEOC Memorandum*, Fair Empl. Prac. Manual (BNA) at 405:7157.

89. See, e.g., *Johnson*, 1995 U.S. App. LEXIS 37061, at \*14; *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200-01 (1st Cir. 1987).

90. See, e.g., *Faulkner*, 3 F.3d at 1425 n.3; *Lynch v. Belden and Co.*, 882 F.2d 262, 265 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990).

91. See, e.g., *Touchet*, 1996 U.S. App. LEXIS 3353, at \*23; *Faulkner*, 3 F.3d at 1425 n.3.

92. See, e.g., *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1011 n.2 (6th Cir. 1987)

93. See, e.g., *Kitchen*, 825 F.2d at 1011 n.2.

94. See, e.g., *Lynch*, 882 F.2d at 265.

95. *Id.*

96. See, e.g., *Touchet*, 1996 U.S. App. LEXIS 3353, at \*23; *Johnson v. Philip Morris, Inc.*, No.94-5972/94-5928, 1995 U.S. App. LEXIS 37061, at \*14 (6th Cir. Nov. 29, 1995); *Kitchen*, 825 F.2d at 1011 n.2.

97. 882 F.2d 262 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990).

If you answer on this second issue is yes, that defendant has *articulated* or *stated* his legitimate nondiscriminatory reason. . . .<sup>98</sup>

The employer's production of a legitimate, nondiscriminatory reason may be stipulated by the parties. Indeed, the First Circuit in *Loeb* found it "unlikely . . . that there is a dispute over whether the employer has met his burden of production. . . ." <sup>99</sup> Similarly, one district court properly charged the jury that the "[d]efendants have offered evidence of legitimate nondiscriminatory reasons for their actions" and that the jury need only resolve the issue of pretext for discrimination.<sup>100</sup>

### 3. The Pretext for Discrimination

Whether the district court chooses to instruct the jury on the full tripartite formula or limits the charge to the ultimate issue of discrimination, the same issues arise in defining the pretext for discrimination. They will be discussed later in this article.<sup>101</sup>

## III. Instructions Limited to the Ultimate Issue of Discrimination

Instead of instructing the jury on the full tripartite formula, the district court might limit its instructions to the ultimate issue of intentional discrimination. There are two compelling reasons for such a limitation.

### A. *Relevance of the Tripartite Formula in a Jury Trial*

The Supreme Court twice has stated that, in the context of appellate review of a bench trial,<sup>102</sup> the full tripartite formula for circumstantial individual disparate treatment is no longer relevant. The tripartite formula should be deemed equally irrelevant once the parties have presented their evidence to a jury.

In *Aikens* the Court held that the fact finder should focus not on the various elements of the tripartite formula, but on "the ultimate question of discrimination vel non,"<sup>103</sup> and decide "which party's explanation of the employer's motivation it believes."<sup>104</sup> The Court observed that this ultimate inquiry would be "even more difficult" if the fact finder applied "legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof.'"<sup>105</sup> The prima

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98. *Lynch*, 882 F.2d at 265 (emphasis added).

99. 600 F.2d 1003, 1016 n.16 (1st Cir. 1979).

100. *Ryther v. KARE* 11, 84 F.3d 1074, 1087 n.14 (8th Cir. 1996).

101. See *infra* section IV for a discussion of how the district court should draft the language for pretext.

102. Of course, a jury trial can now be obtained. See *supra* notes 11-12 and accompanying text.

103. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

104. *Id.* at 716.

105. *Id.* at 716 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981)).

facie case and the production of a legitimate, nondiscriminatory reason therefore become irrelevant once a case is fully tried.<sup>106</sup>

A decade later in *Hicks* the Supreme Court relied on *Aikens* to hold that a plaintiff cannot prevail on a claim of circumstantial intentional disparate treatment merely by disproving the employer's reason; rather, the plaintiff must prove the ultimate issue of discrimination vel non.<sup>107</sup> The Second Circuit, in *Cabrera v. Jakobovitz*,<sup>108</sup> has explained the impact of *Hicks* upon jury instructions, once the employer has articulated to the jury a legitimate, nondiscriminatory reason for its action:

In that event, whether or not the facts of the plaintiff's prima facie case are disputed, the jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the [job] was denied because of race (or, in other cases, because of some other legally invalid reason), . . . and (2) the jury is entitled to infer but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation. . . .<sup>109</sup>

Various circuits, including the Fourth,<sup>110</sup> Fifth,<sup>111</sup> Seventh,<sup>112</sup> and Eleventh,<sup>113</sup> have reached the same conclusion.

The Seventh Circuit, in *Gehring v. Case Corp.*,<sup>114</sup> offered yet another

106. *Id.* at 715 (Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant).

107. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

108. 24 F.3d 372 (2d Cir.), *cert. denied*, 115 S. Ct. 205 (1994).

109. *Cabrera*, 24 F.3d at 382.

110. *See, e.g.*, *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 208 (4th Cir. 1986) (relying on *Aikens* and stating: "When the jury addressed the existence of the alleged discrimination, therefore, no legal vitality remained in the preliminary factual inference and no independent significance attached to the success or failure of [the plaintiff's] attempted prima facie showing").

111. *See, e.g.*, *Olitsky v. Spencer Gifts, Inc.* 964 F.2d 1471, 1478 (5th Cir. 1992) (affirming district court's decision not to instruct jury on the prima facie case), *cert. denied*, 507 U.S. 909 (1993); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (affirming instructions that contained tripartite formula, but stating: "Under the logic of *Aikens*, it is clear that the issue of whether a plaintiff has made out a prima facie case has no place in the jury room. Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age.").

112. *See, e.g.*, *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) (relying on *Aikens* and stating that "the only question the jury need answer—is whether the plaintiff is a victim of intentional discrimination") (emphasis in original), *cert. denied*, 115 S. Ct. 2612 (1995).

113. *See, e.g.*, *Spanier v. Morrison's Mgmt. Servs., Inc.*, 822 F.2d 975, 980 (11th Cir. 1987) (affirming jury charge that "did not include an instruction to analyze the evidence according to the [tripartite] scheme" because "[w]hen the court has allowed both parties to develop their full proof, the analysis of the evidence should look to whether plaintiff has met the ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination." (quoting *Smith v. Farah Mfg. Co.*, 650 F.2d 64, 68 (5th Cir. 1981))).

114. 43 F.3d 340 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2612 (1995).

explanation for the irrelevance of full tripartite formula instructions. It wisely noted that a district court “need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is possible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel.”<sup>115</sup>

Still other circuit courts conclude that full tripartite formula instructions are irrelevant because certain portions of the formula—such as the employer’s production of a legitimate, nondiscriminatory reason—are not true jury questions at all.<sup>116</sup>

### B. *The Difficulty of Drafting Clear Instructions on the Tripartite Formula*

Even if the district court determines that the tripartite formula is relevant after presentation of all the evidence, it might decide that drafting instructions containing the formula would be too difficult. Several circuit courts, most notably the First Circuit in *Loeb*<sup>117</sup> and the Second Circuit in *Cabrera*<sup>118</sup> have criticized full tripartite formula instructions on three grounds.

First, the tripartite language was drafted to guide the district courts in the orderly presentation of the evidence, not to guide the jury in its deliberations.<sup>119</sup> The *Cabrera* court explained: “While we agree that courts have become ‘more comfortable’ with the . . . framework . . . we do not see why increased *judicial* familiarity . . . justifies an explication of these standards, and particularly the legalistic terms in which they are expressed, to a *jury*.”<sup>120</sup>

Second, phrases such as “prima facie case,” “burden of persuasion,” and “shifting burden of production” have created difficulties for judges

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115. *Gehring*, 43 F.3d at 343.

116. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1018 n.21 (1979); *see also Cabrera v. Jakobovitz*, 24 F.3d 372, 382 (2d Cir.) (If the defendant has met its burden of producing evidence that, if taken as true, would rebut the prima facie case, . . . , the jury need not be told anything about a defendant’s burden of production), *cert. denied*, 115 S. Ct. 205 (1994). *But see Gafford v. General Elec. Co.*, 997 F.2d 150, 169 (6th Cir. 1993) (“the issue of whether a prima facie case has been established is an issue of both law and fact” and so can be submitted to the jury).

117. 600 F.2d 1003 (1st Cir. 1979).

118. 24 F.3d 372 (2d Cir. 1994).

119. *See Loeb*, 600 F.2d at 1016 (the tripartite formula “was not written as a prospective jury charge”); *see also Cabrera*, 24 F.3d at 380 (though the burdens of proof and production do not vary from bench to jury trials, the standards that must guide a judge during a bench trial are not necessarily helpful or even appropriate for inclusion in jury charges); *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 207 (4th Cir. 1986) (questioning “how a proof scheme designed primarily for bench trials under Title VII . . . can be transposed to jury trials”); *Grebin v. Sioux Falls Indep. Sch. Dist.*, 779 F.2d 18, 20 (8th Cir. 1985) (noting that “*McDonnell Douglas* was not a jury case and its ritual is not well suited as a detailed instruction to the jury”).

120. 24 F.3d at 381 n.4 (emphasis in original).

and juries alike.<sup>121</sup> A jury may never understand “the distinction between burden of persuasion and burden of production”;<sup>122</sup> the confusion is compounded if the jury then hears that a burden “shifts back” to the plaintiff.<sup>123</sup>

Third, instructions containing the full tripartite formula might distract the jurors from their primary task, leading them “to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination.”<sup>124</sup>

Commentators also discourage the use of instructions containing the full tripartite formula. For example, a widely used pattern jury instruction book provides full tripartite instructions for ADEA cases but then urges caution in using them.<sup>125</sup> For Title VII cases it does not charge the jury on the tripartite formula.<sup>126</sup>

Accordingly, the district court would be well-advised to instruct the jury on the ultimate issue of discrimination rather than on the full tripartite formula.

#### IV. The Definition of Pretext Under Either the Full Tripartite Formula or the Ultimate Issue of Discrimination Approach

Whether the district court opts for full tripartite formula instructions or for an instruction limited to the ultimate issue of discrimination, it must define the concept of a pretext for intentional discrimination.<sup>127</sup> It must explain the causal requirement, and it also should discuss the role of the employer’s business judgment.

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121. *See id.* at 381 (“Though these statements faithfully endeavor to track the three-step formulation . . . , they created a distinct risk of confusing the jury.”); *see also* Williams v. Valencis Kisco, Inc., 964 F.2d 723, 731 (8th Cir.) (tripartite formula “ ‘is not well suited as a detailed instruction to the jury’ and adds little understanding to deciding the ultimate question of discrimination”) (quoting *Grebin*, 779 F.2d at 20), *cert. denied*, 506 U.S. 1014 (1992); *Spanier v. Morrison’s Management Servs., Inc.*, 822 F.2d 975, 980 (11th Cir. 1987) (noting that after the parties have presented their cases, “ ‘neither the trial court nor this court need parse the evidence in accordance with the ebb and flow of shifting burdens’ and [s]till less should a jury be put to such a task”) (quoting *Smith v. Farah Mfg. Co.*, 650 F.2d 64, 68 (5th Cir. 1981)); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85 (2d Cir. 1983) (predicting that the defendant’s proposed instructions, “couched in such lawyerly cant as ‘prima facie case,’ and ‘shifting burden of proof,’ would only have confused the jury”); *Loeb*, 600 F.2d at 1016 (finding “subtleties” of the tripartite formula “confusing”).

122. *Cabrera*, 24 F.3d at 381.

123. *Id.*

124. *Loeb*, 600 F.2d at 1016.

125. *See* 4 DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 106.04 (1995 Pocket Part).

126. *See id.* at § 104.04.

127. *See, e.g., Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 938 (1st Cir. 1995) (affirming instructions because the defendant failed to timely object, but noting that an instruction stating that the plaintiff “need not prove that Cabletron acted with any discriminatory intent” was “flawed in its treatment of causation”).

A. *The Explanation of Causation*

In explaining the causal requirement for pretext, the district court typically asks the jury if the plaintiff's protected status was "a determining"<sup>128</sup> or "a determinative"<sup>129</sup> factor in the adverse employment action. The district court cannot require the plaintiff to prove that her status was "the" or "the sole" determining factor; such a mistake could lead to reversal on appeal.<sup>130</sup> Surprisingly, some district and circuit courts use the words "the" and "a" interchangeably. For example, the Eighth Circuit recently affirmed an instruction that contained "a determining factor" language, but then held, "[r]eading the instructions as a whole, it is evident that the jury's consideration was directed to whether age was *the* determining factor in the decision to discharge [the plaintiff]."<sup>131</sup>

If the district court uses the phrase "a determining factor," it should provide a definition. Indeed, it may be error to omit such definition.<sup>132</sup> Moreover, in the absence of such definition, the jury might well ask the district court for clarification.<sup>133</sup>

The district court might follow the widely accepted definition of "a determining factor" as but for the plaintiff's protected status, the ad-

128. See, e.g. *Ryther v. KARE* 11, 84 F.3d 1074, 1087 (8th Cir. 1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415, 419 (8th Cir.), cert. denied, 65 U.S.L.W. 3261 (U.S. Oct. 8, 1996) (No. 96-128); *Touchet v. Halliburton Co.*, No. 94-8042, 1996 U.S. App. LEXIS 3353, at \*23 (10th Cir. Feb. 29, 1996); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425 (10th Cir. 1993); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992); *Spanier v. Morrison's Management Servs.*, 822 F.2d 975, 980 (11th Cir. 1987); *Grebin v. Sioux Falls Indep. Sch. Dist.* No. 49-5, 779 F.2d 18, 20 n.1 (8th Cir. 1985); *Blackwell v. Sun Elec. Co.*, 696 F.2d 1176, 1181 (6th Cir. 1983); see also *EEOC Memorandum*, Fair Empl. Prac. Manual (BNA) at 405:7157.

129. See, e.g., *Fuller v. Phipps*, 67 F.3d 1137, 1144 (4th Cir. 1995) (taking "a determinative influence" language from *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)); *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1309 (10th Cir. 1990); *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1050 (11th Cir. 1989), cert. dismissed, 493 U.S. 1064 (1990); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 80 (2d Cir. 1983).

130. See *Miller v. CIGNA Corp.*, 47 F.3d 586, 595-96 (3d Cir. 1995) (reversing and remanding for a new trial where instructions contained the following: "solely because of his age," "discriminatory motive was the sole cause of the employment action," and "age was the sole determinative factor"); see also *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975) (reversing and remanding for a new trial where instructions stated "that it is unlawful to discharge an individual 'merely because of his age,' and that he has the burden of showing by a preponderance of the evidence 'that he was discharged from his job because of his age' without making it clear that it need not have been the sole or exclusive cause").

131. *Slathar*, 78 F.3d at 418-19 (emphasis added); see also *Faulkner*, 3 F.3d at 1425-26 (using "a determining factor" language but at one point using "the determinative factor" language); *Messina*, 903 F.2d at 1308-09 (although instructions said "the determinative factor," court affirms as having directed the jury to the ultimate issue of "a determining factor").

132. See *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9, 11 (2d Cir. 1981).

133. See *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) (jury asked judge for clarification of "a determining factor" language), cert. denied, 115 S. Ct. 2612 (1995).

verse employment action would not have occurred.<sup>134</sup> In affirming such language, the Second Circuit in *Hagelthorn v. Kennecott Corp.*,<sup>135</sup> explained:

We believe the charge set forth in simple terms the two aspects of a 'determinative factor' crucial to the jury's understanding; first, that there can be more than one determinative factor in the employer's decision; second, that age must be a factor in the absence of which the plaintiff would not have been discharged.<sup>136</sup>

Interestingly, the Fourth Circuit has labelled the "but for" language "perhaps superfluous," but nonetheless "accurate."<sup>137</sup>

The EEOC's model instructions, drafted specifically in response to the *Hicks* decision, provide a different, and quite lengthy, definition of "a determining factor":

In order for you to find for [plaintiff], [plaintiff] must prove by a preponderance of the evidence that the Defendant intentionally discriminated against [plaintiff] because of his/her [race]. That is, the [plaintiff] must prove that [race] was a determining factor in the defendant's decision to discharge him/her. . . .

If, on the other hand, the defendant meets the burden of production, you must then consider whether discrimination was the true reason for the discharge. In order to find for the [plaintiff], [he/she] must persuade you, by a preponderance of the evidence, that, more likely than not, [race] was the true reason for the decision to discharge. . . .

In determining whether [the protected status] was the true reason for the defendant's decision you should consider whether the reason offered by the defendant is credible. If you find that the explanation offered by the defendant is not believable, then you may determine that discrimination was the true reason for the discharge and find for the [plaintiff]. This conclusion may be based solely upon your determination that the defendant's explanation is not believable, or upon other factors that convince you that, more likely than not, discrimination was the true reason for the discharge. . . .

If you find that the explanation offered by the defendant is believable . . . , and that it was the sole reason for the discharge, then you must find for the defendant."<sup>138</sup>

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134. *Fuller v. Phipps*, 67 F.3d 1137, 1144 (4th Cir. 1995); *Gehring*, 43 F.3d at 343 (in answer to jury's question regarding "a determining factor," district court used "but for" language); *Grebin*, 779 F.2d at 20 n.1.; cf. *Faulkner*, 3 F.3d at 1425 n.3 (using "a determinative factor" in conjunction with "except for" language).

135. 710 F.2d 76 (2d Cir. 1983).

136. *Hagelthorn*, 710 F.2d at 86; see also *Blackwell v. Sun Elec. Co.*, 696 F.2d 1176, 1181 n.7 (6th Cir. 1983) (affirming instructions that said: "[P]laintiff need not show that age was the sole or exclusive factor in the defendant's discharge of plaintiff. There could be more than one factor in the decision to discharge plaintiff. The plaintiff is nevertheless entitled to recover if one such factor was his age, and if that factor made a difference in determining whether the plaintiff was discharged.").

137. See *Fuller*, 67 F.3d at 1144.

138. *EEOC Memorandum*, Fair Empl. Prac. Manual (BNA) at 405:7157-7158.

However, not every circuit court approves of “a determining factor” language. The Seventh Circuit in *Gehring* observed, “[h]ow ‘determining factor’ entered the vocabulary of age discrimination is a mystery. The term is not found in the [ADEA], and the Supreme Court has never used it in a case under the ADEA.”<sup>139</sup> The court deemed the phrase “not . . . in common usage” and believed that the ultimate issue could be expressed in a more “straightforward” manner.<sup>140</sup> The court nonetheless affirmed instructions containing “a determining factor” language because they also contained the “but for” definition.<sup>141</sup> It concluded that in light of the other instructions, the phrase “a determining factor” “could have been replaced by ‘banana’ wherever [it] appeared, without loss of meaning.”<sup>142</sup>

The *Gehring* court provided a commonsense alternative to the “a determining factor” and “but for” language: “You must decide whether the employer would have fired . . . the employee if the employee had been [outside the protected class] and everything else remained the same.”<sup>143</sup> Such an alternative “uses simple and familiar words, avoids double negatives, and can be tailored to the circumstances of the claim.”<sup>144</sup>

There are other explanations of causation in addition to “a determining factor” language and the *Gehring* alternative. For example, a district court might use the “but for” language without reference to “a determining factor.”<sup>145</sup> It also might ask the jury if the adverse employment action occurred “because of” the plaintiff’s protected status.<sup>146</sup> Alternatively, it might use the phrase “a motivating factor” instead of “a determining factor.”<sup>147</sup>

Thus, the district court has several choices in instructing the jury on the causal requirement. Given the widespread acceptance of “a determining factor” language, it could well recite that language and avoid reversal on appeal. In the interest of clarity, however, it should abandon the phrase altogether and adopt the *Gehring* alternative. As a compro-

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139. 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2612 (1995).

140. *Id.* at 344.

141. *Id.* at 343-44.

142. *Id.* at 344.

143. *Id.*

144. *Gehring*, 43 F.3d at 344.

145. *See, e.g.*, *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988).

146. *See, e.g.*, *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 201 (1st Cir. 1987).

147. *See, e.g.*, *Stemmons v. Missouri Dept. of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996) (affirming charge that “simply instructed the jury to find for [the plaintiff] if ‘race was a motivating factor’ in the decision and if the department would have selected her if she had not been black”); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir.), *cert. denied*, 506 U.S. 1014 (1992) (affirming instructions “whether race was a motivating factor in the discharge decision”); *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1011 n.2. (6th Cir. 1987) (affirming instructions that the plaintiff prove “intent to discriminate . . . was a motivating factor in the defendants’ decisions concerning the plaintiff”).

mise, it could retain the phrase "a determining factor" and then define it according to the *Gehring* alternative.

### B. *The Role of the Employer's Business Judgment*

After explaining the causal requirement for pretext, the district court should instruct the jury on the role of the employer's business judgment. As the First Circuit stated in *Loeb*, "an employer is entitled to make its own subjective business judgments, however misguided they may appear to the jury, and to fire an employee for any reason that is not discriminatory."<sup>148</sup> An instruction on the employer's business judgment is fully consistent with *Hicks*' ruling that the plaintiff must prove intentional discrimination, not merely rebut the employer's articulated reason.<sup>149</sup>

The Eighth Circuit has been the most active in discussing the need for a business judgment instruction. In *Walker v. AT&T Technologies*,<sup>150</sup> it reversed and remanded a case because the district court failed to give a business judgment instruction that was "crucial to a fair presentation of the case."<sup>151</sup> It reasoned, persuasively, that because much of the trial evidence concerned the relative qualifications of the plaintiff and his replacement, the jury could have been misled in the absence of a business judgment instruction.<sup>152</sup> The jury should have been told that the employer "was entitled to exercise its business judgment in making the promotion decision."<sup>153</sup>

Recently, in *Stemmons v. Missouri Department of Corrections*,<sup>154</sup> the Eighth Circuit affirmed as harmless error a district court's decision not to give a business judgment instruction that was taken verbatim from *Walker*.<sup>155</sup> It distinguished *Walker* on the facts:

The record in this case is unlike *Walker*, . . . In *Walker*, the plaintiff's case consisted primarily of the testimony of co-workers who indicated that the plaintiff was the most qualified candidate. . . . None of that testimony directly indicated that the plaintiff's age (the relevant question in *Walker*) played a part in the hiring decision. . . . In this case, on the other hand, the jury heard testimony that very strongly suggested that race affected the hiring decision.<sup>156</sup>

Nonetheless, the *Stemmons* court went on to state that a district court should give the business judgment instruction "whenever it is proffered" by the employer.<sup>157</sup> Moreover, in two other cases decided the

148. 600 F.2d 1003, 1019 (1st Cir. 1979).

149. See *supra* notes 45-50 and accompanying text.

150. 995 F.2d 846 (8th Cir. 1993).

151. *Walker*, 995 F.2d at 849.

152. See *id.* at 850.

153. *Id.*

154. 82 F.3d 817 (8th Cir. 1996).

155. See *id.* at 819.

156. *Id.* at 821.

157. *Id.*

same year, the Eighth Circuit affirmed business judgment instructions,<sup>158</sup> leaving no doubt of its strong preference for the instruction.

The other circuits have not taken such a clear stand on the business judgment instruction. For example, the Tenth Circuit has affirmed a district court's decision not to instruct on the employer's business judgment,<sup>159</sup> but also has affirmed instructions containing business judgment language.<sup>160</sup>

Notwithstanding the limited appellate law on this point, the district court routinely should include business judgment language in its pretext instruction. The jury can determine the ultimate issue of discrimination only if it understands that the employer legally may take any nondiscriminatory action.

## V. Conclusion

Although the district court has ample discretion in drafting the jury instructions for a case of circumstantial individual disparate treatment, it should adopt instructions that are limited to the ultimate issue of discrimination rather than those containing a full tripartite analysis. An instruction limited to the ultimate issue fulfills the principles of *Hicks* and *Aikens*; it also provides the jury with clearer guidance of their mission.

In drafting that instruction, the district court should use *Gehring's* "straightforward" language to explain the causal requirement for pretext. At the very least, it should use the *Gehring* language to clarify the phrase "a determining factor." Moreover, the court should include a business judgment instruction lest the jury misunderstand the ultimate issue of discrimination vel non. In these ways the court ensures that the jury may reach a fair result, consistent with the mission of the antidiscrimination statutes.

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158. See *Ryther v. KARE* 11, 84 F.3d 1074, 1087 n.14 (8th Cir. 1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415, 418-19 (8th Cir.), cert. denied, 65 U.S.L.W. 3261 (U.S. Oct. 8, 1996) (No. 96-128).

159. See, e.g., *Touchet v. Halliburton Co.*, No. 94-8042, 1996 U.S. App. LEXIS 3353, at \*25 (10th Cir. Feb. 29, 1996).

160. See, e.g., *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1426 n.4 (10th Cir. 1993).

