PROOF OF PRETEXT

A REVIEW OF CASE AUTHORITY AND STRATEGY
FROM A PLAINTIFF’S PERSPECTIVE

By: John F. Beasley, Jr.

JF BEASLEY, LLC
31 North Main Street
PO Box 309
Watkinsville, GA 30677
Telephone: (706) 769-4410
Facsimile: (706) 769-4471
jfbeasley@jfbeasleylaw.com
www.jfbeasleylaw.com
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The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else.


I. **INTRODUCTION**

The definition of “pretext” is “a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.”¹ In all but the rarest of circumstances, proof of pretext is the single most important issue in an employment discrimination case. This is because, in most instances, an employer is easily going to pass the “LNDR” test. That is, an employer will virtually always be able to articulate a “legitimate non-discriminatory reason” for an adverse employment action. It is then left to the employee’s counsel to, at a minimum, show this reason to be false. Ultimately however, the employee must shoulder the burden of proving the penultimate issue of discrimination. Certainly, this is a more onerous task but one that is appropriately left for trial.

There are two stages of litigation in which evidence of pretext is critical. The first is at the summary judgment stage and the second is before the jury. It is at the first stage where pretext has its most academic scrutiny. At the second stage, it is a matter of proving both that the employer’s reasons are false and that the real reason is discriminatory one; however, this can often be done through effective cross examination of employer’s witnesses or, in some cases, by discrediting the employer’s counsel. That is to say, proof of pretext at trial is a bit more of a free-wheeling and open-ended proposition. While trial strategy will be touched on, this paper will focus on the pretext analysis at the summary judgment stage and how evidence of pretext may be developed through investigation, the use of well-crafted discovery and legal arguments designed to break down the formulaic barriers to proof that have wormed their way into the summary judgment analysis. Indeed, summary judgment has become a formidable weapon in the pocket of the employer primarily because employees have, in many instances, been robbed of the inferences to which they are entitled as the non-movant in these cases. This is due in no small part to a largely formalistic and academic approach to a very straight forward question – is it possible that the employer is lying about, hiding the ball, covering up, avoiding, obfuscating or cloaking the real, discriminatory reason for some adverse action. In other words, is there evidence that the LNDR is false. That is to say, the question is whether there is evidence of pretext not whether the plaintiff has proven pretext. Unfortunately, all too often a court will erroneously saddle

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the employee with proof of pretext or, worse, proof of discrimination even at this early stage.

In this paper I will briefly trace the origins of proof through a showing of “pretext” as it has evolved. I will then outline some of the traditional avenues of creating an inference of pretext. Next, I will provide an assessment of the best methods for approaching the issue of pretext at the summary judgment stage. Finally, I will catalogue these various approaches in a practice pointer section that should be of value to counsel for plaintiffs embarking on the long road to proving discrimination.

II. EVIDENCE AND PROOF OF PRETEXT (AN OVERVIEW)

The word “pretext” as applied to employment discrimination claims has become a term of art. Its use has origins in the model of proof first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There, the Court defined the well-worn standard as follows:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

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The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.

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[Then the complainant must] be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.

*McDonnell Douglas Corp. v. Green*, 411 U.S. at 804 (1973). Several years later, the Court elaborated on this model, explaining that the initial steps are designed to set the table for proof of pretext and thus discrimination.

If the defendant carries [its] burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

*Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981). In the disparate treatment, circumstantial evidence case, proof of discrimination is the ultimate goal but proving pretext will get you there.

In setting up this model, the Court articulated several methods of showing pretext, including:

- Instances in which persons outside the protected class were treated better for offenses of comparable seriousness;
- The manner in which the employee was treated by the employer while employed;
- The employer’s reaction to “legitimate civil rights activities”; and
- Statistics concerning the employer’s employment policy and practice with respect to minority employment insofar as it may suggest a general pattern of discrimination.

*McDonnell Douglas Corp. v. Green*, 411 U.S. at 805. Of course, these alternative methods were not exclusive but, rather, examples that could inform the court as to the ultimate question of discrimination.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court added an additional method of showing pretext in the context of employment testing, which is proof that “other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest.” *Id. at 425; see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988). This proof, however, was qualified in *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978). In that case, the Court
underscored an employee’s right to “introduce evidence that the [employer’s] proffered justification [for the adverse action] is merely a pretext for discrimination.” *Id.* at 578. However, it faulted the Court of Appeals for a finding of pretext based upon the mere conclusion that “different practices would have enabled the employer to at least consider, and perhaps to hire, more minority employees.” *Id.* The Court held that an employer may not be saddled with liability based solely upon its failure to use the least discriminatory test, “at least until a violation of Title VII has been proved.” *Id.*

Ultimately, proof of pretext is “not limited to presenting evidence of a certain type.” The evidentiary theories available to a plaintiff in an attempt to establish that an employer’s stated reasons for taking adverse action are pretextual “may take a variety of forms.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). The burden of proof, however, will always lie with the plaintiff. *See Texas Dept. of Cnty. Affairs v. Burdine*, 450 U.S. at 253 (citing *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25, n. 2 (1978)). So, while an employer has the slight burden of articulating some legitimate reason for an adverse employment action, the plaintiff bears the ultimate burden of persuading the trier of fact that the reason is a mere pretext for discrimination. *Id.* This is a burden that remains with the plaintiff throughout.

In *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) the Supreme Court clarified the process:

when the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff’s proof by offering evidence of the reason for the plaintiff’s rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption “drops from the case,” and “the factual inquiry proceeds to a new level of specificity.” . . . The District Court [is] then in a position to decide the ultimate factual issue in the case.

*Id.* at 714-15 (internal citations and quotations omitted). The decision for the factfinder is ultimately an analysis of the plaintiff’s evidence of pretext and a determination as to whether such showing is enough to prove discrimination. The question then becomes how one goes about providing evidence of pretext such that the issue can reach the jury and the “ultimate factual issue” can be decided.

In *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), the Court explained that proving pretext does not only mean proof that the employer’s explanation for its actions is false but that it was a cover-up for discrimination. “[A] reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason.” *Id.* at 515 (quotations and emphasis supplied by the Court). In practical terms, this means that “once the defendant has responded to the plaintiff’s prima facie case, the district court has before it all the evidence it needs to decide not . . . whether defendant’s response is credible, but whether the defendant intentionally discriminated against the plaintiff.” *Id.* at 519. So, getting back to the definition of pretext – a “purpose or motive alleged” to be true but actually false – we
are left with the question of what effect a showing of falsehood will have, since that is often the most that an employee can hope to achieve? The Supreme Court begins the answer to this question when it states: “[t]hat the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff’s proffered reason of race is correct. That remains a question for the factfinder to answer . . . .” Id. at 524 (emphasis added). In this statement, the Court suggests that, at a minimum, a showing that an employer’s reason is unpersuasive or contrived should get the plaintiff to the jury. This means that proving discrimination really has two mutually exclusive but also interdependent parts – evidence of pretext e.g. that the employer’s reasons for adverse action are not credible and proof that discrimination is the real reason. The former can be assessed by the court; the latter is a matter for the jury. A more direct analysis of the two part yet symbiotic nature of pretext is found in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000).

In Reeves, the Court explained that proof that a defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. Id. at 147. As a result, presenting evidence of pretext by showing that the employer’s articulated reason for taking action against the plaintiff is false should get the case to the jury. This is because, “it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation.” Id. “The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.” Id. (citation omitted). The Supreme Court elaborates on this proof, explaining that:

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as “affirmative evidence of guilt” . . . Moreover, once the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Id. (citations omitted). In other words, although a plaintiff is required to show both that the defendant’s reasons are false and that discrimination is the true reason for the adverse action, evidence of the first can suffice for the second. That is to say, except in the rare case where “the record conclusively reveal[s] some other, nondiscriminatory reason for the employer’s decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred” (Reeves, 530 U.S. at 148), evidence of pretext will, at a minimum, get the case to the jury and allow for a finding of discrimination.
Notwithstanding the Supreme Court’s explanation of this paradigm, some courts have continued to overstate the plaintiff’s burden. This was particularly true prior to Reeves. Before the Court’s clarification of the burdens in Reeves, some courts took language in St. Mary’s Honor Center and previous cases to mean that a plaintiff only survived summary judgment and proved their case by showing both evidence of pretext and additional evidence of discrimination. See, for example, Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 441 (11th Cir. 1996) disapproved of by Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997); Reinhold v. Virginia, 135 F.3d 920, 923 (4th Cir. 1998); Chaffin v. John H. Carter Co., 179 F.3d 316, 320 (5th Cir.1999). This “pretext-plus” model of proof was thoroughly debunked in Reeves. Nevertheless, even after Reeves, some courts have struggled with the idea that nothing more than evidence of pretext need be shown to prove discrimination.3

In addition, defendants struggle to find facts that support the rare case where (1) the record conclusively reveals some other, nondiscriminatory reason for the employer’s decision; or (2) where the plaintiff creates only a weak issue of fact as to whether the

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3 See Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000)(“In examining the impact of Reeves on our precedents, we conclude that Reeves prevents courts from imposing a per se rule requiring in all instances that a [plaintiff] offer more than a prima facie case and evidence of pretext. . . following Reeves, we decline to hold that no . . . defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext. Rather, we hold that the Supreme Court’s decision in Reeves clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his ‘ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff’”; Radentz v. Marion County, 640 F.3d 754 (7th Cir. 2011)(to demonstrate pretext, the plaintiff must show that the “nondiscriminatory reason was dishonest and that the defendant’s true reason was based on discriminatory intent”); Stockwell v. City of Harvey, 597 F.3d 895, 901-02 (7th Cir. 2010)(in using the indirect method of proof, a plaintiff must show that the employer’s reason is not credible or factually baseless and also “provide evidence that supports the inference that the real reason is discriminatory”); Woods v. Boeing Co., 355 F. Appx. 206, 212 n. 2 (10th Cir. 2009)(Judge Anderson in a concurrence indicates concern over the idea that plaintiff should avoid summary judgment on evidence of pretext alone. Disavowing pretext plus he, nevertheless goes on to state that the focus should be on “on the plaintiff’s [ultimate] burden of proof. The “plus” in pretext-plus refers to the quantum of evidence. The “but for” requirement refers to the ultimate fact of causation”); Warren v. City of Tupelo Mississippi, 332 F. App’x. 176, 183 (5th Cir. 2009) (in granting summary judgment based upon an absence of evidence to discriminate, the Fifth Circuit found that the district court was not holding the plaintiff to a “pretext plus” standard, but was only adhering to the court’s “oft-articulated rule that evidence may founder when it has no probative value with respect to the ultimate question before the jury of whether there was discrimination”); El Kassem v. Telvisita Inc., 2009 WL 530571 (W.D. Va. 2009)(quoting with approval a 1998 decision acknowledging increased affinity for the two-part, “pretext plus” standard at summary judgment); Paz v. Potter, 2006 WL 3702653 (D.P.R. 2006)(at the pretext stage the plaintiff must produce evidence beyond the mere assertion that the alleged justification is implausible and show that discriminatory animus actually motivated the employer’s decision(citing pre-Reeves decisions)); Hamilton v. Boise Cascade Exp., 280 F. App’x. 729, 731 (10th Cir. 2008)(“Although we do not require ‘pretext plus,’ specifically that a plaintiff demonstrate that the reason was false and a motive for discrimination, the falsity combined with other circumstances in the case must permit the inference that unlawful discrimination was a motivating factor in the decision”); Thoman v. Philips Med. Sys., 2007 WL 203943 (D.N.J. 2007)(“In sum, the plaintiff cannot rely solely on a potential finding that the defendant’s explanation is implausible. The fact that a judge or a jury might disbelieve the defendant’s asserted nondiscriminatory reason is not enough, by itself, to preclude summary judgment. Rather, the plaintiff must be able to adduce evidence, whether direct or circumstantial, from which a reasonable juror could conclude that the defendant’s explanation is incredible,” quoting Chipollini v. Spencer Gifts, 814 F.2d 893 (3rd Cir. 1987)).
employer’s reason was untrue and there is abundant and uncontroverted independent evidence that no discrimination had occurred. See Reeves, 530 U.S. at 148. In Reeves, the Court held that in rare cases, “although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory.” Id.; see also Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 649 (4th Cir.2002) (noting Reeves provides two non-exhaustive examples entitling an employer to judgment as a matter of law, including whether a plaintiff has presented a weak issue of fact). Nevertheless, the law is fairly well settled that because evidence of pretext will allow for an inference of discrimination evidence of pretext should, in most cases, render summary judgment improper. It is important, however, to note that evidence of pretext must exist for each of the employer’s reasons for taking adverse action against an employee. See Pettit v. Steppingstone, Ctr. For The Potentially Gifted, 2011 WL 2646550 (6th Cir. 2011)(plaintiff must rebut each of defendant’s proffered reasons – temporal proximity is not enough); Harris v. Mississippi Transp. Comm’n, 329 F. App’x. 550, 556 (5th Cir. 2009)(to carry his burden of showing pretext a plaintiff must “put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates”); Crawford v. City of Fairburn, Ga., 482 F.3d 1305, 1309 (11th Cir. 2007)(“by failing to rebut each of the legitimate, nondiscriminatory reasons [plaintiff] has failed to raise a genuine issue of material fact about whether those reasons were pretext for discrimination); Reed v. Lawrence Chevrolet, Inc., 108 F. App’x. 393, 398 (7th Cir. 2004)(“[i]n order to show pretext, moreover, the plaintiff must specifically rebut each legitimate, non-discriminatory reason given by the defendants for not hiring him”).

It is the evidence of pretext that is the subject of the remainder of this paper. Just what type of evidence is sufficient to create the inferences of pretext that get a plaintiff to a jury and what type of evidence is best used to actually prove discrimination. As mentioned previously, the Supreme Court has articulated some broad categories: instances in which persons outside the protected class were treated better; the treatment the plaintiff received while employed; other acts of discrimination and responses to other “legitimate civil rights activities”; statistics concerning the employer’s employment policy and practice; and best or better practices that may have avoided discrimination.

4 Healy v. Tougaloo Coll., 2011 WL 915050 (S.D. Miss. Mar. 15, 2011)(acknowledging plaintiff’s affidavit sufficient to create an issue of fact as to performance based reasons for discipline but holding that fact issue was weak and did not cast doubt on perceptions of poor performance particularly when coupled with other evidence); Dickey v. Carolina Children’s Home, 2010 WL 2571848 (D.S.C. 2010)(finding pretext insufficient where undisputed evidence revealed that employer’s financial position, not plaintiff’s FMLA leave, was the reason for her termination); Panetta v. Sheakley Group, Inc., 707 F. Supp. 2d 767, 774 (S.D. Ohio 2010)(finding rare case where pretext shown but clear evidence provided that motive for deception was to avoid payment of severance not discrimination based on pregnancy); Oakes v. City of Chicago, 2009 WL 5166221 (N.D. Ill. Dec. 22, 2009)(finding “rare case” where evidence supported favoritism not discrimination); Swackhammer v. Sprint/United Mgmt. Co., 493 F.3d 1160, 1170 (10th Cir. 2007)(employer’s nondiscriminatory reason shown to be false but true reason for disparate treatment was friendship not discrimination); Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1260 (11th Cir. 2001)(although evidence of pretext existed, motive was clearly an unproffered, nondiscriminatory reason for disparate treatment – namely perception of prior agreement with favored employee).
To this list we can also add the following: implausible or fantastic justifications (see Miller-El v. Cockrell, 537 U.S. 322, 338-39 (2003)(quoting Purkett v. Elem, 514 U.S. 765 (1995)) (in the context of jury selection); and qualifications evidence as an additional level of comparator scrutiny (Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006)).

III. METHODS OF PROOF

As previously indicated, there is no single or best method of proving discrimination although proof of pretext in the context of the McDonnell Douglas burden shifting model is most often utilized. Still, methods of proving discrimination and showing pretext are often conjoined and can be mutually dependent. Some of these methods include the following:

- A departure from usual business procedures or a suspect practice or procedure;
- The lack of fixed or reasonably objective standards for evaluation and/or discipline;
- Best or better practices that may have avoided discrimination.
- Implausible or fantastic justifications;
- Whether the version of events as related by one party is internally consistent and plausible, or whether numerous inconsistencies and conflicting documentary evidence render the story unreliable;
- Evidence of a general atmosphere of discrimination may also be considered: proof of historically-limiting opportunity, policies or past practices with respect to minority employment or harassment;
- Responses to the plaintiff’s “legitimate civil rights activities”; 
- Statistical proof even if it is not dispositive of the claim in and of itself;
- Instances in which persons outside the protected class were treated better.

See McDonnell Douglas Corp. v. Green, 411 U.S. at 805; Miller-El v. Cockrell, 537 U.S. at 338-39 (2003); Warren v. Halstead Indus., Inc., 802 F.2d 746, 753 (4th Cir. 1986). These principles will be examined through their use in various cases.
A. Suspect Business Practices and Procedures

Suspect business practices often go hand in glove with implausible or fantastic justifications for an employment action. A recent and prime example can be found in the case of Smith v. Lockheed-Martin Corporation, 644 F.3d 1321 (11th Cir. 2011). In this case, the plaintiffs, all of whom were white, were terminated for having transmitted a racially offensive e-mail. Within weeks of their terminations, two African American employees were disciplined but not terminated for transmitting a racially offensive video. In the course of investigating the plaintiff's actions, the defendant created a disciplinary matrix that included a number of characteristics of the white individuals subject to discipline, one being their race. Defendant denied that this had anything to do with the decisionmaking process and should not be counted toward evidence of racial bias. The Eleventh Circuit had this to say about the practice:

Lockheed has represented that it had no policy in place calling for HR to account for an employee's race in this fashion; instead, Bryant has supported his tracking of race as merely a decision of personal convenience, intended to aid his putative future reporting of that information to external authorities. Evidence in the record contradicts Bryant's stated reason, however. Indeed, according to other HR officials—including Heiserman—there simply was no “possible [HR] reason” or “legitimate ... business purpose for Lockheed to be” monitoring the race of employees in the course of a discipline investigation.

Moreover, Bryant has claimed that employee race did not play any role in the ultimate discipline decisions made, despite appearing on the “matrix” as a key consideration in those discipline determinations. That is, Bryant has stated, it was understood that Lockheed's principal decisionmakers would “close one eye [to the race entry]” when looking at the “matrix.”

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The discipline “matrix,” on which Mitten's race was tracked, strengthens the reasonableness of the inference that Heiserman sought to fire all whites who distributed racist emails and, thus, fired Mitten because of his race. The disciplinary review committee and Heiserman relied on the “matrix” to reach their discipline decisions, including Mitten's. On its face, the “matrix” indicates that race was pertinent to the discipline decisions made, and Lockheed has not explained satisfactorily why this was legitimate. Therefore, although the district court entirely ignored this fact, Lockheed's injection of race into its decision-making process yields an unavoidable inference that the employee's race impacted the discipline determination, and it is a jury's province to decide whether race actually bore on the decision to terminate Mitten. See, e.g., Williams v. Lindenwood Univ., 288 F.3d 349, 356 (8th Cir. 2002) (“[I]ntegrating racial
language at all into the decision-making process creates the inference that race had *something* to do with the decision-making process.

*Id.* at 1345-46 (footnotes omitted). The court explained further that “[i]t plainly defies reason to believe, and a jury, in turn, reasonably could discount, Bryant’s implausible claim that race, notwithstanding its presence on the “matrix” was not considered by the disciplinary review committee or Heiserman because those decisionmakers were expected to “close one eye” to the employee’s race when looking at the “matrix.” *Id.* at 1345 n. 83.

*Smith v. Lockheed* is a good example of a highly questionable business practice yielding evidence of pretext. Pretext can also be shown through an inexplicable deviation from standard practices. *See Kouvchinov v. Parametric Tech. Corp.*, 537 F.3d 62, 68 (1st Cir. 2008). In *Kouvchinov*, the court acknowledged the possibility of showing pretext through an employer’s failure to adhere to a documented policy and practice of hearing an employee’s side of the story before terminating him, although in that case the plaintiff failed to present sufficient proof of consistent application of such a policy. In a “shoe on the other foot” scenario, in *Lugo v. Avon Products, Inc.*, 2011 WL 747961 (D.P.R. 2011), an employer lost the pretext argument where it failed to show that it consistently applied a policy of terminating probationary employees that receive negative evaluations and warnings. *See also Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 875 (11th Cir. 1986)(selective implementation of prior experience requirement when it came to male job applicants).

In addition, the reasonableness of an employer’s policies or practices can also be probative of pretext. The more idiosyncratic or questionable the employer’s reason, the easier it will be to expose it as a pretext, if indeed it is one. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1027 n. 6 (1st Cir. 1979). In *Kilgo v. Bowman Transp., Inc.*, *supra*, the employer’s idiosyncratic and questionable policies related to women as truck drivers raised an inference that the company was deliberately trying to exclude women. For instance, the company refused to provide separate sleeping, shower and bathroom facilities for its women drivers and female applicants were informed about the lack of separate facilities. *Id* at 874-75. Similarly, women were not hired as over the road drivers because of a policy against women driving with men other than their husbands. *Id.*

Notwithstanding the fact that suspect practices can lead to a finding of pretext, courts acknowledge that an employer has the right to act somewhat irrationally and even to employ unsound business practices. *Zick v. Verson Allsteel Press Co.*, 644 F. Supp. 906, 911 (N.D. Ill. 1986)(citing *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir.1980)); *Rose-Matson v. NMR Hospitals, Inc.*, 133 F.3d 1104, 1107-1109 (8th Cir.1998)(discrimination laws do not prohibit employment decisions based on job performance, erroneous evaluations, personality conflicts, or even unusual business practices); *Stockwell v. City of Harvey*, 597 F.3d 895 (7th Cir.2010)(“courts are not ‘super-personnel departments’ charged with determining best business practices”). Thus, a company can completely shirk the reasoned practice of investigating allegations of wrongdoing before committing to a disciplinary decision. *Gallow v. Autozone, Inc.*, 10
952 F. Supp. 441, 449 n. 6 (S.D. Tex. 1996)(“the failure to investigate (while possibly a poor business practice) does not establish that Defendant's proffered reason for terminating Plaintiff was a pretext for discrimination”).

Still, while employers are given a wide berth to act irrationally, there are limits. For instance, employers have the right to act and apply policy in a subjective manner yet the subjective standards must be non-discriminatory and related to job performance. Courts have held that a “subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion.” Chapman v. AI Transp., 229 F.3d 1012, 1034 (11th Cir. 2000); see also E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1297 (11th Cir. 2000)(“employment decisions may legitimately be based on subjective criteria as long as the criteria are capable of objective evaluation and are stated with a sufficient degree of particularity”). To be sure, deviation from standard business practices can infuse the decision with the taint of pretext. See Lattimore v. Polaroid Corp., 99 F.3d 456, 466-67 (1st Cir.1996).

Likewise, irrational business behavior will present a red flag for pretext. In Radentz v. Marion County, 640 F.3d 754, 758-59 (7th Cir. 2011) the plaintiffs alleged that their contracts as pathologists were terminated in order for the County to hire African American pathologists. The Defendant argued the termination was to save money. The court addressed this “business decision” as follows:

In their briefs to this court, the defendants appear to believe that it is not our province to inquire as to why they chose to terminate rather than modify the contract, and that we cannot examine the wisdom of their business decisions. They further argue that the plaintiffs brought a discrimination complaint based on the termination, not based on a failure to renegotiate the contract. We do not examine the wisdom of business decisions, but we do consider whether the asserted justification for the termination was honestly-held. That determination is relevant to the claim of discriminatory termination. Here, the defendants consistently have maintained that they were pleased with the quality of the plaintiffs' services, and that they wished to retain the services of the plaintiffs, but that they could not do so because the out-of-county autopsies rendered the contract too expensive. They failed, however, to utilize the contract provision that would have directly met both of those professed desires—it would have eliminated the extra expense while retaining the services of the plaintiffs. Nor could the requirement of six months' notice have been a factor in that choice, because in terminating the contract, the defendants relied on the provision for terminating without cause, and gave the six months' notice required by that provision. The failure to exercise the right under provision K to eliminate the troublesome expenses, and to instead terminate the contract, casts doubt on whether the expense was actually the reason for the termination.
Another business practice that can be fertile ground for raising pretext is pre-selection of candidates for what was otherwise supposed to be a competitive job application process. In Deslauriers v. Napolitano, 738 F. Supp. 2d 162 (D. Me. 2010) the court described how pre-selection can form the basis for a showing of pretext. The court noted that while pre-selection of a candidate alone may not violate the law where it is “based on the qualifications of the preselected party” (Goostree v. State of Tennessee, 796 F.2d 854, 861 (6th Cir. 1986); accord Kennedy v. Landon, 598 F.2d 337, 341 (4th Cir. 1979)) it “can be relevant to the employer’s motivations and ‘operate[] to discredit the employer’s proffered explanation for its employment decision.’” Deslauriers v. Napolitano, 738 F. Supp. 2d at 181 (quoting Goostree, 796 F.2d at 861 and citing Ham v. Washington Suburban Sanitary Comm’n, 158 Fed.Appx. 457, 470 (4th Cir. 2005) (preselection can support a finding of pretext in conjunction with other evidence); Coble v. Hot Springs Sch. Dist. No.6, 682 F.2d 721, 728–29 (8th Cir. 1982) (finding that evidence of preselection discredited the school district’s proffered legitimate explanation)).

As evidenced from the authority cited here, business practices can be a fertile ground for a showing of pretext but it is also subject to a court’s nod to business judgment and prerogative if not also a court’s reluctance to appear to be acting as a “super personnel board.” From the plaintiff’s perspective it is much better if some questionable business policy or practice could also be combined with justifications that are decidedly implausible or fantastic as in the Smith v. Lockheed case.

B. Implausible or Fantastic Business Justifications for Adverse Employment Actions

In the face of court allowances for subjective and even irrational business reasons for employment actions, there are some reasons for employment decisions that are inherently suspect and sufficient to show pretext. That is, the reasons are simply to implausible or fantastic to be credible. Some examples include the following:

- Termination for physical contact with manager during investigatory interview questionable where plaintiff touched the manager only because he was specifically asked to demonstrate how he had touched another employee.5

- Layoff due to overstaffing and need for efficiency implausible where most of the construction crews were working 10 hour days, six days a week and the project was months behind schedule.6

- Rejection of plaintiff’s job application for her refusal to submit to pre-employment medical tests unworthy of belief where plaintiff, at most, stated that she “would not want” to take further tests in light of her pregnancy. The defendant’s position was further

undermined by its failure to notify the plaintiff of the need for further testing or alternatives.\(^7\)

- Termination of plaintiff with heart problems based on determination nine months prior that he was endangering employees and damaging company property was more than curious since the company kept him employed for the nine months and even responded to a request for verification of employment by saying his probability for continued employment was excellent.\(^8\)

- Denial of raise due to budget constraints implausible where records clearly show surplus and other raises given.\(^9\)

- Four years of stellar performance belies sudden claims of poor working relationships to justify termination of teacher after advocacy for disabled students.\(^10\)

- Termination of plaintiff for alleged drug conviction implausible where supervisor had hired felons on parole (one of which had been involved in a burglary that the employer, incredulously, argued was not a “job related” offense) and employed drug users.\(^11\)

- Refusal to hire female plaintiff for nighttime wait-staff position because she already worked lunch and couldn’t work two jobs implausible since plaintiff was already working nights in cocktail position.\(^12\)

- Argument that, to save costs, plaintiff pathologists had to have their contracts terminated rather than modified because if merely modified plaintiffs may have exercised their own right to terminate the contracts so nonsensical as to be evidence of pretext.\(^13\)

- In termination for theft, ignoring evidence refuting culpability and applying different disciplinary tactics for similar offenses raises question of pretext.\(^14\)

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7 *Beatty v. Chesapeake Ctr., Inc.*, 818 F.2d 318, 322 (4th Cir. 1987)(finding employer's explanation for its employment action inherently incredible as a matter of law).
8 *Borrelli v. Metal Traders, Inc.*, 2008 WL 2914795 (W.D. Pa. 2008)(the company manager had also said the plaintiff could not be trusted due to his recent heart problems).
11 *Uniroyal Tech. Corp. v. N.L.R.B.*, 151 F.3d 666, 669 (7th Cir. 1998).
13 *Radentz v. Marion County*, 2011 WL 1237931 (7th Cir. 2011).
Rationale for terminating sales associate implausible where focused not on sales but on extraneous deficiencies and ignored unquestionable success in the sole area of evaluation identified by employer’s own performance criteria.\footnote{Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 332 (3d Cir.1995) \textit{but see} Taylor v. Peerless Indus. Inc., 322 F. App’x. 355, 362-63 (5th Cir. 2009)(positive sales volume alone insufficient to raise question of pretext in performance based termination).}

Termination suspect where none of the performance problems were mentioned in any evaluations, plaintiff was on promotional list and had received positive recommendations.\footnote{Shockley v. Minner, 726 F.Supp.2d 368, 378-79 (D. Del. 2010).}

Non-promotion for poor performance highly suspect where plaintiff produced numerous letters from customers and company employees and supervisors establishing promotability.\footnote{Robinson v. Home Depot, Inc., 2009 WL 2960990 (D.N.J. 2009)(“whether an employer has “misjudged” an employee’s performance is relevant to the question of pretext”)(citing Fischbach v. D.C. Dep’t of Corr., 86 F.3d 1180, 1183 (D.C.Cir.1996) (“[I]f the employer made an error too obvious to be unintentional, perhaps it had an \textit{unlawful motive} for doing so.”)).}

Of course, the fact that a court may think that the employer acted irrationally does not mean discrimination is proved; rather, discrimination is proven only where the evidence of pretext leads to the conclusion of discrimination. \textit{Burdine}, 450 U.S. at 259; \textit{McDonnell Douglas}, 411 U.S. at 804-05. Still, as evidenced here, questionable reasons for an adverse employment action can bring the plaintiff one step closer to proving discrimination so long as it is shown that the standard or criterion the employer relied on was “obviously weak or implausible.” \textit{Villanueva v. Wellesley College}, 930 F.2d 124, 131 (1st Cir. 1991).

C. Inconsistencies and Shifting Reasons

Just as an employee might be closely questioned as to his or her account of discrimination, so too will an employer’s justification for its actions be scrutinized for inconsistencies, including whether that such justification shifts or changes over time. \textit{See EEOC v. Ethan Allen}, 44 F.3d 116, 120 (2d Cir.1994)(“From such discrepancies a reasonable juror could infer that the explanations given by [an employer] were pretextual, developed over time to counter the evidence suggesting [discrimination]”).\footnote{See also Washington v. Garrett, 10 F.3d 1421, 1434 (6th Cir.1993) (“[I]n the ordinary case, such fundamentally different justifications for an employer’s action ... give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that ... the official reasons [were not] the true reason[s]”; Castleman v. Acme Boot Co., 959 F.2d 1417, 1422 (7th Cir.1992) (“A jury’s conclusion that an employer’s reasons were pretextual can be supported by inconsistencies in ... the decisionmaker’s testimony”).}

Numerous cases provide authority for the “shifting reason” attack on an employer’s non-discriminatory reasons for its employment actions. Some of them include: \textit{Cleveland v. Home Shopping Network, Inc.}, 369 F.3d 1189, 1194 (11th Cir. 2004)(inconsistent rationale for termination allowed jury to question credibility and once credibility is...
damaged, a rational jury could infer discrimination); *Kobrin v. Univ. of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994)(“Substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext”); *Cicero v. Borg–Warner Auto., Inc.*, 280 F.3d 579, 592 (6th Cir. 2002) (“An employer's changing rationale for making an adverse employment decision can be evidence of pretext”); *Siraj v. Hermitage in N. VA*, 51 F. App’x. 102, 111 (4th Cir. 2002)(citing *EEOC v. Sears*, 243 F.3d 846, 852-53 (4th Cir. 2001) (employer's shifting reasons for adverse employment action is, in and of itself, probative of pretext)).

However, it must be said that minor discrepancies will not be enough to create an inference of pretext. See *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 216 (4th Cir. 2007) (“Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it”) (quoting *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006)). Likewise, where arguably different reasons for an adverse action are nevertheless compatible, they will not, without more, be sufficient to show pretext. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1997) (compatible reasons for adverse employment decision are not necessarily shifting reasons and are insufficient to raise a genuine issue of fact as to pretext); see also *Ritter v. Hughes Aircraft*, 58 F.3d 454, 459 (9th Cir. 1995) (explaining that an inference of pretext arises only “where an employer simultaneously offer[s] two distinct and arguably inconsistent reasons for an employee’s discharge”).

Multiple sources provide opportunities for diligent plaintiff’s counsel to ferret out evidence of shifting reasons. One source can be firsthand accounts of the adverse action meetings, whether they be obtained through company documents like write-ups or counseling memos and separation notices or exit interviews, declarations of witnesses or the occasional surreptitious recording. Other sources include Department of Labor documents, unemployment or due process hearing transcripts, agency position statements and audit reports of various kinds. Consistency is the watch-word for employers and it is often difficult to maintain consistency when the position is a cover-up for an illegal motivation. The key for plaintiff’s counsel is to get the information early and before all documents are filtered through legal counsel and the lens of litigation. See Section V, infra.

**D. Past Discrimination and General Practices e.g. Other Act Evidence**

It has long been the case that background evidence and evidence of other acts of discrimination may have a particularly relevant role in proving discrimination. In *McDonnell Douglas Corp. v. Green*, the Court made it clear that past practices with respect to minority employment may be a necessary part of proving discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 805. Consistent with this position, courts have been willing, in appropriate cases, to allow evidence of past practices in order to show discrimination. In the often quoted case of *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), the Eighth Circuit held that:
Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices—evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Id. at 1103. While “proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual,” it “may add ‘color’ to an employer’s decisionmaking process.” Ruiz v. Posadas de San Juan Assoc., 124 F.3d 243, 249 (1st Cir.1997). In Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008) the Supreme Court underscored the fact that there should be no per se exclusion of “other act” evidence. Id. at 387 (discussing evidence of discrimination by other supervisors in the context of an ADEA suit); see also Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1285-86 (11th Cir.2008) (upholding admission of evidence of racial discrimination against other employees to prove an employer’s intent to discriminate). The issue of admissibility, however, is one that will be left largely to the trial court and reviewed on an abuse of discretion standard. Id.

Technically speaking, presentation of “other act” evidence may not be part of the traditional McDonnell Douglas/pretext method of proof; rather, it has been described as being in line with proving discrimination directly through “circumstantial evidence.” As explained in a number of Seventh Circuit cases, this would be part of creating a “convincing mosaic of circumstantial evidence,” a tactic discussed more in Section IV below. That said, such proof is important if for no other reason than to bolster the evidence of pretext. Indeed, other act evidence not shown to be directly related to the discriminatory decision at issue though not supportive of a direct-method-of-proof case could, in connection with other evidence, support a case under the traditional McDonnell Douglas framework. Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 762 (7th Cir. 2001). An explanation of this method of proof and where “other act” evidence fits in may be helpful.

The distinction between the direct and indirect methods of proof was well stated in Faas v. Sears, Roebuck & Co., 532 F.3d 633 (7th Cir. 2008). There, the court noted that a plaintiff may establish a claim of discrimination through either the direct or indirect methods of proof and that a plaintiff may utilize circumstantial evidence under both methods although the distinction is vague, and the terms are somewhat misleading. Id. at 641 (citing Luks v. Baxter Healthcare Corp., 467 F.3d 1049, 1052 (7th Cir.2006)). The direct method of proof, as explained in Faas, involves direct evidence, such as near-admissions by the employer, as well as more attenuated circumstantial or “other act” evidence that suggests discrimination albeit through a longer chain of inferences. Id. (citations and internal quotes omitted). In contrast, the indirect method of proof involves a certain subset of circumstantial evidence that includes how the employer treats similarly situated employees, and conforms to the prescription of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Id.

Other act evidence fits within this “direct method” category and, unlike comparator evidence, is subject to a less stringent standard of admissibility. In
Stimeling v. Board of Educ. Peoria Public Schools Dist., 2010 WL 4922880 (C.D.Ill. 2010). The court noted that:

proof of disparate treatment of similarly situated employees is not required to make a direct case of discrimination. [A plaintiff] may reference behavior toward other[s] [in his protected class] . . . without any requirement of substantial similarity and may demonstrate that he was passed over or replaced by a [person outside his class] and that Defendants' stated reason is pretextual without demonstrating substantial similarity.

Id. at *8. This is not the “comparator evidence” discussed below but the type of evidence referred to as “me too” evidence – the type considered by the Court in Sprint/United Mgmt. Co. v. Mendelsohn, supra.

The third circuit offers a slightly different formula in which “other act” evidence is helpful to a finding pretext. In Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir.1994), the Third Circuit held that to survive summary judgment, a plaintiff may show pretext in one of two ways. She must point to some direct or circumstantial evidence, “from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.” Id. at 764. Under the second approach, a plaintiff must show that, notwithstanding the employer's legitimate nondiscriminatory reason, discrimination was “more likely than not” the motivation behind the employer’s actions, a showing that may be satisfied by evidence “that the employer has previously discriminated against her, that the employer has discriminated against other persons within the plaintiff’s protected class or within another protected class, or that the employer has treated more favorably similarly situated persons not within the protected class.” Dean v. Kraft Foods N. Am., Inc., 2005 WL 1793532 (E.D. Pa. 2005)(quoting Simpson v. Kay Jewelers, 142 639, 645 (3rd Cir. 1998)). In Dean, the plaintiff presented evidence of past discrimination against both herself and other African-American employees sufficient to suggest a finding of pretext under the second method outlined in Fuentes. Even though the plaintiff failed to discredit her employer’s nondiscriminatory explanation, she was able to show pretext with evidence of its past discrimination.

In other cases, evidence of other acts have been allowed in order to show motive. Typically, admissibility centers around a showing of some connection be it temporal or fact based with the case at bar. See Allen v. Magic Media, Inc. 2011 WL 903959 (D.Kan. 2011)(“Because direct testimony as to the employer's mental processes seldom exits, evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination [and] [e]vidence of a defendant’s past sexual harassment admitted to prove discriminatory intent in cases of race and gender discrimination may be admitted for a proper purpose under Rule 404(b)’’); King v. McMillan, 594 F.3d 301, 310 (4th Cir. 2010)(prior harassment by the same perpetrator); Alaniz v. Zamora-Quezada, 591 F.3d 761, 774 (5th Cir. 2009)(cases tried together and
multiple plaintiffs allowed to testify concerning sex discrimination under the same modus operandi).

All that said, however, any “other act” evidence will be scrutinized not only under Fe.R.Civ.P. 403 but also 404. Cases excluding such evidence are numerous and include the following recent cases: *Mendelsohn v. Sprint/United Management Co.*, 2010 WL 4540310 (10th Cir. 2010); *Buonanoma v. Sierra Pacific Power Co.*, 2010 WL 3724254 (D.Nev. 2010); *Murphy v. Kmart Corp.*, 2010 WL 3703708 (D.S.D. 2010); and *Mulligan v. Provident Life & Acc. Ins. Co.*, 271 F.R.D. 584, 590-91 (E.D.Tenn. 2011).

E. Statistics

Although rarely sufficient on its own, statistical evidence showing disparate treatment by the employer of members of the protected class can prove that an alleged legitimate employment decision was pretextual. *Deslauriers v. Napolitano*, 738 F. Supp. 2d 162, 183-84 (D. Me. 2010); *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991); but see *Jackson v. Watkins*, 619 F.3d 463, 468 (5th Cir. 2010)(requiring more than statistics alone to rebut employer’s articulated nondiscriminatory reasons). This is because statistical data showing an employer’s pattern of conduct toward a protected class can create an inference that an employer discriminated against individual members of the plaintiff’s class. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1114–1115 (10th Cir.2007); *Noyes v. Kelly Services*, 488 F.3d 1163, 1173 (9th Cir. 2007). “Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer’s offered explanation for an employment decision regarding a particular individual masks a discriminatory motive.” *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84 –85 (2nd Cir.1990). However, in order to create such an inference of pretext, “a plaintiff’s statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between comparable individuals.” *Fallis v. Kerr–McGee Corp.*, 944 F.2d 743, 746 (10th Cir.1991).

Some things to consider when looking to statistical evidence for proof of pretext include the following:

- There must be additional supporting evidence.19

- The pool size and time period may be determinative – smaller and narrower might be better.20

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19 *Ortiz v. Norton*, 254 F.3d 889, 897 (10th Cir.2001); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 848 (1st Cir.1993)(“a company’s overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer when [deciding whether to promote] a particular individual”); *Baker v. Randstad N. Am., L.P.*, 151 F. App’x. 314, 320 (5th Cir. 2005)(“Although statistical evidence can be probative of pretext, it is extraordinarily rare that raw numbers can insulate a plaintiff from summary judgment”).

20 *Springs v. Mayer Brown, LLP*, 2011 WL 2004229 (W.D.N.C. 2011)(allowing discovery of information for statistical use “due to the relatively small size of defendant’s Charlotte office and the limited time in
Gross statistical disparity is preferred if not required.\textsuperscript{21}

Significant context and relationship to the challenged action must be provided.\textsuperscript{22}

Statistics must account for nondiscriminatory explanations such as variations in job performance, experience and training.\textsuperscript{23}

General statistical evidence will not suffice.\textsuperscript{24}

Even with its obvious limitations, plaintiffs should pursue and argue for consideration of statistical evidence as relevant to the overall employment picture. Plaintiff's should argue that objections go to weight not admissibility of such evidence. See \textit{Obrey v. Johnson}, 400 F.3d 691, 695 (9th Cir. 2005)(“A statistical study may fall short of proving the plaintiff’s case, but still remain relevant to the issues in dispute. [Studies] may be relevant, and therefore admissible, even if . . . not sufficient to establish [a] prima facie case or a claim of pretext. Thus, objections to a study’s completeness generally go to ‘the weight, not the admissibility of the statistical evidence’”).

\section*{F. Comparators}

Comparator evidence is a strong indicator of pretext and an avenue of proof that should never be ignored. \textit{McDonnell Douglas}, 411 U.S. at 804 (“Especially relevant” to a showing of pretext “would be evidence that white employees involved in acts against petitioner of comparable seriousness ... were nevertheless retained or rehired”). Unfortunately, the circuits are not consistent as to what level of comparison is necessary for a showing of pretext, although the majority seem to favor a very high level of comparison or “nearly identical” standard.

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\textsuperscript{21}Carney v. City and County of Denver, 534 F.3d 1269, 1275 (10th Cir.2008) (suggesting that “gross statistical disparities” may show pretext, but refusing to determine whether the statistical disparities at issue were gross because there were numerous problems with the plaintiff’s statistical evidence).
\textsuperscript{22}Cheatham v. Allstate Ins. Co., 465 F.3d 578, 583 (5th Cir.2006) (statistics not probative of discriminatory intent because they were devoid of context); \textit{EEOC v. Tex. Instruments, Inc.}, 100 F.3d 1173, 1185 (5th Cir.1996) (probative value of statistical evidence depends on all the surrounding facts, circumstances, and other evidence of discrimination); \textit{Dooley v. Roche Lab Inc.}, 275 F. App’x. 162, 165 (3d Cir. 2008)(“But while ‘[s]tatistical evidence of an employer’s pattern and practice with respect to minority employment may be relevant to a showing of pretext,’ we have explained that conclusions cannot fairly be drawn from ‘raw numerical comparisons’ in the absence of ‘analysis of either the qualified applicant pool or the flow of qualified candidates over a relevant time period’”); \textit{Kilpatrick v. Tyson Foods, Inc.}, 268 F. App’x. 860, 863 (11th Cir. 2008).
\textsuperscript{23}Sanders v. Su. Bell Tel., L.P., 544 F.3d 1101, 1110 (10th Cir.2008).
\textsuperscript{24}Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 542-43 (3d Cir.1992) (statistical evidence too general to establish pretext); Molthan v. Temple Univ. of Com. System of Higher Educ., 778 F.2d 955, 963 (3d Cir.1985) (same); Bogren v. Minnesota, 236 F.3d 399, 406 (8th Cir. 2000)(generic employment statistics are not probative of reasons for her termination).
\end{flushright}
Eleventh Circuit: Nearly identical standard. *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999) (“We require that the quantity and quality of the comparator’s misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges”);

Tenth Circuit: Similar in all relevant respects and conduct of comparable seriousness. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir.1997); *Kendric v. Penske Transp. Servs.*, 220 F.3d 1220, 1230 (10th Cir. 2000);


Eighth Circuit: Similar in all relevant respects. *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005) abrogated on other grnds by *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011);

Seventh Circuit: Prima facie identical in all relevant respects or directly comparable in all material respects. *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir.2002); *Ajayi v. Aramark Bus. Servs.*, Inc., 336 F.3d 520, 532 (7th Cir.2003).

Sixth Circuit: Nearly identical standard. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir.1994) (“plaintiff must prove that all of the relevant aspects of his employment situation are ‘nearly identical’ to those of the ... employees who he alleges were treated more favorably”);

Fifth Circuit: Nearly identical standard. *Martin v. Budget Rent-A-Car Sys. Inc.*, 2011 WL 2748540 (5th Cir. 2011)(“plaintiffs offering another employee as a comparator must demonstrate that the employment actions at issue were taken under “nearly identical” circumstances”);

Third Circuit: Similar in all relevant respects. *Opsatnik v. Norfolk S. Corp.*, 335 F. App’x. 220, 223 (3d Cir. 2009);

Second Circuit: Reasonably close resemblance. *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir.2000) (“[T]here should be an ‘objectively identifiable basis for comparability’ “ shown by “a reasonably close resemblance of the facts and circumstances of plaintiff’s and comparator’s cases”); see also *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997)(similar in all material respects);

First Circuit: Similar in all relevant respects. *Kosereis v. Rhode Island*, 331 F.3d 207, 214 (1st Cir.2003) (“plaintiff must show that others similarly situated to him in all relevant respects were treated differently by the employer”);
DC Circuit: Nearly identical standard. McFadden v. Ballard Spahr Andrews & Ingersoll, LLP, 611 F.3d 1, 4 (D.C.Cir.2010) (comparators must be “nearly identical” in all relevant aspects of their employment to be similarly situated).

Despite the relatively high level of comparisons required by the courts, counsel should be careful not to place too much emphasis on titles or, in some cases, even rank. See Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1326 (11th Cir.2011) (“[D]ifferences in job ranks ... are not, in and of themselves, dispositive as to whether the two individuals may be compared for the purposes of evaluating a discrimination claim”) (quoting Rioux v. City of Atlanta, 520 F.3d 1269, 1281 (11th Cir.2008)). If there are differences in rank or title, the critical question is whether the employer subjected differently ranked employees to the same or different employment policies. Lathem v. Dep’t of Children & Youth Servs., 172 F.3d 786, 793 (11th Cir.1999). Ultimately, however, the question of whether persons are similarly situated is a factual question for the jury. McDonald v. Vill. of Winnetka, 371 F.3d 992, 1002 (7th Cir. 2004); George v. Leavitt, 407 F.3d 405, 414-15 (D.C.Cir.2005); Harlen Assoc. v. Vill. of Mineola, 273 F.3d 494, 499 n. 2 (2d Cir.2001).

IV. The “Mosaic” of Evidentiary Proof

While there are many different ways in which pretext may be shown, it will come as little surprise to learn that the most successful cases are those that offer the court and factfinder multiple avenues from which to approach the question of pretext and, ultimately, discrimination. To be sure, “each type of circumstantial evidence can be used on its own or in conjunction with the other types of circumstantial evidence to establish discrimination.” Titus v. Elgin, Joliet & Easter, 2005 WL 1432193 (N.D. Ind. 2005)(citing Troupe v. May Dep’t Store Co., 20 F.3d 734, 736 (7th Cir. 1994)). The most common path for proving discrimination is through the traditional McDonnell Douglas model; that is, utilizing an “indirect” method of proof. However, this should not be a plaintiff’s first volley. Instead, a plaintiff should first focus on what the Seventh Circuit has described as the “direct” method of proof.

The direct method is proof of discrimination either by direct evidence (something that is not available in most cases and unnecessary to discuss in a paper whose focus is pretext) or by showing a “convincing mosaic” of circumstantial evidence that “allows a jury to infer intentional discrimination by the decisionmaker.” Silverman v. Board of Education, 637 F.3d 729, 733 (7th Cir.2011). Let’s call this the “shotgun shell” approach. Under this theory, a plaintiff attempts to prove discrimination directly by presenting any of three broad types of circumstantial evidence:

1. Evidence including suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn.

2. Evidence whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic
(pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment.

(3) Evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer’s stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination. [This type of evidence is substantially the same as the evidence required to prove discrimination under the indirect method mentioned above].

_id_. at 734; _Troupe v. May Department Stores Co._, 20 F.3d 734, 736 (7th Cir.1994). A plaintiff uses evidence under this method of proof to show discrimination directly but, as an amalgam of all the various methods of proving pretext, it can only serve to advance a plaintiff’s position even if it does not suffice to directly prove the point of intentional discrimination.

This “convincing mosaic” or “shotgun shell” approach was relied on in _Smith v. Lockheed-Martin Corporation, supra_, where the plaintiffs, five white employees, avoided summary judgment through a showing of pretext based on a multifaceted evidentiary approach that eschewed the traditional _McDonnell Douglas_ model. While there was not a direct comparator due to differences in rank between the remaining plaintiff in the case and the African American employee who received better treatment, the plaintiff was able to show proof in the following forms:

(a) testimony and documentary evidence of a motive to severely discipline white employees so as to avoid adverse publicity;

(b) better treatment of African American employees (suspension) for a nearly identical offence that caused plaintiffs to be fired;

(c) implausible explanations for the more severe discipline of the white employees;

(d) “me too” evidence from other white employees terminated under similar circumstances;

(e) predetermined disciplinary measures; and

(f) questionable business practices with regard to racial identifications in a disciplinary matrix.

This evidence was accepted by the court as an alternative to the _McDonnell Douglas_ traditional framework with the admonition to the defense that “establishing the elements of the _McDonnell Douglas_ framework is not, and never was intended to be, the _sine qua non_ for a plaintiff to survive a summary judgment motion in an employment
discrimination case.” Id. at 1328. The court underscored the fact that in proceeding this way, the failure to produce a comparator, a necessity for making out a prima facie case, did not doom the case as a whole. Id.

This, of course, all makes sense for, as the Supreme Court has made clear, in handling these cases the issue is simply proof by a preponderance of the evidence and, on summary judgment, proof sufficient to convince a reasonable jury to return a verdict for the plaintiff:

we should not depart from the [c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases. That rule requires a plaintiff to prove his case by a preponderance of the evidence, using direct or circumstantial evidence. We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in Reeves v. Sanderson Plumbing Products, Inc. . . . we recognized that evidence that a defendant’s explanation for an employment practice is unworthy of credence is one form of circumstantial evidence that is probative of intentional discrimination. The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.

Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003)(internal quotes and citations omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986) (a motion for summary judgment is defeated when the plaintiff has presented evidence “such that a reasonable jury could return a verdict for the [plaintiff]”).

The point is that plaintiffs need to paint with a broad brush. Being tied to proof of pretext through a formulaic model simply gives the defense a path to argue dismissal and offers the temptation to segregate a plaintiff’s proof into parts that separately might fail to persuade but when viewed together is a compelling tale of discrimination. It is the combination of factors, any of which judged on their own would be much less compelling, that provides sufficient evidence to allow a reasonable jury to conclude that an employer’s explanation for some adverse action is a pretext for impermissible discrimination. Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 102 (2d Cir. 2001).

V. Practical Tips

There is no direct path to the development of evidence that might support an argument for pretext but some ideas can be gleaned from the case law and experience, most of which revolve around case investigation and discovery. The following are bullet points to provide some direction. There are no secrets here just some rather obvious but sometimes overlooked practical tips:
➢ **Start Early**

One can assume that the employer will not be admitting discrimination although it is not unheard of, particularly in certain disability cases and sometimes FMLA cases. This will certainly be clear upon the first call from the client. It is at this point, when the clients explain why they were told they were being fired, not hired, denied a promotion or refused a raise – even if no explanation was given - that investigation and development of evidence of pretext must begin. This starts with a review of anything the client has in the way of documentation. It also requires immediate development of witnesses and obtaining of witness statements. Ethical rules permitting, there are many employees that are fair game for an early interview and some may even give statements. Ex-employees are almost always appropriate for an interview and can provide a wealth of evidence as to past practices and, in some instances, similar acts that can be helpful as background or “other act” evidence.

Documentary evidence that might be available includes: client notes (diaries and calendars); a client’s electronically stored information e.g. e-mails (which demands a discussion of who is the rightful owner and the need to preserve such “ESI”); exit interview notes; separation notices; termination letters; taped conversations – ubiquitous these days; as well as third party records – if your client didn’t tape a meeting or retain some documents odds are another witness may have. If it is a public employer, open records act requests are a necessary first step. In addition, on-line resources should be exhausted, including reviews of Secretary of State records, Pacer and other court filings. Westlaw – especially if you have access its brief bank and filed documents database – is very valuable.

➢ **Embrace the Unemployment Hearings**

Unemployment proceedings are invaluable for developing, early on, reasons for discharge that may later shift and become ammunition for an argument of pretext. If unemployment is challenged, a mistake that many employers cannot resist, often it is an opportunity for early cross examination and development of decisionmaker testimony that, if not directly admissible can be used for impeachment. The hearing itself will offer the opportunity to subpoena witnesses and develop third party testimony that can be critical. The unemployment file will include information from the employer gleaned from witnesses that may not have been prepared by defense counsel and thus helpful to a more accurate assessment of the facts. In addition, the file will many times include the very documentation that the employer refused to allow the plaintiff to take with him or her upon termination.

➢ **Use the Agencies**

An employment case invariably involves a government agency. If there is not a state agency then there will certainly be a federal one such as the NLRB, EEOC, VETS, OSHA, or the U.S. Office of Special Counsel. These agencies will start the leg work of discovery. Employer position statements obtained after the close of an investigation will provide a wealth of information and potential evidence that, like unemployment records, can provide evidence of shifting reasons for an adverse employment action.
These agencies can also be helpful inasmuch as they will have access to prior discriminatory activity that may not be readily available before discovery.

➤ **Be Aggressive in Discovery**

Employers will resist discovery that is any more far-reaching than the unit in which your client worked and that will be narrowly defined. In order to develop appropriate other act evidence, similarly situated comparators and broader discriminatory practices, a plaintiff’s counsel must look beyond the employer defined unit to the farthest reaches of the highest official to have had a say in the employee’s mistreatment.

In the absence of any evidence that there were hiring or firing practices and procedures applicable to all the employing units, discovery may be limited to plaintiff’s employing unit. Discovery may be expanded from the Plaintiff’s employing unit, however, if the plaintiff can show the requested information is “particularly cogent” to the matter or if the plaintiff can show a “more particularized need for, and the likely relevance of, broader information.”

In determining the appropriate employing unit of the plaintiff alleging employment discrimination, courts look to the level of the supervisor or supervisors who are primarily responsible for the employment decision regarding the plaintiff and other similarly-situated employees. The rationale is that the motive and intent of the supervisors who made the employment decisions relating to the plaintiff and other employees is relevant to determining whether the employment decision was discriminatory.

*Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 653-54 (D. Kan. 2004). In many cases, Human Resources may be so involved in the employment decision that company-wide or region-wide discovery is permissible. If the opportunity presents itself, it should not be squandered.

In addition, discovery geared toward statistical proof should, in appropriate cases, be developed. Often this will include discovery of historical termination, hiring, promotion and/or pay practices. While rarely probative on its own, such evidence can add to the mosaic of proof that will tilt a case beyond summary judgment and on to trial. Of course, this may necessitate an expert that can help with the appropriate context and provide analysis that will account for nondiscriminatory explanations for the statistical results. Speaking to the relevance of such discovery, the Second Circuit offered the following:

It is well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer’s general practices at the pretext stage to help rebut the employer’s purported nondiscriminatory explanation. Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the
likelihood that an employer's offered explanation for an employment
decision regarding a particular individual masks a discriminatory motive.
This case turns on the sincerity of American Cyanamid’s claim that
Hollander’s abrasive personality justified his discharge, notwithstanding
what Hollander depicts as American Cyanamid’s prior fickle attitude
towards this dimension of Hollander’s job performance and the inability of
a company supervisor to detail instances in which such problems impeded
productivity. It is possible that Hollander’s discovery request might
uncover a pattern of older management employees leaving American
Cyanamid under unexplained circumstances, which might help prove his
claim that American Cyanamid’s explanation for his discharge was
pretextual.

Because employers rarely leave a paper trail—or “smoking gun”—attesting
to a discriminatory intent, disparate 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. Such determinations are, generally speaking, most competently
and appropriately made by the trier of fact. So long as the plaintiff can
present “solid circumstantial evidence” supporting his case, he should
have the opportunity to prove his case at trial. The district court’s refusal
to compel an answer from American Cyanamid deprived Hollander of
evidence potentially helpful to his attempt to assemble such a quantum of
circumstantial evidence supporting his argument of pretext.

\textit{Hollander v. American Cyanamid Co.,} 895 F.2d 80, 84–85 (2nd Cir.1990) (citations
omitted). In that case, discovery was allowed as to the termination of similarly situated
persons from a defined geographic area that was broader than the employing unit.

Finally, e-discovery has evolved into a valuable and indispensable tool for
plaintiffs. Corporate communication is largely electronic and includes not only e-mail
but text messaging and is used from portable devices as well as office computers. It is
essential that a plaintiff plan for and obtain discovery of all manner of communication
that bears upon the employment decision at issue and the company’s workplace
practices. For it is in those communications that valuable evidence of motive will lie.
This will require planning and well-crafted discovery requests that utilize search terms
designed to get the most relevant information with the least amount of effort. Hiring an
IT specialist prior to discovery to assist in this effort should be seriously considered.

VI. Conclusion

It is an understatement to say that proving a person’s, much less a corporation’s,
state of mind is a difficult proposition. Fortunately, this is not necessary at the
summary judgment stage. At the summary judgment stage, it is merely necessary to
show evidence of pretext – evidence that the employer’s explanations for its actions are
false. This paper outlines a number of evidentiary methods for clearing this hurdle and
getting the case to a jury. The best approach, however, is to develop the case with a view
toward showing discrimination directly – through a mosaic of circumstantial evidence that will allow an inference of intentional discrimination and preclude a judge from rendering his or her own decision as to the merits of a matter that is particularly suited for the jury. Any such proof will begin at case intake and continue through aggressive discovery with an eye toward such key elements of proof as suspect business practices, implausible explanations for employment actions, other acts of discrimination, shifting or inconsistent reasons for an otherwise discriminatory employment decision, statistical evidence of discriminatory practices and better treatment of comparable employees outside the protected class. Presented as a whole, particularly when coupled with a prima facie case, such evidence will provide the best opportunity for getting the case beyond summary judgment and for proving the ultimate issue of discrimination at trial.