

*OXMAN v. WLS-TV: TER-R.I.F.-IC NEWS FOR ADEA PLAINTIFFS*

*Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988)

In *Oxman v. WLS - TV*<sup>1</sup> the Seventh Circuit modified the elements of a prima facie case of employment discrimination applicable to reduction-in-force (R.I.F.) situations under the federal Age Discrimination in Employment Act (ADEA).<sup>2</sup> As a result, plaintiffs no longer must show evidence of their employer's discriminatory intent<sup>3</sup> to establish a prima facie<sup>4</sup> case of employment discrimination.

Jonah Oxman, sixty-one, was an employee of WLS-TV, managing its satellite bureau. To cut expenses, WLS-TV closed the satellite bureau and discharged Oxman.<sup>5</sup> Although Oxman was a qualified candidate, management failed to offer him another available position and subsequently filled several positions with younger employees.<sup>6</sup> Oxman charged WLS-TV with age discrimination under the ADEA.<sup>7</sup> The district court granted summary judgment to WLS-TV, finding lack of dis-

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1. 846 F.2d 448 (7th Cir. 1988).

2. 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

3. In *Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985), the employer discharged fifty-four year old Matthews along with thirteen other employees for economic reasons. *Id.* at 1216. Matthews offered termination statistics of employees over age forty versus employees under forty as circumstantial evidence of discriminatory intent. *Id.* at 1218. The Seventh Circuit found the statistics insignificant and affirmed the district court's grant of summary judgment. *Id.* at 1219. The *Matthews* court held a plaintiff discharged due to an R.I.F. must produce circumstantial or direct evidence of the employer's discriminatory intent in order to establish a prima facie age discrimination case. *Id.* at 1218. In *Oxman*, the Seventh Circuit overruled *Matthews*. 846 F.2d at 456.

4. "Prima facie" means a legally rebuttable presumption. 9 WIGMORE, EVIDENCE § 2494 (Chadbourn rev. 1981).

5. *Oxman v. WLS-TV*, 846 F.2d 448, 451 (7th Cir. 1988). Oxman worked for WLS-TV for 17 years in various newswriting and managerial positions. During that time, management never complained about his performance and rewarded Oxman with annual salary increases. Oxman held the position of "northwest bureau" manager at the time of his discharge. *Id.* at 450.

6. *Id.* at 451. According to Oxman, the WLS-TV news director told him at his discharge "that the news bureau had grown very complex and that if Oxman took a job as a producer, within a week the station would discover that Oxman could not do the job." *Id.* At the time of discharge, WLS-TV had two newswriter positions and created a manager of scheduling position. WLS-TV did not consider Oxman for either position. *Id.* Management filled one newswriter's position with a 31 year old editor. The manager of scheduling position was filled with a 26 year old. *Id.*

7. *Id.* Oxman claimed WLS-TV violated ADEA § 623(a) by not considering him for available positions for which he qualified. Section 623(a) makes it unlawful for an employer to discharge an individual because of his age. 29 U.S.C. § 623(a) (1982 & Supp. IV 1986).

Oxman's claim falls under the disparate treatment theory of employment discrimination as opposed to disparate impact. Under the disparate treatment theory, the employer treats some employees less favorably than others because of race, sex, religion, national origin or age. The disparate impact theory involves facially neutral employment practices that in fact fall more harshly on one

criminatorial intent.<sup>8</sup> The Court of Appeals for the Seventh Circuit reversed and *held*: to establish an ADEA prima facie case an employee discharged because of work force reduction is not required to prove the employer intended to discriminate. To establish such a prima facie case an employee must show that at the time of his discharge: 1) he was "within the protected age group"; 2) he was "performing according to his employer's legitimate expectations"; 3) "he was terminated"; and 4) "others not in the protected class were treated more favorably."<sup>9</sup>

Congress enacted the Age Discrimination in Employment Act (ADEA)<sup>10</sup> to combat employment discrimination<sup>11</sup> against workers aged forty and over.<sup>12</sup> Because of the similarity in aims and provisions, courts

group than another and cannot be justified by business necessity. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-12 (1976).

8. *Oxman v. WLS-TV (Oxman III)*, 641 F. Supp. 652, 654 (N.D. Ill. 1986). The district court initially denied defendant's motion for summary judgment in *Oxman v. WLS-TV (Oxman II)*, 609 F. Supp. 1384, 1395 (N.D. Ill. 1985), but granted the defendant's renewed motion in *Oxman III* partially because of the Seventh Circuit's interim decision in *Matthews v. Allis-Chalmers*. *See supra* note 3 and accompanying text.

9. 846 F.2d 448, 455 (7th Cir. 1988). The *Oxman* prima facie elements are very similar to those established in *Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985). *See supra* note 3. They differ in two respects. The *Oxman* court changed *Matthews*' second element of the plaintiff's capacity from "was qualified to assume another position," *Matthews*, 769 F.2d at 1217, to "was performing according to the employer's legitimate expectations." 846 F.2d 448, 455. Second, the *Oxman* court changed *Matthews*' fourth element from "circumstantial or direct evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in making the employment decision," *Matthews*, 769 F.2d at 1217, to "the employer treated others not in the protected class more favorably." *Id.* at 455. *Matthews* adopted the prima facie elements developed in *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). *See infra* notes 32-34 and accompanying text.

10. 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

11. Congress' statement of findings provides in part that the disadvantages faced by older workers in efforts to retain and regain employment, employers' setting of arbitrary age limits, and the high incidence of unemployment among older workers prompted its passage of the ADEA. The Act's purpose is to promote employment based on ability rather than age and to prohibit arbitrary age discrimination in employment. 29 U.S.C. § 621. (1982 & Supp. IV 1986).

President Lyndon B. Johnson's 1967 speech calling on Congress to remedy the "serious and senseless loss [of the older worker] to a nation on the move", 1 PUB. PAPERS 32, 37 (1968), and a Labor Department study prompted Congress' passage of the ADEA. The Labor Department study estimated that persons over 45 comprised 27% of all unemployed and 40% of the long-term unemployed. W. WILLARD WIRTZ, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 6 (June 1965).

12. 29 U.S.C. § 631(a) (1982). ADEA prohibits failing or refusing to hire, discharging or otherwise discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment due to age. 29 U.S.C. § 623(a) (1982 & Supp. IV 1986). Section 623(f)(1)-(3) provides exceptions to these provisions. 29 U.S.C. § 623(f) (1982 & Supp. IV 1986).

often apply Title VII<sup>13</sup> burden of proof standards to ADEA cases.<sup>14</sup>

*McDonnell Douglas Corp. v. Green*,<sup>15</sup> a Title VII case, established the indirect "burden shifting" method of proof.<sup>16</sup> To establish a prima facie case of employment discrimination, an employee must show: 1) he belonged to the protected class;<sup>17</sup> 2) he applied and was qualified for the job;<sup>18</sup> 3) despite his qualifications, the employer rejected him;<sup>19</sup> 4) "after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications."<sup>20</sup> Once the employee establishes his prima facie case, the burden shifts to the employer to produce a legitimate, nondiscriminatory reason for the

13. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1982 & Supp. IV 1986). Title VII prohibits discrimination in employment on the basis of race, sex, religion or national origin.

Congress modeled the ADEA's prohibitions after Title VII, while following the Fair Labor Standards Act of 1938 for remedies. Scholl & Strang, *Age Discrimination and the Modern Reduction in Force*, 69 MARQ. L. REV. 331, 336 (1986). See also Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 621, 623 n.10 (1983) (comparing sections of Title VII and ADEA that proscribe employer's practices).

14. See, e.g., *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) (*McDonnell Douglas* Title VII burden of proof standard applied to ADEA replacement case); *Hughes v. Black Hills Power & Light Co.*, 585 F.2d 918, 919 n.1 (8th Cir. 1978) (*McDonnell Douglas* formula applied to ADEA layoff case); *Kentroti v. Frontier Air Lines*, 585 F.2d 967, 969 (10th Cir. 1978) (*McDonnell Douglas* formula applied to ADEA denial of seniority number case); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 590 (5th Cir. 1978) (*McDonnell Douglas* formula applied to ADEA discharge case); *Rodriguez v. Taylor*, 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (*McDonnell* formula applied to ADEA refusal to hire case).

15. 411 U.S. 792 (1973). *McDonnell Douglas* involved a black employee who protested his lay off from the company by conducting a "lock in" of company employees. When the company began rehiring, it advertised for applicants to fill the black employee's former position. The black employee applied, but the company refused to rehire him. *Id.* at 802.

16. An alternative method of proof is direct evidence. Direct evidence of discrimination would be, for example, an employer's direct statement that he refused to hire or discharge an employee because of his race, sex, religion or age, or other proof of employer intent to discriminate. The courts disagree regarding what constitutes direct evidence in different situations. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1, 13-17 (1986).

17. This element ensures that the employee is within the zone of interests protected by the statute. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753 (5th Cir. 1980). Such a characterization is necessary for standing. See *infra* note 18. In *McDonnell Douglas* the protected class was a racial minority. 411 U.S. at 802.

18. 411 U.S. at 802. This element anticipates the employer's possible rebuttal to employment discrimination—that the plaintiff was not qualified. *Id.*

19. *Id.* Cognizable injury to the plaintiff together with the first element represents "standing" to sue. *Id.*

20. *Id.* at 802. This element demonstrates discrimination using relatively objective evidence. *Id.*

plaintiff's rejection.<sup>21</sup> Finally, a court must allow the employee a chance to prevail by showing the employer's reason was "pretextual."<sup>22</sup>

The *McDonnell Douglas* Court devised the indirect proof method to compensate for evidentiary difficulties specific to employment discrimination cases.<sup>23</sup> The *McDonnell Douglas* formula requires no direct evidence of illegal motivation on the part of the employer.<sup>24</sup> In fact, the *McDonnell Douglas* prima facie case allows some plaintiffs to prevail without showing any evidence that the protected status was the determining factor in the employer's decision.<sup>25</sup> On the other hand, by requiring the plaintiff to show the absence of the most common nondiscriminatory reasons for an employee's rejection,<sup>26</sup> the *McDonnell Douglas* formula also spares the employer unnecessary litigation expense

21. *Id.* The employer's burden is one of production, not persuasion. The employer need only produce a legitimate, nondiscriminatory reason, not persuade the court that it was actually motivated by such reason. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

Courts have shown more leniency toward the employer's burden in ADEA cases, as opposed to Title VII cases. Subjective reasons for the employer's actions such as the worker's failure to "measure up," or laying off the employees that the employer "would miss the least" provide legitimate nondiscriminatory reasons for ADEA cases but would be unacceptable in Title VII cases. *Player*, *supra* note 13 at 656.

22. 411 U.S. at 804. In *McDonnell Douglas*, where the employer refused to rehire a black employee following illegal activities during his layoff, the Supreme Court stated that a party could demonstrate pretext by showing: 1) rehiring of whites engaged in similar activities; or 2) statistical showing of employer's general treatment of minority employees. *Id.* at 805 (1973).

The plaintiff at all times retains the ultimate burden of persuading the trier of fact of intentional discrimination. Plaintiff must show his age, race, sex, religion, or national origin was a "determining" factor in the employer's actions. *See generally Player*, *supra* note 13.

23. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). These difficulties include lack of written or oral evidence of the employer's motive and the employer's control over such evidence.

Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one. When the evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up.

*La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

24. *Player*, *supra* note 14, at 627.

25. This happens when the plaintiff establishes his prima facie case and the employer does not articulate a legitimate nondiscriminatory reason for his action. The employer's failure to articulate a nondiscriminatory reason leaves only the plaintiff's established presumption of discrimination which will result in a judgment, as a matter of law, for the plaintiff. *Player*, *supra* note 13, at 628. *See Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (under Title VII, if plaintiff puts forth a convincing prima facie case and the employer is silent, plaintiff must win).

26. Legitimate nondiscriminatory reasons precluded by a convincing prima facie case include lack of qualifications and absence of job openings. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979).

if the employee cannot establish his prima facie case.<sup>27</sup>

The First Circuit adapted the *McDonnell Douglas* formula to an ADEA discharge case in *Loeb v. Textron, Inc.*<sup>28</sup> Because of the unavailability of direct evidence, and employers' control of such evidence, the court found the formula well suited to discrimination cases.<sup>29</sup> The four elements of the *Loeb*-modified *McDonnell Douglas* prima facie case are: 1) protected class membership; 2) job performance that met his employer's legitimate expectations; 3) discharge; and 4) employer search for replacements with similar qualifications.<sup>30</sup>

The federal circuit courts disagree about the fourth element of the prima facie case for an R.I.F. discharge.<sup>31</sup> Because the employer does not seek a replacement, the fourth element set forth in *Loeb* is inapplicable to an R.I.F. case. In *Williams v. General Motors Corp.*<sup>32</sup> the Fifth Circuit created a fourth element for R.I.F. cases requiring the employee

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27. If the employee does not establish his prima facie case, the employer may file a motion to dismiss, a motion for summary judgment, or a motion for a directed verdict. *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134 (7th Cir. 1985).

28. 600 F.2d 1003 (1st Cir. 1979). *Textron, Inc.* hired Loeb, age 50, for a management position in 1971. Despite favorable reviews and raises, management terminated Loeb in 1975 for "poor job performance," and replaced him several years later with a 46 year old. Loeb filed suit under the ADEA. The District Court instructed the jury on the *McDonnell Douglas* burden of proof and the jury found for Loeb. *Id.* at 1008. *Textron* appealed, claiming the *McDonnell Douglas* formula inapplicable to age discrimination cases. The First Circuit held the *McDonnell Douglas* formula applicable. *Id.* at 1010.

29. "Proof of the *McDonnell Douglas* type prima facie case assures the plaintiff his day in court despite the unavailability of direct evidence, and entitles him to an explanation from the defendant employer for whatever action was taken." *Id.* at 1014.

30. *Id.* The *Loeb* court adapted the *McDonnell Douglas* hiring decision elements to a discharge decision. The first element, belonging to a protected class, remains the same. The second element, qualification for the job, becomes adequate job performance (thus "qualified" for the job he held). The third element, applicant's rejection, changes to employee's termination. The fourth element, continued applicant search, changes to replacement search (both demonstrating a continued need for the same services and skills). The *Loeb* court stated this adaptation produced an analogous inference of discrimination. *Id.* at 1013.

31. The circuit courts generally agree the first three elements in *Loeb* prove suitable to R.I.F. situations. However, standing alone, these elements do not create an inference of discrimination. *Scholl & Strang, supra* note 13, at 346.

32. 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). In *Williams*, 15 plaintiffs charged General Motors with age discrimination because it eliminated certain positions and relegated supervisory positions to hourly wage positions. Following a jury verdict for some of the plaintiffs, General Motors appealed, stating the district court erred in failing to require the plaintiffs demonstrate their replacements were outside the "protected age group." The Fifth Circuit held the R.I.F. plaintiff need not show actual replacement. However, in absence of this evidence demonstrating the employer's discrimination, the plaintiff must produce circumstantial or direct evidence of the employer's discriminatory intent. *Id.* at 129.

to produce circumstantial or direct evidence that the employer intended to discriminate because of age.<sup>33</sup> Because the ADEA merely requires employers to make employment decisions without regard to age, the court reasoned the employee must show intent to discriminate.<sup>34</sup>

In *Coburn v. Pan American World Airways, Inc.*<sup>35</sup> the District of Columbia Circuit chose an alternative approach in R.I.F. situations. As the fourth element of his prima facie case, the court required the employee to show he was "disadvantaged in favor of a younger person."<sup>36</sup> The court refused to require direct evidence of discriminatory intent because the exigencies of R.I.F. situations can be analyzed best when the employer articulates a nondiscriminatory reason for the discharge.<sup>37</sup>

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33. *Id.* The court calls this the third element because it combines elements one and three from *Loeb* into its first element. The requirement

simply insists that a plaintiff produce some evidence that an employer has not treated age neutrally . . . lead[ing] the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.

*Id.* at 129-30.

Other courts have cited the *Williams* prima facie case without much elaboration. *See, e.g.*, *EEOC v. Western Elec. Co., Inc.*, 713 F.2d 1011, 1014-15 (4th Cir. 1983); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982); *EEOC v. Trans World Airlines, Inc.*, 544 F. Supp. 1187, 1218 (S.D.N.Y. 1982); *Franci v. Avco Corp.*, 538 F. Supp. 250, 256 (D. Conn. 1982); *Deutsch v. Carl Zeiss, Inc.*, 529 F. Supp. 215, 218 (S.D.N.Y. 1981). The Seventh Circuit originally adopted the *Williams* approach in *Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985).

One commentator insists the *Williams* approach in an R.I.F. situation puts an unreasonable burden on the plaintiff. Direct evidence is rarely available and statistical data used as circumstantial evidence is unreliable unless the employer has discharged a large number of workers. *Player, supra* note 13, at 639. *See also* Thompson, Hauserman & Jordan, *Age Discrimination in Reduction-in-Force: The Metamorphosis of McDonnell Douglas Continues*, 8 INDUS. REL. L.J. 46, 65-66 (1986) (suggesting courts' sympathy toward an employer forced by economic problems to reduce its workforce adds to the plaintiff's burden).

34. 656 F.2d at 129.

35. 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983). In *Coburn* the defendant argued the court should require direct evidence of discriminatory intent in R.I.F. situations. Otherwise, anyone in the protected age group would presumptively have a cause of action because the R.I.F. employees virtually always would be qualified for other company positions. The *Coburn* court rejected the defendant's argument. *Id.* at 343.

36. *Id.* at 342. The *Coburn* court followed the reasoning in *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982). Other courts have followed the *Cuddy/Coburn* fourth element with some modifications. *See, e.g.*, *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.) (requiring plaintiff to show "others not in the protected class were treated more favorably"), *cert. denied*, 464 U.S. 937 (1983); *Parker v. Federal Nat'l Mortgage Ass'n.*, 741 F.2d 975 (7th Cir. 1984) (tacitly confirming *Coburn* approach by not requiring discriminatory intent evidence and stating plaintiff would have little difficulty establishing a prima facie case because he was qualified and was not given positions which younger employees filled).

37. 711 F.2d at 343.

In *Oxman v. WLS-TV*<sup>38</sup> the Seventh Circuit reviewed the functions of the *McDonnell Douglas* indirect burden-shifting formula.<sup>39</sup> The Court found that the *Coburn* prima facie fourth element<sup>40</sup> conformed better to the *McDonnell* functions than did the *Williams* prima facie element.<sup>41</sup>

The court enunciated three functions of the *McDonnell Douglas* formula. First, the formula requires the employee to eliminate the most common nondiscriminatory reasons for his termination.<sup>42</sup> Second, the formula allows the employer to avoid unnecessary litigation expense.<sup>43</sup> Finally, the formula compensates for evidentiary difficulties by permitting plaintiffs to succeed without introducing evidence that age was the determining factor in the employer's decision.<sup>44</sup>

The *Oxman* court argued that the *Williams* analysis destroys the functions of the *McDonnell Douglas* scheme because it starts with the employer's claim that he acted pursuant to an R.I.F.<sup>45</sup> The court stated the employee should not have the burden of disproving this claim in his prima facie case.<sup>46</sup> Requiring evidence of discriminatory intent at the prima facie stage at best "fuses the prima facie and pretext steps."<sup>47</sup> At worst, this requirement destroys the third function of the *McDonnell Douglas* formula because the employee can no longer prevail without producing some evidence of discriminatory intent.<sup>48</sup>

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38. 846 F.2d 448 (7th Cir. 1988).

39. *Id.* at 453-55. See *supra* notes 16-22 and accompanying text.

40. See *supra* notes 35-36 and accompanying text.

41. 846 F.2d at 455. For a discussion of the *Williams* elements, see *supra* notes 23-24 and accompanying text. The *Oxman* court's fourth element is "others not in the protected class were treated more favorably." 846 F.2d at 455. The *Oxman* court explained this formulation "merely requires an employer that releases a protected employee while simultaneously hiring (or not 'bumping') younger employees to fill positions for which the older employee was qualified to explain its actions without forcing the protected employee to uncover that elusive 'smoking gun.'" *Id.* at 455-56. Although the court alludes to the requirement that the plaintiff be qualified to assume other company positions, nothing in the court's prima facie case requires the plaintiff to prove this. The *Oxman* prima facie case merely requires the plaintiff prove performance according to his employer's legitimate expectations. *Id.* at 455.

42. *Id.* at 453. See *supra* note 26.

43. 846 F.2d at 453. See *supra* note 27.

44. 846 F.2d at 453. See *supra* note 25 and accompanying text.

45. 846 F.2d at 454.

46. *Id.* The burden should be on the employer to introduce R.I.F. in its rebuttal as the motivation for discharge.

47. *Id.* See *Player*, *supra* note 13, at 666-67 (suggesting the plaintiff present both prima facie and pretext evidence at the first stage of the trial to survive a directed verdict for the defendant in courts which follow the *Williams* formula).

48. 846 F.2d 448, 454 (7th Cir. 1988). The third function of the *McDonnell Douglas* formula compensates for the evidentiary difficulties by permitting the plaintiff to succeed without introducing

The *Oxman* court noted that requiring direct or circumstantial evidence of discriminatory intent is unnecessary to protect the employer from unfounded claims.<sup>49</sup> The R.I.F. inference of discrimination, established when the employer retains “nonprotected” employees to perform the plaintiff’s job or another job for which the plaintiff was qualified, is no weaker than the *Loeb* “replacement” inference of discrimination,<sup>50</sup> established when an employer discharges the plaintiff and obtains a “nonprotected” replacement.<sup>51</sup>

The *Oxman* court thoroughly examined the *McDonnell Douglas* formula’s functions.<sup>52</sup> Also, the court properly concluded that requiring the employee to present circumstantial or direct evidence of the employer’s discriminatory intent at the prima facie stage obstructs the formula’s purpose.<sup>53</sup> Arguably, a plaintiff might satisfy the *Williams* circumstantial evidence requirement by proving the employer treated members of the “nonprotected” class more favorably, blurring the difference in the *Williams* and *Oxman* prima facie case criteria.<sup>54</sup> Nonetheless, the *Oxman* court’s prima facie case eliminates confusion regarding what evidence will satisfy *Williams* fourth element<sup>55</sup> and provides a clear method for establishing a prima facie case in an R.I.F. situation.

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any evidence that age was the determining factor in the employer’s decision. The requirement to produce direct or circumstantial evidence of the employer’s discriminatory intent as in *Williams* directly contravenes this function. See *supra* note 16.

49. 846 F.2d at 455.

50. See *supra* notes 28-30 and accompanying text.

51. 846 F.2d at 455. Because the discrimination inference is the same in either case, courts that use the *Loeb* elements for discharge cases should not require more (i.e., circumstantial or direct evidence of the employer’s discriminatory intent) of plaintiffs in R.I.F. cases.

52. See *supra* notes 41-43 and accompanying text.

53. See *supra* notes 45-48 accompanying text.

54. In *Branson v. Price River Coal Co.*, 627 F. Supp. 1324 (D. Utah 1986), *aff’d*, 853 F.2d 768 (10th Cir. 1988), the employer moved for summary judgment based on the plaintiff’s failure to establish a *Williams* prima facie case, having produced no evidence the employer did not treat age neutrally in its decision. The plaintiffs argued such a showing destroyed the functions of the *McDonnell Douglas* formula and therefore the court should apply the *Oxman* prima facie case. The district court found little difference between the two tests, stating, “*Oxman* simply supplies an example of the type of proof required under *Williams*.” *Id.* at 1330 (discussing *Oxman II*, 609 F. Supp. 1364 (N.D. Ill. 1985), in which the court held plaintiff proved his prima facie case). The court granted motion for summary judgment because plaintiffs were unable to show employers offered available jobs to younger employees. 627 F. Supp. at 1332. See Scholl & Strang, *supra* note 13, at 355 (best evidence establishing the fourth element of *Williams* prima facie case is the placement or retention of a younger person in a remaining job for which the plaintiff was qualified).

55. Scholl & Strang, *supra* note 13, at 355 (higher courts’ failure to precisely delimit the fourth element requires judges to decide what type of evidence rises to the level of creating a reasonable presumption).



The *Oxman* court's reasoning is flawed, however, in its assertion that the prima facie case protects employers from unnecessary litigation expense.<sup>56</sup> The court found the discrimination inference no weaker in an R.I.F. situation involving retained younger employees than in a replacement situation.<sup>57</sup> However, usually in an R.I.F. situation the employee's job no longer exists.<sup>58</sup> Additionally, the *Oxman* prima facie case does not require the employee to show he was qualified for another job within the company. *Oxman* merely requires evidence that the employee was performing according to his employer's legitimate expectations.<sup>59</sup> Thus, the *Oxman* prima facie case fails to consider the situation in which an employer eliminates an employee's job due to an R.I.F. and the employee is not qualified to assume another position in the company.<sup>60</sup> Such an employee could establish a prima facie case which would force the lawsuit to continue to the employer's rebuttal stage.<sup>61</sup>

The *Oxman* decision makes it easier for an employee dismissed in an R.I.F. situation to prove a prima facie case of discrimination. As a result, employers engaged in R.I.F. situations may be subject to more lawsuits and greater litigation expenses.

C.G.V.

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56. See *supra* notes 48-50 and accompanying text.

57. 846 F.2d at 454.

58. Thompson, Hauserman & Jordan, *supra* note 33, at 64.

59. See *supra* note 41.

60. As one commentary noted,

Where the function has been eliminated, requiring an employer to articulate a legitimate, nondiscriminatory reason for terminating the employee who performed that function, but could perform no other, would be to tacitly shift the burden of demonstrating the employee's (lack of) qualification to the employer. The protected worker who is qualified for but one function in his employer's organization has no age discrimination claim when the job itself — the duty, as opposed to just the person performing it — is eliminated.

Scholl & Strang, *supra* note 13, at 353.

61. See *supra* note 22 and accompanying text.

