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THE USE OF PATTERN-AND-PRACTICE BY INDIVIDUALS IN NON-CLASS CLAIMS

DAVID J. BROSS*

I. INTRODUCTION

In 1998, MCI International, Inc. ("MCI") laid off ninety-four employees, seventy-seven percent of whom were over the age of forty.[1] The Equal Employment Opportunity Commission ("EEOC") sued MCI on behalf of thirty-nine of the laid-off employees, arguing that the layoff violated the Age Discrimination in Employment Act ("ADEA").[2] The court refused to con-

* Special thanks to Richard A. Bales, Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University, and Gail M. Langendorf.

1. EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1479–80 (D.N.J. 1993).
2. *Id.* at 1444.

sider the case as a class action, and instead treated it as thirty-nine separate disparate treatment cases.[3]

One of the laid-off employees was Donald Lee.[4] MCI argued that it had fired Lee because of poor performance, but the EEOC refuted this argument by presenting a positive letter of recommendation from Lee's second-level supervisor, which recommended Lee's re-hiring and stated that Lee's layoff was not a reflection of his performance.[5] The district court, however, dismissed the claim, finding that Lee could not show a prima facie case of age discrimination because he could not point to a similarly situated individual who was treated differently.[6]

If this case had been brought as a single pattern-and-practice class action instead of as a group of individual disparate treatment claims, the outcome likely would have been different. The statistical evidence that a large proportion of the laid-off employees were over the age of forty (and therefore protected by the ADEA) would have shifted the burden of persuasion to MCI to prove that it had not discriminated against Lee.[7] However, because the court followed the approach that most circuits have taken, that the pattern-and-practice approach to proving discrimination is not available to plaintiffs bringing individual disparate treatment cases, this route was not available to Lee, and his case was dismissed.[8]

In *International Brotherhood of Teamsters v. United States*,[9] the United States Supreme Court held that evidence of pattern-and-practice can be used in class actions to shift the burden of proof to the employer.[10] However, the Court did not address whether pattern-and-practice can be used to shift the burden of proof in individual, non-class action lawsuits.[11] The circuit courts are divided on this issue.

Five federal circuits have held that an individual, non-class plaintiff may not shift the burden of proof by demonstrating solely a pattern-and-practice of discrimination.[12] These courts have found that the burden-

3. *Id.* at 1446.
4. *Id.* at 1455.
5. *Id.*
6. *MCI Int'l, Inc.*, 829 F. Supp. at 1455.
7. *Id.* at 1479.
8. *Id.* at 1455.
9. 431 U.S. 324 (1977).
10. *Id.* at 360.
11. *See id.*
12. Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355–56 (5th Cir. 2001); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1106 (10th Cir. 2001); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 760–61 (4th Cir. 1998); Gilty v. Vill. of Oak Park, 919 F.2d

shifting method adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*[13] is more suited for individual, non-class claims of discrimination, and that the pattern-and-practice approach, therefore, is not applicable to these types of cases.[14] However, two federal circuits have found that the language in *Teamsters* and other Supreme Court cases indicate a willingness to allow the use of pattern-and-practice evidence to shift the burden of proof in individual, non-class actions.[15] These courts have reasoned that evidence of a pattern-and-practice can change the position of the employer to that of a proved wrongdoer as effectively as the *McDonnell Douglas* burden-shifting method.[16]

This article agrees with the minority of circuits that have held that individuals can bring pattern-and-practice cases. The traditional disparate treatment model of proof, i.e., the *McDonnell Douglas* approach, works well for a plaintiff who has strong circumstantial evidence that the employer has discriminated against the particular plaintiff.[17] However, problems arise when the plaintiff has overwhelming evidence that the employer engaged in a broad pattern of discrimination, but little evidence of individual discrimination. Where the plaintiff already has proven a broad pattern of intentional discrimination, the burden of persuasion should be on the employer to show that that pattern did not adversely affect the plaintiff.

Part II of this article analyzes the current types of employment discrimination under Title VII. It begins by explaining disparate impact and disparate treatment. It then analyzes the methods to prove disparate treatment, including the pattern-and-practice method, which is the subject of this article.

Part III explains the two different views on whether evidence of pattern-and-practice discrimination shifts the burden of proof to the employer. Currently, the majority of courts have held that pattern-and-practice cannot shift the burden of proof to the employer. On the other hand, a minority of courts have held that the *Teamsters* approach should be extended to include individual, non-class plaintiffs.

1247, 1252 (7th Cir. 1990); Craik v. Minn. State Univ. Bd., 731 F.2d 465, 469–70 (8th Cir. 1984).

13. 411 U.S. 792 (1973).

14. *See Celestine*, 266 F.3d at 355–56; *Thiessen*, 267 F.3d at 1095; *Lowery*, 158 F.3d at 760–61; *Gilty*, 919 F.2d at 1252; *Craik*, 731 F.2d at 469–70.

15. Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir. 1986); Davis v. Califano, 613 F.2d 957, 961–62 (D.C. Cir. 1979).

16. *Cox*, 784 F.2d at 1559; *Davis*, 613 F.2d at 961–62.

17. *Davis*, 613 F.2d at 961–62.

Part IV provides a detailed analysis of the competing views. This section explains how the use of pattern-and-practice by individuals to shift the burden is consistent with past Supreme Court cases, why pattern-and-practice proves discrimination in individual, non-class actions, and how the *Teamsters* method promotes the anti-discrimination policy of Title VII.

Part V recommends that courts adopt the *Teamsters* approach in individual, non-class actions because this approach will afford the plaintiff another option when the *McDonnell Douglas* method will likely prevent the plaintiff from succeeding in an otherwise-valid discrimination claim.

II. TYPES OF DISCRIMINATION

There are two types of discrimination in the workplace: disparate impact and disparate treatment. This article focuses on pattern-and-practice evidence in disparate treatment cases. However, in order to fully understand disparate treatment cases, it is important to know how they are different from disparate impact cases. To provide this information, this article begins by analyzing disparate impact actions, and then discusses disparate treatment actions.

A. *Disparate Impact*

Disparate impact claims focus on whether employment policies or practices that are facially neutral and not intended to discriminate nevertheless have a disparate effect on the protected group.[18] Disparate impact "seeks the removal of employment obstacles, not required by business necessity, which . . . freeze out protected groups from job opportunities and advancement."[19] With this type of discrimination, the Supreme Court has ruled that a plaintiff is relieved of proving that the employer had a discriminatory motive.[20] Prior to *Griggs v. Duke Power Co.*,[21] proof of discriminatory motive was critical to the plaintiff's case, as the plaintiff was required to prove that his or her employer treated the plaintiff less favorably because of his or her race.[22]

Disparate impact claims involve three stages of proof.[23] First, the plaintiff must establish by a preponderance of the evidence that the employer

18. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000).
19. *Id.*
20. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).
21. 401 U.S. 424 (1971).
22. Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 838–39 (1982).
23. Connecticut v. Teal, 457 U.S. 440, 446 (1982).

"uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[24] Once the plaintiff establishes a prima facie case of disparate impact, the burden shifts to the defendant, who may either discredit the plaintiff's statistics or proffer statistics of his own which show that no disparity exists.[25] The employer may also produce evidence that its disparate employment practices are based on legitimate business reasons, such as job-relatedness or business necessity.[26] If the defendant fails to show either, the plaintiff prevails, but if the defendant succeeds in showing a business justification, the burden of production shifts back to the plaintiff.[27] When this occurs, the plaintiff has the duty to show the existence of an alternative nondiscriminatory practice or policy that would also satisfy the asserted business necessity.[28]

B. *Disparate Treatment*

The second type of discrimination, and perhaps the easiest to understand, is disparate treatment. Disparate treatment occurs where an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[29] However, while the inquiry in disparate impact is not focused on discriminatory motive, proof of discriminatory motive is critical to claims of disparate treatment.[30] Fortunately for the plaintiff, discriminatory intent "can in some situations be inferred from the mere fact of differences in treatment."[31] The ultimate question in every disparate treatment case is whether the plaintiff was intentionally discriminated against.[32] A plaintiff subjected to this type of discrimination has three ways to prove discrimination: proof of intent through direct evidence, the *McDonnell Douglas* approach, or pattern-and-practice.

1. Proof of Intent Through Direct Evidence

The first method a plaintiff may use to prove disparate treatment discrimination is through direct evidence. Under this theory, the plaintiff offers

24. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).
25. Davis v. Califano, 613 F.3d 957, 962 (D.C. Cir. 1979).
26. § 2000e-2(k)(1)(A)(i).
27. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660–61 (1989).
28. *Id.* at 661.
29. *Teamsters*, 431 U.S. at 335 n.15.
30. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
31. *Id.*
32. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

"[e]vidence, which if believed, proves existence of fact in issue without inference or presumption."[33] The burden of production then shifts to the employer to show that it would have made the same employment decision absent its consideration of the illegal criterion.[34] Examples include epithets or slurs uttered by an authorized agent of the employer, a decision-maker's admission that he or she would or did act against the plaintiff because of the plaintiff's protected characteristic, or an employer policy framed squarely in terms of race, sex, religion, or national origin.[35] The Civil Rights Act of 1991 clarified the requirements of using direct evidence of discrimination.[36] According to the 1991 Act, the plaintiff must show that an illegitimate criterion was a "motivating factor" in the employment decision.[37] Additionally, the 1991 Act stated that the employer can escape damages and orders of reinstatement, hiring, and promotion by demonstrating that qualification was reasonably necessary to the normal operation of that particular business or enterprise.[38] However, an employer making this showing will still be liable for attorney's fees and injunctive or declaratory relief.[39]

2. The *McDonnell Douglas* Method

In 1973, when faced with the fact that employers seldom provide the plaintiff with direct evidence of discrimination, the Supreme Court developed a burden-shifting pattern of proof, commonly referred to as the *McDonnell Douglas* test.[40] The function of the *McDonnell Douglas* method of proof is to allow the plaintiff to raise an inference of discriminatory intent indirectly.[41] It serves to eliminate the most common nondiscriminatory reasons for the employer's action,[42] e.g., lack of qualifications or the absence of an available job.

In *McDonnell Douglas*, the Supreme Court created a three-step process intended to create a level playing field for both the plaintiff and defendant.[43] The plaintiff has the initial burden of establishing a prima facie case of dis-

33. BLACK'S LAW DICTIONARY 460 (6th ed. 1990).
34. *Burdine*, 450 U.S. at 254.
35. *See* Perry v. Woodward, 199 F.3d 1126, 1134 (10th Cir. 1999); *see also* § 2000e-2(a)(1).
36. § 2000e-2(m).
37. *Id.*
38. § 2000e-5(g)(2)(B)(ii).
39. § 2000e-5(g)(2)(B)(i)(ii).
40. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
41. Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).
42. *Id.*
43. 411 U.S. 792 (1973).

crimination.[44] This prima facie case may be proved by showing: 1) that the plaintiff belongs to a protected class; 2) that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants;" 3) that the plaintiff was rejected; and 4) that, after the plaintiff's rejection, the position remained open and the "employer continued to seek applicants from persons of [plaintiff's] qualifications."[45] If proven, these facts give rise to an inference that the plaintiff was rejected for discriminatory reasons, creating a mandatory, but legally rebuttable, presumption that the employer unlawfully discriminated.[46]

Once the plaintiff has demonstrated a prima facie case of discrimination, "[t]he burden then . . . shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[47] The employer's burden is one of production only, not persuasion as in disparate impact claims.[48] This means the defendant must adduce evidence sufficient to allow the fact-finder to reasonably conclude that the employment decision was not motivated by discrimination.[49] If the jury believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, judgment must be in favor of the plaintiff.[50] However, if the employer has articulated a legitimate, nondiscriminatory reason, the plaintiff is afforded a fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the rejection were pretext,[51] e.g., a cover-up for a racially discriminatory decision. Often, the plaintiff will attempt to present statistical evidence of discrimination to demonstrate pretext, as discussed in the next section.

3. Pattern-and-Practice

A third way of proving disparate treatment is by demonstrating a pattern-and-practice of discrimination. "When Title VII was enacted in 1964, it authorized private actions by individual employees and public actions by the Attorney General in cases involving a 'pattern[-and-]practice' of discrimination."[52] "In 1972, Congress amended Title VII to authorize the EEOC to

44. *Id.* at 802.
45. *Id.*
46. *Burdine*, 450 U.S. at 254.
47. *Green*, 411 U.S. at 802.
48. *Burdine*, 450 U.S. at 254.
49. *Id.*
50. *Id.*
51. *Id.* at 255–56.
52. EEOC v. Waffle House, Inc., 534 U.S. 279, 286 (2002) (quoting 42 U.S.C. § 2000e-6(a) (1994)).

bring its own enforcement actions" on behalf of the Attorney General.[53] "In 1991, Congress again amended Title VII to allow the recovery of compensatory and punitive damages by a 'complaining party.'"[54] This "term includes both private plaintiffs and the EEOC."[55] To bring a pattern-and-practice claim, most courts hold that the individual or agency bringing the suit must bring it as a class action. Some courts, however, hold that an individual plaintiff may bring a pattern-and-practice suit.

Under the Civil Rights Act of 1964,[56] a civil action may be brought if there is reasonable cause to believe that any person or group is engaged in a pattern-and-practice of discrimination.[57] When alleging that an employer's policies exhibited a pattern-and-practice, the plaintiff must show that there was a system-wide pattern-and-practice to deny the plaintiff "the full enjoyment of Title VII rights."[58] The plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[59]

Senator Hubert Humphrey, during congressional debates on Section 707(a) of Title VII, explained the concept of pattern-and-practice:

> a pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.
>
> . . . .
>
> The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice. . . .[60]

The plaintiff must establish by "preponderance of the evidence that . . . discrimination was the . . . standard operating procedure."[61]

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53. *Waffle House, Inc.*, 534 U.S. at 286 (citing Gen. Tel. Co. of the Northwest v. EEOC, 446 U.S. 318, 325 (1980)); *see also* 42 U.S.C. § 2000e-6 (2000). For a discussion of the EEOC's history, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 3–9 (1999).

54. *Waffle House, Inc.*, 534 U.S. at 287 (quoting 42 U.S.C. § 1981a (a)(1) (1994)).

55. *Id.*

56. § 706(a).

57. 42 U.S.C. § 2000e-6(a) (2000).

58. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

59. *Id.*

60. 110 CONG. REC. 14, 270 (1964).

A pattern-and-practice suit is divided into two phases: liability and remedy.[62] During the liability stage, the plaintiff must prove a prima facie case of a policy, pattern, or practice of intentional discrimination against a protected group.[63] The prima facie case may be demonstrated either by statistical evidence aimed at establishing the defendant's past treatment of the protected group, or testimony from protected class members detailing specific instances of discrimination.[64] If the plaintiff satisfies this prima facie requirement, "[t]he burden [of production] then shifts to the employer to defeat [it] . . . by demonstrating that the . . . proof is either inaccurate or insignificant."[65] To challenge the plaintiff's proof, employers usually attack the source, accuracy, or probative force of the plaintiff's statistics.[66]

Once the defendant introduces evidence satisfying its burden of production, the jury must then consider the evidence introduced by both sides to determine whether the plaintiffs have established by preponderance of the evidence that the defendant engaged in a pattern-and-practice of intentional discrimination.[67] If the jury finds that the plaintiff has proved a pattern-and-practice of discrimination, the case may move on to the remedial phase, depending on the remedy sought by the plaintiffs.

If injunctive relief is the only relief appropriate based on the evidence presented by both sides, an injunction should be awarded. This ends the inquiry and the case does not move on to the remedial phase.[68] On the other hand, if relief such as back pay, front pay, or compensatory recovery is requested in the pleadings' in addition to injunctive relief, the court must conduct the remedial phase of the trial.[69] The plaintiffs enter this second phase with a presumption "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."[70] This means that each plaintiff must now show only that she suffered an adverse employment decision and, therefore, was a potential victim of the proved class-wide discrimination.[71] The burden of persuasion then shifts to the employer to demonstrate that the individual was subjected to the

61. *Teamsters*, 431 U.S. at 336.
62. *Id.* at 360–61.
63. *Id.* at 360.
64. *Id.* at 339.
65. *Id.* at 360.
66. *See Teamsters*, 431 U.S. at 340.
67. *See id.*
68. *Id.* at 361.
69. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1997).
70. *Id.* at 362.
71. *Id.* at 361–62.

adverse employment decision for lawful reasons.[72] If the employer cannot meet this burden, the plaintiff is entitled to individualized relief.[73]

In sum, a plaintiff attempting to prove disparate treatment is afforded three ways to prove discrimination. First, the plaintiff can present direct evidence including admissions by the employer or documents depicting discriminatory actions. Second, the plaintiff can use the *McDonnell Douglas* method of proof.[74] This test requires the plaintiff to demonstrate that the plaintiff belongs to a protected class, "was qualified for a job for which the employer was seeking applicants," that the plaintiff was rejected, and that "after [plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications."[75] Third, the plaintiff can present evidence of a system-wide, pattern-and-practice of discrimination.

III. USING PATTERN-AND-PRACTICE TO SHIFT THE BURDEN IN INDIVIDUAL DISPARATE TREATMENT CASES

In class actions and actions brought by the EEOC, the burden of persuasion can be shifted to the employer by demonstrating a pattern-and-practice of discrimination by the employer.[76] Additionally, pattern-and-practice can be used to prove pretext in the third stage of the *McDonnell Douglas* method.[77] However, the circuits are split on whether pattern-and-practice can be used by an individual plaintiff to shift the burden to the employer in an individual claim of disparate treatment. Most circuits do not allow an individual plaintiff to shift the burden by demonstrating a pattern-and-practice, but a minority of circuits have recognized a plaintiff's right to present such proof.

A. *Rationale Used by Courts That Do Not Allow Burden to Be Shifted*

The Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have held that pattern-and-practice cannot be used to shift the burden of proof in individual claims.[78] These courts focused on the fundamental differences between class

72. *Id.* at 362.
73. *Id.* at 361.
74. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
75. *Id.* at 802.
76. *Teamsters*, 431 U.S. at 360.
77. *Green*, 411 U.S. at 804–05.
78. Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355–56 (5th Cir. 2001); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1106 (10th Cir. 2001); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 760–61 (4th Cir. 1998); Gilty v. Vill. of Oak Park, 919 F.2d

actions and individual claims, and held that an inference of discrimination will not arise in an individual case until the plaintiff has proved all the elements of a prima facie case.[79] As a result of these differences, these courts held that the *McDonnell Douglas* method is better suited to prove individual disparate treatment claims.[80]

In *Lowery v. Circuit City Stores, Inc.*,[81] the Fourth Circuit held "that individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII."[82] The plaintiffs, eleven African-American current and former employees of Circuit City, brought suit alleging that Circuit City had a "corporate culture of racial animus toward African-Americans" mainly because of a group of "white senior managers."[83] The plaintiffs asserted that the

> all-white management intentionally [demonstrated] racial animus . . . through discriminatory promotion policies and practices that included, among other things: (1) excessively subjective procedures and criteria used to deny opportunities for promotion to qualified African-Americans; (2) making the existence of job promotion vacancies known only through informal networks of white employees rather than through formal job posting procedures; (3) requiring African-American employees to satisfy more onerous requirements for promotion than those required for white employees; and (4) maintaining more onerous performance standards for African-American employees than for similarly situated white employees.[84]

The district court entered judgment in favor of the employees on their claim that the employer engaged in a pattern-and-practice of discrimination.[85] Both the employer and employees appealed.[86]

The Fourth Circuit framed the issue as "whether individuals have a private, non-class cause of action for pattern[-and-]practice discrimination and, thus, may . . . [use] . . . the *Teamsters* method of proof."[87] The court concluded that "although such plaintiffs . . . [can] use evidence of a pattern[-and-]practice of discrimination to help prove claims of individual discrimination

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1247, 1252 (7th Cir. 1990); Craik v. Minn. State Univ. Bd., 731 F.2d 465, 469–70 (8th Cir. 1984).

79. *See, e.g.*, *Lowery*, 158 F.3d at 760–61.
80. *Id.*
81. *Id.* at 742.
82. *Id.* at 759.
83. *Id.* at 749.
84. *Lowery*, 158 F.3d at 749.
85. *Id.* at 755–56.
86. *Id.* at 756–57.
87. Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 760 (4th Cir. 1998).

within the *McDonnell Douglas* framework, individual plaintiffs are not entitled to the benefit of the *Teamsters* method of proof."[88] In reaching this conclusion, the Fourth Circuit noted that "[t]he Supreme Court has never applied the *Teamsters* method of proof in a private, non-class suit charging employment discrimination."[89]

The Fourth Circuit articulated two reasons why the pattern-and-practice framework is inapplicable to individual disparate treatment cases. First, the court held that the "manifest" and "crucial" differences between an individual's claim of discrimination and class actions prevent an individual plaintiff from shifting the burden solely with evidence of a pattern-and-practice.[90] Second, the court stated that because the remedies sought in individual, non-class actions are different than the remedies sought in class actions, an individual plaintiff should not be allowed to shift the burden of proof through evidence of a pattern-and-practice.[91]

1. "Manifest" and "Crucial" Difference

Focusing on this "manifest" and "crucial" difference, the *Lowery* court noted that in class actions, "the plaintiffs first litigate the common question of fact, i.e., whether the employer utilized a pattern[-and-]practice which discriminated against the class."[92] Class actions are different from individual actions because in individual actions, common questions of fact are not litigated, but a specific instance of discrimination is the sole question that must be answered.[93] Thus, the fundamental difference is that in the individual, non-class actions, the main inquiry is a particular employment decision, whereas in class actions, the liability phase focuses not on individual decisions, but on the existence of a pattern of discriminatory conduct.[94] However, the Fourth Circuit stated that evidence of a pattern-and-practice can be a useful tool in demonstrating that the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination, or that the employer's articulated reasons for the adverse action was pretext.[95]

88. *Id.* at 760–61.
89. *Id.* at 761.
90. *Id.* at 760–61.
91. *Id.* at 761.
92. *Lowery*, 158 F.3d at 761.
93. *Id.*
94. *Id.*
95. *Id.*

2. Difference in Remedies Sought

The *Lowery* court also focused on the difference in remedies sought in class actions and individual actions.[96] In class actions, plaintiffs "primarily seek to redress widespread discrimination."[97] Accordingly, the Fourth Circuit concluded that the relief typically sought is injunctive and may include requiring the defendant to adopt affirmative action plans or altering a seniority system.[98] "On the other hand, in a private, non-class . . . [action], the plaintiff seeks to remedy individual harm" and seeks remedies such as back-pay, front-pay, reinstatement, hiring, or damages.[99] The difference between the two remedies is that the remedies sought in individual cases "require [an] examination of the circumstances surrounding a single employment action involving the plaintiff," whereas the class action requires an examination of the entire class.[100]

B. *Rationale Used by Courts That Allow the Burden to Be Shifted*

Although the Supreme Court has never explicitly held that pattern-and-practice can be used to prove a prima facie case and shift the burden to the defendant in private, non-class suits, the Eleventh and District of Columbia Circuits ("D.C. Circuits") have allowed proof of pattern-and-practice to shift the burden.[101] These courts borrow language from the leading Supreme Court cases allowing pattern-and-practice in class actions and apply this language to individual claims.

An example is the D.C. Circuit case of *Davis v. Califano*.[102] In *Davis,* Dr. Barbara Davis, a white female employee, "alleged unlawful discrimination . . . based on her sex, in hiring, promotions, and other conditions of employment, in violation of Title VII."[103] Dr. Davis provided statistical evidence showing that she was not promoted as quickly as other males with the same qualifications.[104] She presented data showing: 1) a "disparity in grade and salary structure between male and female employees;" 2) a "disparity in promotion rates of men and women employees;" and 3) a "disparity in grade

96. *Id.*
97. *Lowery*, 158 F.3d at 761.
98. *Id.*
99. *Id.*
100. *Id.*
101. Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir. 1986); Davis v. Califano, 613 F.2d 957, 961–62 (D.C. Cir. 1979).
102. 613 F.2d at 957.
103. *Id.* at 958.
104. *Id.* at 960.

and salary structure of male and female employees . . . with regard to their education."[105] The district court dismissed the complaint, and Dr. Davis appealed.[106]

The D.C. Circuit Court framed the issue as whether statistics alone could prove a prima facie case in an individual discrimination.[107] The D.C. Circuit Court, quoting the United States Supreme Court, stated that "statistical proof of a 'broad-based policy of employment discrimination 'provides' reasonable grounds to infer that individual 'employment' decisions were made in pursuit of the discriminatory policy and . . . require 's' the employer to come forth with evidence dispelling that inference.'"[108] As a result, the D.C. Circuit Court concluded that equal force and effect must be given to the use of statistical evidence regardless of whether the case is brought as an individual, non-class action or as a class action.[109]

The *Davis* court then adopted the same rationale adopted by the Supreme Court in *Teamsters* and applied it to individual, non-class actions.[110] The D.C. Circuit Court found that the purpose of a prima facie case is to "create a greater likelihood that any single [employment] decision was a component of the overall pattern."[111] It does not, nor is it expected to, "conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice."[112] Proof of a pattern-and-practice of discrimination "creates a rebuttable presumption in favor of individual relief [which] is consistent with the manner in which presumptions are created generally."[113] "Moreover, the finding of a pattern[-and-]practice change[s] the position of the employer to that of a . . . wrongdoer [and] . . . the employer [is] in the best position to show why any individual employee was denied an employment opportunity."[114] The *Davis* court concluded that because proof of a pattern-and-practice of discrimination accomplishes the objective of the prima facie case, the *Teamsters* rationale should be applied to individual actions.[115]

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105. *Id.*
106. *Id.* at 958.
107. *Davis*, 613 F.2d at 961.
108. *Id.* at 963 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 359 (1977)).
109. *Davis*, 613 F.2d at 963.
110. *Id.*
111. *Id.* (quoting *Teamsters*, 431 U.S. at 359 n.45).
112. *Teamsters*, 431 U.S. at 359 n.45.
113. *Id.*
114. Davis v. Califano, 613 F.2d 957, 963 (D.C. Cir. 1979) (quoting *Teamsters*, 431 U.S. 359 n.45).
115. *Id.*

IV. ANALYSIS OF THE METHODS

There are three reasons why individual plaintiffs in Title VII actions for disparate treatment should be able to shift the burden of production by demonstrating the defendant had a pattern-and-practice of discrimination. First, allowing individuals to use the *Teamsters* approach is consistent with existing case precedent. Second, use of pattern-and-practice by individuals is effective proof of discrimination in individual, non-class actions. Third, the *Teamsters* approach promotes the anti-discrimination policy of Title VII.

A. *Consistent With Case Precedent*

The first reason why plaintiffs should be afforded the right to shift the burden of proof by using evidence of a pattern-and-practice of discrimination is that it is consistent with past case law. In *Teamsters*, the Supreme Court acknowledged that past cases have made it "unmistakably clear that 'statistical [evidence has] served . . . an important role' . . . in which the existence of discrimination is a disputed issue"[116] and is "competent in proving employment discrimination [cases]."[117] Furthermore, "[i]n many cases the only available avenue of proof is the use of . . . statistics to uncover clandestine and covert discrimination by the employer."[118] In a footnote, the Supreme Court explained that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[119] "Statistics showing [a distinct] racial . . . imbalance . . . [provide] a telltale sign of purposeful discrimination."[120]

Case law has supported the fact that the significance of the *McDonnell Douglas* method does not lie in its "specification of the discrete elements" required to prove a prima facie case.[121] *McDonnell Douglas* indicates "that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a

116. *Teamsters*, 431 U.S. at 339 (quoting Mayor of Philadelphia v. Educ. Equal. League, 415 U.S. 605, 620 (1974)).

117. *Id.*

118. *Id.* at 340 n.20 (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971)); *see also* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382 (4th Cir. 1972).

119. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

120. *Id.*

121. *Id.* at 358.

discriminatory criterion illegal under the Act."[122] Thus, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence,"[123] as long as the evidence creates an inference of discrimination. As stated in *Teamsters*, statistics can "create a greater likelihood that any single decision was a component of the overall pattern"[124] and are a "telltale sign of purposeful discrimination."[125] Furthermore, "proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief [which] is consistent with the manner in which presumptions are [normally] created."[126] As a result, the plaintiff should not be denied the ability to demonstrate a prima facie case solely through evidence of a pattern-and-practice.

B. *Pattern-and-Practice Does Work in Individual, Non-Class Actions*

The second reason why individual plaintiffs should be afforded an opportunity to use the *Teamsters* approach is because it is suitable to be used in individual, non-class actions. In *Lowery*, the Fourth Circuit stated "that there is a 'manifest' . . . difference between an individual's claim of discrimination and a class action alleging a general pattern[-and-]practice of discrimination."[127] The court determined that in a non-class action, the question of whether the employer discriminated against the plaintiff in one particular instance is litigated, whereas in a class action, the question of whether a discriminatory policy existed is litigated.[128] Therefore, proof of a pattern-and-practice answers the question of discrimination in the workplace, but not for that individual plaintiff. Although this difference is clear, it does not justify prohibiting individual plaintiffs from using evidence of a pattern-and-practice to shift the burden, for three reasons.

First, the two-phase trial created by the Supreme Court in *Teamsters* defeats this theory.[129] During the first stage, the plaintiff demonstrates that "the employer has followed an employment policy of unlawful discrimination."[130] If the employer cannot rebut this evidence by clear and convincing evidence, liability is established and the case moves on to the remedial phase.[131] Dur-

122. *Id.*
123. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983).
124. *Teamsters*, 431 U.S. at 359 n.45.
125. *Id.* at 340 n.20.
126. *Id.* at 359 n.45.
127. Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998) (citing Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 876 (1984)).
128. *Id.*
129. *Teamsters*, 431 U.S. at 360–61.
130. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977).
131. *Id.*

ing the remedial phase, the plaintiff proves that he was, in fact, discriminated against.[132]

Second, to shift the burden, the plaintiff must show that discrimination more likely than not played a role in the employment decision affecting the plaintiff.[133] Evidence demonstrating a pattern-and-practice of discrimination throughout the company or corporation adequately meets this burden.[134] Evidence of a pattern-and-practice creates the likelihood that any single decision was in furtherance of the discriminatory policy.[135] Once this is shown, the employer becomes a wrongdoer and is in the best position to demonstrate that the employment actions were taken for legitimate reasons.[136]

Third, the evidentiary value of demonstrating a pattern-and-practice of discrimination should not be, and is not, any less valuable because there are not multiple parties. Regardless of whether or not evidence of a pattern-and-practice is brought in an individual, non-class action, or in a class action, its importance in proving discrimination is the same.

C. *Promotes Anti-Discrimination Policy of Title VII*

The third reason why individual plaintiffs should be afforded the *Teamsters* approach is that it promotes the anti-discrimination policy and goals of Title VII.[137] "The primary purpose of Title VII [is] 'to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices. . . .'"[138] Under Title VII, practices and procedures "'cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.'"[139] Unfortunately, by only affording an individual plaintiff the use of the *McDonnell Douglas* approach, employers get away with intentional discrimination.[140]

Forcing the plaintiff to prove discrimination through the *McDonnell Douglas* method presents the employer with an advantage.[141] *McDonnell Douglas* works well for a plaintiff with strong circumstantial evidence that the employer has discriminated against the particular plaintiff.[142] However,

132. *Id.*
133. *Id.* at 359 n.45.
134. *Id.*
135. *Teamsters*, 431 U.S. at 359 n.45.
136. *Id.*
137. *Id.* at 348.
138. *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).
139. *Id.* at 358 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)).
140. *See Green*, 411 U.S. at 802–03.
141. *See id.*
142. *Id.*

problems with *McDonnell Douglas* arise when the plaintiff has overwhelming evidence that the employer has a broad pattern of discrimination, but no evidence that the particular plaintiff was discriminated against.[143] In this situation, the burden should be on the employer to demonstrate that it did not discriminate against the individual plaintiff. By affording the plaintiff the option of shifting the burden through evidence of a pattern-and-practice of discrimination, the purpose of Title VII will be met.

Past cases have demonstrated the difficulties plaintiffs have when they have strong statistical evidence, but not enough evidence to prove a prima facie case under *McDonnell Douglas*.[144] In *Victory v. Hewlett-Packard Co.*,[145] the plaintiffs' suit for gender discrimination was dismissed for failure to demonstrate a prima facie case of discrimination, despite the fact that the plaintiff submitted evidence of a pattern-and-practice of discrimination.[146] In that case, plaintiff alleged that the employer "paid her less than comparably trained and qualified men, failed to promote her to management positions for which she was qualified, and failed to equalize the terms and conditions of her employment."[147] Convincing statistical evidence was presented to demonstrate her claim.[148] First, between the years of 1986 and 1989, twelve male sales representatives were promoted out of a pool of ninety-five male sales representatives.[149] On the other hand, during this same time frame, out of the twenty-five female sales representatives, not a single female was promoted.[150] The statistical expert explained that there was a "one in twenty chance that this outcome could have occurred randomly . . . [and that] 'there is no explanation for the fact that women received lower promotion rating than men.'"[151] Furthermore, a review of salaries showed that women received around $7500 per year less than comparably trained and qualified men.[152]

In dismissing plaintiff's claim, the United States District Court for the Eastern District of New York found several problems with the prima facie case presented by the plaintiff.[153] First, the "plaintiff never applied for a spe-

143. *Id.*
144. *Id.*
145. 34 F. Supp. 2d 809 (E.D.N.Y. 1999).
146. *Id.* at 821.
147. *Id.* at 813.
148. *Id.* at 815.
149. *Id.*
150. *Victory*, 34 F. Supp. 2d at 815.
151. *Id.*
152. *Id.*
153. *Id.* at 818–19.

cific position."[154] Although this was true, "Hewlett-Packard did not have a uniform practice of posting openings for management positions or a standardized written application procedure."[155] However, the plaintiff had informed her district managers on several occasions of her interest in obtaining a management position.[156] Second, the "[p]laintiff failed to articulate a specific promotion for which she was denied."[157]

Victory demonstrates the problems a plaintiff has with the *McDonnell Douglas* approach.[158] Although the plaintiff did not have clear-cut evidence that she was discriminated against, she did present evidence sufficient to show that there was a great likelihood that she was discriminated against.[159] It is in this type of case where the *Teamsters* approach would be advantageous to the plaintiff. The Supreme Court has acknowledged that evidence of a pattern-and-practice is important evidence.[160] Evidence of this type changes the position of the employer to that of a proved wrongdoer and forces the employer to demonstrate by clear and convincing evidence that the employment action was made for legitimate reasons.[161] The *Teamsters* approach solves the problem of dismissing cases where there is clear evidence of discrimination, but not enough to prove the prima facie case.[162] Additionally, affording this method to individuals is consistent with Title VII's purpose of eliminating all discriminatory policies.

V. RECOMMENDATION

By adopting the use of pattern-and-practice in individual, non-class actions to prove discrimination, plaintiffs will be afforded multiple options in proving discrimination in violation of Title VII. Although the Supreme Court has never specifically held that individuals can use evidence of a pattern-and-practice of discrimination to shift the burden, past Supreme Court decisions make it clear that the *McDonnell Douglas* method was not meant to be the sole method of proving discrimination for an individual.[163]

154. *Id.* at 819.
155. *Victory*, 34 F. Supp. 2d at 819.
156. *Id.*
157. *Id.*
158. *See id.* at 816–17.
159. *Id.* at 815–16.
160. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).
161. *Id.* at 359–61.
162. *Id.*
163. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In *Teamsters*, the Defendants argued that the *McDonnell Douglas* pattern of proof was the only means of establishing a prima facie case of individual discrimination.[164] The Court responded by stating that:

> [t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.[165]

Furthermore, the Supreme Court also stated in *United States Postal Service Board of Governors v. Aikens*,[166] that a "plaintiff may prove his case by direct or circumstantial evidence."[167] These statements by the Supreme Court indicate that there is more than just one method by which the plaintiff may shift the burden to the defendant.[168] These statements also demonstrate that one of the rationales behind not allowing pattern-and-practice to be used by individual plaintiffs, which the Supreme Court has never officially allowed, is without merit.[169]

As noted above, the *Teamsters* approach can be applied to individuals.[170] Courts should permit individual plaintiffs to demonstrate that adverse employment decisions were part of a discriminatory policy followed by the employer. Proof of a discriminatory policy may not be enough to prove that the individual plaintiff was discriminated against, but it does provide strong evidence and "create[s] a greater likelihood that any single decision" by the employer was based on that policy.[171] The Supreme Court has stated that "proof of the pattern[-and-]practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."[172]

Once a pattern-and-practice is established, the burden shifts to the employer to prove by clear and convincing evidence that the plaintiff's proof is inaccurate or insignificant.[173] If the employer cannot meet this burden, the

164. *Teamsters*, 431 U.S. at 358.
165. *Id.*
166. 460 U.S. 711 (1983).
167. *Id.* at 714 n.3.
168. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983).
169. *Id.*
170. *Teamsters*, 431 U.S. at 328.
171. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977).
172. *Id.* at 362.
173. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1287 n.22 (11th Cir. 2000) (citing Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir. 1986)); *Teamsters*, 431 U.S. at 362.

jury may conclude that a violation has occurred.[174] At this point, the case moves onto the liability phase.[175] During this phase, the plaintiff must demonstrate that she "was a potential victim of the proved discrimination."[176]

The concerns over the differences of proof between class actions and individual, non-class action lawsuits are solved at the liability phase. During this phase, the individual plaintiff demonstrates that he or she was in fact discriminated against in a specific instance.[177] The proof of an overall policy of discrimination is merely used to get to this point and to demonstrate that the employer has a history of discrimination.[178]

VI. CONCLUSION

The Supreme Court has stated that the *McDonnell Douglas* pattern of proof is not the sole method of proof available to individual plaintiffs. As a result, plaintiffs should be afforded the option of demonstrating discrimination through the use of pattern-and-practice as set out by the Court in *Teamsters*.[179] This approach offers three important advantages to an individual plaintiff. First, the plaintiff can avoid the rigid and sometimes unfair *McDonnell Douglas* approach. The pattern-and-practice approach allows the plaintiff-employee, who has evidence that the employer discriminated, but no evidence that the employer discriminated against that particular plaintiff-employee, to shift the burden of proof. Unfortunately, under the *McDonnell Douglas* approach, the plaintiff's claim would be dismissed. Second, the two-phase pattern-and-practice trial shifts the burden of persuasion to the employer, which is entirely appropriate since the plaintiff already has proven that the employer engaged in systematic intentional discrimination. Third, in cases where cladstone proof of discrimination is not available, proof of a pattern-and-practice of discrimination can provide the plaintiff with a presumption of discrimination. As a result of these important advantages to the plaintiff, plaintiffs should be afforded the right to use proof of a pattern-and-practice of discrimination to shift the burden in individual, non-class actions.

174. *Teamsters*, 431 U.S. at 361.
175. *Id.*
176. *Id.* at 362.
177. *Id.* at 361.
178. *Id.*
179. 431 U.S. 324 (1977).