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Pretext Instructions in Employment Discrimination Cases: Inferring a New Disadvantage for Plaintiffs: Conroy v. Abraham Chevorlet-Tampa, Inc., 375 F.3d 1228 (11th Cir. 2004)

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CASE COMMENTS

PRETEXT INSTRUCTIONS IN EMPLOYMENT DISCRIMINATION CASES: INFERRING A NEW DISADVANTAGE FOR PLAINTIFFS

Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228 (11th Cir. 2004)

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Petitioner was fired from his position as the commercial fleet sales manager for Respondent's car dealership in January of 2001.[1] Respondent told Petitioner that he was being fired because although "he was doing a 'good job' . . . the company was going in a different direction."[2] Petitioner filed suit, alleging that he was discharged in violation of the Age Discrimination in Employment Act (ADEA),[3] based in part on the comments of his supervisor.[4] Petitioner claimed that his supervisor had referred to employees in the commercial fleet department as "geriatrics," and to older employees as "geezer[s]," "dead wood," and "old-fart[s]."[5] At trial, Respondent claimed that Petitioner was terminated due to his poor performance.[6] Petitioner characterized this explanation as a pretext.[7] Petitioner then requested an instruction to inform the jury that if it found that Respondent's explanation was a mere pretext, it was permitted, but not required, to infer that Respondent had discriminated against him.[8] The district court refused to give the proposed instruction.[9] The jury

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* To my parents, Jane and David Schwarz, for inspiring me to dream big and work hard, and to Colin, even though these few words could never express my thanks for everything you do.

** This Case Comment won the George W. Milam award for best case comment.

1. Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1230 (11th Cir. 2004).
2. *Id.*
3. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2000).
4. *Conroy*, 375 F.3d at 1229-30.
5. *Id.* at 1230.
6. *Id.* at 1231. The Human Resources director of Respondent's parent company claimed that Petitioner was fired because Petitioner, and the people he managed in the commercial fleet department, never met standards for number of sales and profitability. *Id.* at 1230-31. Though Petitioner was told at the time of his discharge that he was being let go because "the company was going in a different direction," the Human Resources director testified that Petitioner was told this to "soften the blow" and make the termination easier for Petitioner. *Id.* at 1230-31.
7. *Id.* at 1231.
8. *Id.*
9. *Id.* The district court refused to give the proposed instruction because it believed that the pattern jury instructions adequately covered the information Petitioner's instruction sought to convey. *Id.* Furthermore, the district court stated that the Court of Appeals for the Eleventh Circuit prefers not to inform juries of the legal framework of presenting the case because of the high

subsequently returned a verdict in Respondent's favor, and the district court entered final judgment for Respondent.[10] Petitioner requested a new trial, alleging that the court erred by refusing to give the proposed instruction,[11] but this motion was denied.[12] The Court of Appeals for the Eleventh Circuit affirmed the district court's decision and HELD that the instruction the district court used adequately stated the law; thus, no specific instruction about pretext was necessary.[13]

The ADEA provides that it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual's age."[14] ADEA claims are analyzed by courts within the framework adopted by *McDonnell Douglas Corp. v. Green*,[15] under which the burden of proof is on the plaintiff to prove a prima facie case of discrimination.[16] After the plaintiff establishes the prima facie case, the burden of production is then on the employer to show one or more legitimate, nondiscriminatory reasons for the adverse employment decision.[17] The plaintiff must, in the face of such an explanation, show intentional discrimination[18] because the "ultimate burden of persuasion"

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likelihood of jury confusion. *Id.* This rationale has been stated by other courts as well. *See, e.g.*, Cabrera v. Jakabovitz, 24 F.3d 372, 381 n.4 (2d Cir. 1994). In *Cabrera*, the Court of Appeals for the Second Circuit stated that "increased *judicial* familiarity with the *McDonnell Douglas* standards . . . [does not justify] an explication of these standards, and particularly the legalistic terms in which they are expressed, in instructions to a *jury*." *Id.*

10. *Conroy*, 375 F.3d at 1232.

11. *Id.* at 1232-33.

12. *Id.* at 1232.

13. *Id.* at 1235.

14. 29 U.S.C. § 623(a)(1) (2000).

15. 411 U.S. 792 (1973). For a case analyzing an ADEA claim under this *McDonnell Douglas* model, see, for example, *Gehring v. Case Corp.*, 43 F.3d 340, 342-43 (7th Cir. 1994).

16. *McDonnell Douglas Corp.*, 411 U.S. at 802. To prove the prima facie case under *McDonnell Douglas*, a plaintiff must show that (1) the plaintiff has the protected characteristic or is a member of the protected class; (2) the plaintiff applied for a position for which he or she was qualified and the employer was seeking to hire a person to fill that position; (3) despite having the requisite qualifications, the plaintiff was rejected; and (4) after the plaintiff's rejection, the position remained open and the employer continued to seek someone to fill it. *Id.* In subsequent cases, this framework also has been applied to different types of adverse employment decisions. *See, e.g.*, Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1192-94 (11th Cir. 2004) (using the *McDonnell Douglas* framework in a case where the plaintiff had been terminated). Thus, the termination of an employee, if allegedly based on individual discrimination, is analyzed under this framework, just as an allegedly discriminatory decision not to hire a qualified plaintiff would be. *See id.*

17. *McDonnell Douglas Corp.*, 411 U.S. at 802. As long as the employer offers a reasonable basis for the adverse employment decision, the employer has met the burden of production to rebut the plaintiff's prima facie case, and the plaintiff is not entitled to summary judgment. *Id.* at 802-03.

18. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 223 (1994) (explaining that "the plaintiff must prove that the

remains at all times on the plaintiff to prove that the employer discriminated against him.[19] One particular way of demonstrating this is to show that the explanation offered by the employer is a pretext.[20] Exactly what impact a showing of pretext has on the burden of proof has been the subject of great debate.[21] Similarly, there has been much discussion about how the jury should be instructed when the plaintiff claims pretext.[22]

In *St. Mary's Honor Center v. Hicks*, the Supreme Court considered whether a plaintiff's showing that the employer's stated reason for discharge was false mandated a finding of discrimination, or, alternatively, whether the plaintiff had to present affirmative evidence that the employer's actions were discriminatory.[23] The Court held that the plaintiff did not have to introduce further evidence to support a finding of discrimination.[24] Instead, the "factfinder's disbelief of the reasons put forward by the [employer] . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination."[25] The Court did,

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defendant intentionally discriminated against her" and that the Supreme Court adopted the framework of shifting burdens of proof to aid a plaintiff in demonstrating intent because intent is so difficult to prove).

19. *Hicks*, 509 U.S. at 511.

20. *McDonnell Douglas Corp.*, 411 U.S. at 804. The plaintiff must be given an opportunity to show that the employer's stated explanation for the adverse employment decision was merely pretextual, and that, by inference, the true but unrevealed reason for that decision was intentional discrimination. *Id.*

21. See *Hicks*, 509 U.S. at 511-13, for a discussion of cases in which the circuit courts of appeal disagree as to how to evaluate a plaintiff's claim of pretext. These cases primarily differ about whether a showing of pretext requires a finding that the employer engaged in intentional discrimination. *Id.* After considering the circuit split on this issue, the United States Supreme Court decided that a showing of pretext allows a finding of intentional discrimination only when combined with evidence that the actual reason was discrimination. *Id.* at 511-13, 515.

22. There are two prevailing schools of thought on whether a jury should be instructed that a plaintiff's showing of pretext is a sufficient basis for finding that the employer intentionally discriminated against the plaintiff. The first line of reasoning claims that a jury does not need this type of pretext instruction because (1) such an instruction places too much emphasis on the permissible pretext inferences and (2) jury instructions are not typically given for non-mandatory inferences. *See* Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 574 (5th Cir. 2004); Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 790 (8th Cir. 2001); Gehring v. Case Corp.,43 F.3d 340, 343 (7th Cir. 1994). The second line of reasoning asserts that (1) such an instruction is necessary to fully inform the jury of the legal bases for a finding of discrimination, and (2) a jury not informed of these bases is likely to believe that some inferences are not sufficient legal bases for verdicts. *See* Ratliff v. City of Gainesville, 256 F.3d 355, 361 n.8 (5th Cir. 2001); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998); Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994).

23. 509 U.S. at 504.

24. *Id.* at 511.

25. *Id.* The Court stated that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, '[n]o additional proof of discrimination is *required*.'" *Id.* (quoting Hicks v. St. Mary's Honor Ctr., 970

however, point out that a showing of pretext alone did not compel a decision for the plaintiff.[26] According to the Court, when a plaintiff demonstrates pretext, the fact-finder is allowed to infer discrimination, but it is not required to do so.[27] Setting this so-called "permissive pretext" standard helped resolve a circuit split over the correct weight to give a showing of pretext.[28]

Palmer v. Board of Regents applied the "permissive pretext" standard set forth in *Hicks* to examine whether the trial court erred in refusing to give the plaintiff's proposed jury instruction.[29] The proposed jury instruction stated that discrimination was a permissible inference from a showing of pretext without need for additional evidence.[30] The court first explained that, in reviewing jury instructions, it would find error only if the instructions "misstate the law or mislead the jury."[31] Furthermore, even if error occurred, the court stated that reversal was proper only when failure to give the proposed instructions actually prejudiced the objecting party.[32]

Using this standard, the court held that refusal to charge the jury with one proposed jury instruction did not constitute error.[33] The Court of Appeals for the Eleventh Circuit opined that the instructions given did not mislead the jury because they contained the correct legal standard and fully addressed all the issues.[34] The court further found that the plaintiff was not prejudiced because the instructions given informed the jury that the plaintiff did not need to show additional evidence of discrimination if the jury inferred pretext; thus, the proposed instruction would have only

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F.2d 487, 493 (8th Cir. 1992)).

26. *Id.* at 511.

27. *Id.*

28. *See id.* at 512-13 (discussing the circuit split); *see also* Kline v. Tenn. Valley Auth., 128 F.3d 337, 343-44 (6th Cir. 1997). *Kline* discussed disparate methods of proving pretext that were later resolved by the United States Supreme Court in *Hicks*. *Kline*, 128 F.3d at 343-44. The first of these was the "pretext only" standard, which automatically entitles the plaintiff to judgment after the plaintiff proves that the reason the defendant offered for the adverse employment action was pretextual. *Id.* at 343. The *Kline* court then discussed the "permissive pretext" standard, under which a plaintiff's proof that the defendant's explanation was pretextual permits, but does not compel, a jury verdict for the plaintiff based on an inference of intentional discrimination. *Id.* The final standard discussed was the "pretext plus" approach, which does not allow a jury to return a verdict for a plaintiff based solely on proof of pretext. *Id.* Instead, the plaintiff is required to introduce further evidence of discrimination in addition to disproving the defendant's explanation. *Id.* The *Kline* court finally noted that *Hicks* rejected both the "pretext only" and the "pretext plus" standards, instead opting to adopt the "permissive pretext" approach. *Id.* at 344.

29. Palmer v. Bd. of Regents, 208 F.3d 969, 973-75 (11th Cir. 2000).

30. *Id.* at 972-73.

31. *Id.* at 973.

32. *Id.*

33. *Id.* at 974-75.

34. *Id.* at 975. The text of the instructions is not reported, but both the plaintiff and the employer conceded that the instructions were a correct and accurate statement of the law. *Id.*

clarified the issue.[35] The court explained that failure to give the proposed instructions was not reversible error because the instructions the district court gave amply covered the information the proposed instructions sought to convey. The court did not consider whether the *Hicks* standard mandated a pretext instruction.[36]

The Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* clarified the pretext standard of *Hicks* shortly after the Court of Appeals for the Eleventh Circuit decided *Palmer*.[37] Though *Hicks* had ostensibly resolved a circuit split regarding the value to give pretext in determining if discrimination is present, circuit courts continued to give different weight to pretext after the decision.[38] *Reeves*, however, stated unequivocally that a showing of pretext provided a permissible, but not mandatory, basis for finding that the employer discriminated against the employee.[39] Proof of pretext, the Court explained, is "one form of circumstantial evidence that is probative of intentional discrimination."[40] This is because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation."[41] In other words, showing that the explanation offered by the employer is a pretext is one way for the plaintiff to prove the discrimination.[42]

The court in the instant case acknowledged that the "permissive pretext" standard set forth in *Hicks* and reinforced in *Reeves* was the correct standard, and that it had been applied in the Eleventh Circuit since *Hicks* was decided.[43] Additionally, the instant court affirmed that the "permissive pretext" standard was the standard the Court of Appeals for the Eleventh Circuit applied in *Palmer*, which was decided after *Hicks* but before *Reeves*.[44] Thus, *Reeves* did not alter the precedential value of *Palmer*.[45]

Since the court held that *Palmer* was still an accurate reflection of the law, it examined Petitioner's argument that *Palmer* was distinguishable

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35. *Id.*

36. *See id.*

37. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-47 (2000).

38. Compare, for example, the Court of Appeals for the Fifth Circuit's application of a "pretext plus" standard in *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688, 693 (5th Cir. 1999), *rev'd* 530 U.S. 133 (2000), with the "permissive pretext" standard applied by the Court of Appeals for the Eleventh Circuit in *Palmer*, 208 F.3d at 974.

39. *Reeves*, 530 U.S. at 147.

40. *Id.*

41. *Id.*

42. *See id.*

43. *See* Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1233 (11th Cir. 2004).

44. *Id.*; *see also Palmer*, 208 F.3d at 974.

45. *See Conroy*, 375 F.3d at 1233.

from the instant case.[46] Petitioner argued that *Palmer* was not controlling[47] because in *Palmer*, the trial court instructed the jury that a plaintiff need not show additional evidence of discrimination if the employer's explanation was found to be pretextual.[48] In the instant case, however, the trial court offered no instructions on the legal implications of a showing of pretext.[49] The court rejected Petitioner's argument, holding that although the instructions in *Palmer* were different from those in the instant case, *Palmer* flatly stated that a pretext instruction was unnecessary.[50]

The instant court further questioned whether it would find a failure to give a pretext instruction to be error even if *Palmer* were not controlling precedent.[51] The court held that it was not error for the trial court to refuse to give Petitioner's proposed instructions because the jury was not misled by the instructions given.[52] The instructions given neither limited the way in which Petitioner could prove discrimination nor required the jury to believe that Respondent's explanation was the true motivation for firing Petitioner.[53] The jury, therefore, was still free to return a verdict for Petitioner if it found that the prima facie case was proved and that Respondent's explanation was a pretext.[54]

Even if the instructions given were not misleading, the instant court still could have found error if they did not adequately cover the information the proposed instructions sought to convey, thereby prejudicing Petitioner.[55]

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46. *Id.* at 1233-34.

47. *Id.* at 1234.

48. *Palmer*, 208 F.3d at 975.

49. *Conroy*, 375 F.3d at 1231.

50. *Id.* at 1234. The court stated in *Palmer*, however, that it was considering the failure to give the pretext instructions by considering the instructions "as a whole." *Palmer*, 208 F.3d at 975. The court decided that it could not say, "considering the totality of the circumstances, that Palmer was prejudiced by the trial court's refusal to deliver the specific instructions." *Id.* The court stated clearly that the failure to give the pretext instructions did not constitute error "in this case." *Id.*

51. *Conroy*, 375 F.3d at 1234.

52. *Id.*

53. *Id.* The trial court instructed the jury that it could not question any of Respondent's "legitimate business decisions." *Id.* The Court of Appeals for the Eleventh Circuit apparently interpreted this to mean that jurors could not question whether such decisions made good business sense. *See id.* The instant court then stated that this instruction was not prejudicial because it did not require the jurors to accept that those "legitimate business decisions" were the motivating factors behind the discharge of Petitioner; in other words, the instruction still allowed the jurors to reject those "legitimate business decisions" if they found them to be a pretext for the true reason that Petitioner was terminated. *Id.* This reasoning, however, was never explicitly stated to the jury. *See id.*

54. *Id.*

55. *Id.* at 1235; *see also Palmer*, 208 F.3d at 973; Wood v. President of Spring Hill Coll., 978 F.2d 1214, 1222 (11th Cir. 1992) (holding that, when examining a district court's failure to give a requested instruction, reversal is proper only if (1) the requested instruction accurately states the law; (2) the information in the requested instruction is not adequately explained by the charging

The court explained that since the instructions given provided the jury information about forming inferences and weighing witness credibility, the content of the proposed instructions was sufficiently covered.[56] Thus, the court affirmed the trial court's judgment.[57]

The instant court also addressed decisions by some of its sister courts of appeals which held that *Reeves* required the jury to be instructed about pretext inferences.[58] The court did not critique the reasoning in those cases, but instead it contrasted them with decisions by other circuit courts that have held that *Reeves* does not compel that such an instruction be given.[59] The court stated that it agreed with the Courts of Appeals for the Eighth Circuit and the First Circuit in concluding that pretext instructions were not required under *Reeves*, with little other reasoning stated.[60]

The court in the instant case seemed to give inadequate weight to Petitioner's argument that the jury instructions in *Palmer* were markedly different from those in the instant case.[61] The jurors in *Palmer* were distinctly informed that a demonstration of pretext was one way to show discrimination.[62] The plaintiff in *Palmer* requested his instructions because he felt that it was not clear enough to the jury that discrimination could be shown by pretext alone without additional evidence of discrimination.[63] On

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instructions; and (3) the party proffering the instruction is prejudiced by the trial court's failure to include it).

56. *Conroy*, 375 F.3d at 1235.

57. *Id.*

58. *Id.* at 1233. The court considered the decisions in *Ratliff v. City of Gainesville*, 256 F.3d 355, 360-61 (5th Cir. 2001) and *Townsend v. Lumbermens Mutual Casualty Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (both holding that a trial court is required to instruct jurors that they are allowed, but not required, to infer that the employer intentionally discriminated if the plaintiff proves the prima facie case and if the jury believes that the employer's explanation was not its true motivation for the adverse employment decision). *Conroy*, 375 F.3d at 1233.

59. See *Conroy*, 375 F.3d at 1234, which cited *Moore v. Robertson Fire Protection District*, 249 F.3d 786, 789-90 (8th Cir. 2001) and *Fite v. Digital Equipment Corp.*, 232 F.3d 3, 7 (1st Cir. 2000), as cases that held that *Reeves* did not require an instruction to inform juries that inferences based on a belief that the employer's stated reason for the adverse employment decision was a pretext were permissible. *Moore*, however, stated in a footnote that its holding did not encompass the idea that it would never be reversible error to fail to give a pretext instruction. *Moore*, 249 F.3d at 790 n.9. Additionally, the proposition that *Fite* held that a pretext instruction was not required by *Reeves* is questionable because such an instruction was not timely requested by the plaintiff at trial. *Fite*, 232 F.3d at 7. *Fite*, however, did state in dicta that it doubted that *Reeves* would actually compel such an instruction. *Id.*

60. *See Conroy*, 375 F.3d at 1233-34.

61. *See id.* at 1233.

62. *Id.* at 1234 (stating that the trial court in *Palmer* charged the jury that it was possible to find discrimination when a plaintiff showed that the employer's explanation was not true); Palmer v. Bd. of Regents, 208 F.3d at 969, 973 (11th Cir. 2000).

63. *See Palmer*, 208 F.3d at 973.

the other hand, the instructions in the instant case regarding pretext were completely absent.[64] Though jurors were informed that they could make soundly reasoned inferences,[65] they were not told that deciding that Respondent's explanation was false could support an inference of intentional discrimination and a verdict in favor of Petitioner.[66]

This distinction is not a mere syntactic technicality. Indeed, it has the potential to make the difference between a verdict in favor of a plaintiff and one in favor of the employer. Although jurors are not normally informed of every permissible inference,[67] few non-mandatory inferences have the potential to cause such a sharp differentiation in jury verdicts. In an employment discrimination trial, disbelief of the employer's explanation can lead to a decision that the stated reason was a pretext, from which the jury may infer that the employer discriminated, effectively proving the plaintiff's case.[68] If that permissible inference is taken away, or if the jury is not aware that it is allowed, the plaintiff could very well lose a case he may have won if the jury had known it could legally make such an inference.

According to the Court of Appeals for the Third Circuit, instructing the jury that its disbelief of an employer's reason for termination is a way for the plaintiff to prove discrimination in no way demeans the intelligence of the jury.[69] The legal standard for pretext was articulated in *Hicks*,[70] yet it was frequently misunderstood by federal district and circuit court judges for seven years.[71] The United States Supreme Court, to resolve the confusion, was forced to address the issue again in *Reeves*.[72] Despite their knowledge of the law of employment discrimination, federal judges required much guidance from the United States Supreme Court to understand the standard.[73] Jurors, without such backgrounds, will certainly

64. *See Conroy*, 375 F.3d at 1231.

65. *Id.* at 1231 n.2.

66. *See id.* at 1231.

67. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (stating that a judge need not describe all possible inferences but rather should leave them for counsel to argue).

68. *See Conroy*, 375 F.3d at 1233.

69. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3d Cir. 1998) (stating that "[w]ithout a charge on pretext, the course of the jury's deliberations will depend on whether the jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from . . . the pretextual nature of the employer's proffered reasons for its actions").

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

71. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140 (2000).

72. *See id.*

73. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1243-44 (10th Cir. 2002) (Henry, J., concurring).

need guidance from the trial court to know what weight to give evidence of pretext.[74]

Some courts, including the instant court, have argued that plaintiffs' attorneys can make the case for inferring discrimination from pretext in their arguments.[75] While the attorney is free to make that argument, the role of the court in instructing the jury is to ensure that the jury is fully apprised of the law.[76] Attorneys are free to make many arguments that are only slightly supported by the evidence,[77] but pretext, when combined with a prima facie case, is a legal basis for a finding of discrimination.[78] As such, it should be addressed by the court. Seemingly, the instant court failed to see the importance of omitting a legal standard from the trial court's jury instructions.

The Court of Appeals for the Eleventh Circuit in the instant case, while not blatantly misapplying precedent, did arrive at a pro-employer conclusion that has potentially drastic effects on a plaintiff's ability to prove a discrimination case. By not instructing the jury on the legal weight to give a showing of pretext, the court essentially negated the benefit that the United States Supreme Court has twice decided should be given to the plaintiff.[79] Though the United States Supreme Court did not state in either *Hicks* or *Reeves* that applying a "permissive pretext" standard compels such a jury instruction, failing to so instruct the jury essentially leaves no standard for weighing disbelief of the employer's reasons for termination. Juries, which are neither experts in employment discrimination law nor merely prescient, cannot be expected to properly weigh such a disbelief when such ability has eluded federal courts since the *McDonnell Douglas* framework was created in 1973.[80] By affirming the trial court's failure to properly instruct the jury, the Court of Appeals for the Eleventh Circuit has effectively eliminated a key method for demonstrating intentional discrimination.

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74. *See id.* at 1244 (Henry, J., concurring).

75. *See* Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1235 (11th Cir. 2004); *see also* Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 577 (5th Cir. 2004) (stating that although it believed that the plaintiff was not prejudiced by the trial court's failure to give a pretext instruction because counsel was free to make the pretext argument, it was required to reverse the trial court based on the precedent set by *Ratliff*); Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 791 (8th Cir. 2001) (holding that failure to give a pretext instruction was not reversible error because the employee was not prejudiced, due in part to the ability of counsel to make the pretext argument).

76. *See* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998).

77. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994).

78. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000).

79. *See Reeves*, 530 U.S. at 147; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

80. *See supra* notes 22, 73-74 and accompanying text.

A showing of pretext to prove intentional discrimination can be pivotal in some cases, as direct proof of discrimination is usually difficult or impossible for a plaintiff to prove.[81] When a plaintiff has made a prima facie case and the jury does not believe the employer's explanation, an improperly informed, pretext-ignorant jury could very well believe that the plaintiff has not proven all that is required under the law. By simply requiring a pretext instruction, the Court of Appeals for the Eleventh Circuit could have prevented this pro-employer bias and retained a fair adjudicative atmosphere for employment discrimination cases. Alas, *Conroy* has mandated that this is not to be.

81. *See* McGinley & Stempel, *supra* note 18, at 223 (discussing the difficulty of proving intentional discrimination).