EMPLOYMENT DISCRIMINATION LAW—STRAND V. PETERSBURG PUBLIC SCHOOL AND FRIDRIKSSON V. ALASKA USA FEDERAL CREDIT UNION: THE SUPREME COURT CHARTS AN UNCERTAIN COURSE

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I. INTRODUCTION

Alaska’s Human Rights Act prohibits an employer from discriminating against an individual on the basis of race, religion, color, national origin, sex, marital status, changes in marital status, pregnancy, or parenthood. The Act is modeled after Title VII of the Federal Civil Rights Act of 1964. Repeatedly, the Alaska Supreme Court has purported to look to United States Supreme Court deci-

1. ALASKA STAT. § 18.80.220(a)(1) (1981) provides:
   (a) It is unlawful for
       (1) an employer to refuse employment to a person, or to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, religion, color or national origin, or because of his age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

   It shall be an unlawful employment practice for an employer — [to]
       (1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; . . . .
sions interpreting Title VII for guidance in analyzing cases under Alaska's Human Rights Act.  

In *Strand v. Petersburg Public Schools*, the Alaska Supreme Court sustained a decision by the Alaska State Commission for Human Rights that a small school district committed an act of sex discrimination when it failed to hire a female teacher to fill an elementary school principal position. The court's decision is important because it affirmed the Commission's determination that once the teacher presented a prima facie case of discrimination, the burden of persuasion shifted to the school district to show that sex was not a factor in its hiring decision. This allocation of the burden of persuasion directly conflicts with United States Supreme Court decisions interpreting Title VII.

In *Alaska USA Federal Credit Union v. Fridriksson*, the Alaska Supreme Court upheld the decision of the Commission for Human Rights that a female teller was rejected for a branch manager position because of sex discrimination, even though the Commission specifically found that her employer had not willfully and intentionally discriminated. Again, this holding is contrary to United States Supreme Court decisions which declare that a plaintiff alleging disparate, discriminatory treatment by an employer must show the employer's discriminatory intent.

This article has a threefold purpose. First, it compares federal case law interpreting employment discrimination cases under Title VII with the Alaska Supreme Court decisions in *Strand* and *Fridriksson*. This comparison will show that while the Alaska Supreme Court professes to follow federal precedent in deciding discrimination cases, it has in fact radically departed from that precedent. As a result, once a complainant presents a prima facie case of discrimination, the employer has the burden of proving that he did not discriminate. Furthermore, the court has held that an employee who alleges disparate and discriminatory treatment by an employer may prevail even when the finder of fact determines that the employer did not willfully or intentionally discriminate.

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5. *Id.* at 1223.


7. See infra notes 10-35 and accompanying text.


9. See infra notes 10-35 and accompanying text.
Second, the article compares federal case law, which permits employers hiring persons for supervisory or managerial positions to use subjective hiring procedures, with the Alaska Supreme Court's decisions in *Strand* and *Fridriksson*. This comparison will reveal that the Alaska Supreme Court is hostile to all subjective hiring procedures, even when used to hire supervisors or managers.

Third, the article contends that the Alaska Supreme Court should reject its holdings in *Strand* and *Fridriksson* and adopt the analytical approach of the United States Supreme Court in deciding employment discrimination cases.

II. THE FEDERAL APPROACH TO EMPLOYMENT DISCRIMINATION CLAIMS

Although Title VII of the Civil Rights Act was passed in 1964, the United States Supreme Court did not establish a framework for deciding employment discrimination cases alleging disparate treatment until 1973. *McDonnell Douglas Corp. v. Green* set forth a three-step process for the "order and allegation of proof" in disparate treatment cases. In the first step the plaintiff must establish a prima facie case. In the second step the employer has an opportunity to rebut the prima facie case by articulating some legitimate, nondiscriminatory reason for his conduct. In the final step the plaintiff is given an opportunity to show that the employer's explanation is only a pretext for intentional discrimination.

11. *Id.* at 802-05.

In disparate treatment cases, the plaintiff is alleging that the employer discriminated against the plaintiff because he is a member of a protected class. A plaintiff proceeding under the disparate treatment theory must prove discriminatory motive. On the other hand, discriminatory motive need not be shown in cases proceeding under the disparate impact theory. *Id.*

Disparate impact cases generally involve a claim that an employment practice, although neutral on its face, has the effect of discriminating against a minority group. Job qualifications which reduce the number of qualified minority applicants but which bear no relation to the position being filled are a prime example of an employment practice which has a disparate impact on minority groups. Unless the practice has some legitimate business justification, the employer commits an unlawful act of employment discrimination regardless of his motivation. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

For an excellent analysis of case law concerning disparate impact cases, see Smith, *Employer Defenses in Employment Discrimination Litigation: A Re-assessment*
The court indicated that the first step — establishing a prima facie case — requires the satisfaction of a four-part test. Under the McDonnell Douglas test for determining whether a plaintiff has presented a prima facie case of discrimination under Title VII, the complainant must show:

1. That he or she belongs to a protected class;
2. That he or she applied and was qualified for a job for which the employer was seeking applicants;
3. That despite his or her qualifications, the plaintiff was rejected; and
4. That after the rejection, the position remained open and the employer continued to seek applications from persons with the plaintiff's qualifications.13

Federal courts have been flexible in applying the fourth element of the four-part test. Indeed, all a plaintiff has been required to do in some cases to satisfy the fourth element is to produce a set of circumstances which, if unexplained, appear more likely than not to be the result of discriminatory motives.14

McDonnell Douglas produced a clear analytical framework in which the plaintiff in a Title VII case bears the burdens of production and persuasion in establishing a prima facie case. There was confusion, however, in many lower courts concerning the nature of the employer's burden in rebutting the plaintiff's prima facie case.15 Under McDonnell Douglas, the plaintiff can make a prima facie case upon a fairly sketchy presentation. If the employer is required to rebut this case by a preponderance of the evidence, or by the even heavier burden of clear and convincing evidence, then there has been a shift in the burden of proof because the employer's burden of persuasion when attempting to disprove a discriminatory motive is considerably greater than the plaintiff's burden in presenting a prima facie case.

McDonnell Douglas held only that the employer must "articulate some legitimate, nondiscriminatory reason" for the allegedly discriminatory conduct.16 Some lower courts, however, interpreted the employer's burden of articulating a nondiscriminatory motive to be the burden of going forward;17 others held that the employer bears the burden of persuading the court that his motives were non-

of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372 (1982).
13. 411 U.S. at 802.
15. See infra notes 17-18 and accompanying text.
16. 411 U.S. at 802.
17. Bittar v. Air Can., 512 F.2d 582, 583 (5th Cir. 1975).
discriminatory by a "preponderance of the evidence."\(^{18}\)

In *Furnco Construction Corp. v. Waters*,\(^ {19}\) the United States Supreme Court issued the first of four opinions clarifying the employer's burden when rebutting a plaintiff's prima facie case. The Court explained that a prima facie case under *McDonnell Douglas* should not be equated with an ultimate finding that the employer engaged in illegal discrimination. Instead, the plaintiff's prima facie case merely raises an inference of discrimination by presenting facts which, if unexplained, show more likely than not that the employment decision was based on illegal motives. The Court made it quite clear that "to dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'\(^ {20}\)

In the second decision attempting to clarify the employer's burden, *Board of Trustees v. Sweeney*,\(^ {21}\) the Court reemphasized that the employer's burden of articulating a nondiscriminatory reason for its conduct does not mean that the employer must prove an absence of discriminatory motive when rebutting the plaintiff's prima facie case.\(^ {22}\) "[W]e think that there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.' By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco* . . . we made it clear that the former will suffice to meet the employee's prima facie case of discrimination."\(^ {23}\)

In the third decision, *Texas Department of Community Affairs v. Burdine*,\(^ {24}\) the Court established beyond any doubt that the employer does not have the burden of persuasion in rebutting a prima facie case of discrimination in the federal courts. Once a plaintiff has presented a prima facie case, the employer has the burden of producing evidence of nondiscriminatory motive. Nevertheless, "[t]he plaintiff retains the burden of persuasion."\(^ {25}\) Moreover, although the plaintiff has an opportunity to show that the employer's response to a prima facie case is a pretext for illegal discrimination, "[t]his burden now merges with the ultimate burden of persuading

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20. *Id.* at 578 (quoting *McDonnell Douglas*, 411 U.S. at 802).
22. *Id.* at 25.
23. *Id.*
25. *Id.* at 256 (emphasis added).
the court that [the plaintiff] has been the victim of intentional discrimination."

In April 1983, the Court issued the last of the four decisions, *United States Postal Service Board of Governors v. Aiken.* The Court reiterated that the burden of persuasion in an employment discrimination case always remains with the plaintiff. The incontrovertible learning derived from these cases is that the normal burden of persuasion borne by the plaintiff is unaffected in an employment discrimination case under Title VII. At the same time, though, the Court cautioned lower courts against applying its *McDonnell Douglas* test in an inflexible manner. In *Aiken,* a black postal employee accused the United States Postal Service of racial discrimination when it failed to promote him. The district court ruled in favor of the Postal Service, but the Court of Appeals for the District of Columbia reversed. The Supreme Court vacated the District of Columbia Circuit's opinion and remanded the case for reconsideration in light of *Texas Department of Community Affairs v. Burdine.*

On remand, the court of appeals again held that the district court had erred in requiring Aiken to present direct proof of his employer's discriminatory intent and in requiring Aiken to show as part of his prima facie case that he was as qualified as, or more qualified than, the people who were promoted. The Court granted certiorari to review the case a second time. The Postal Service argued that Aiken had not made out a prima facie case by the mere showing that he was a member of a minority group with minimum qualifications who was rejected for promotion in favor of a nonminority candidate. In the Postal Service's view, Aiken was required to present evidence that he was as qualified as, or more qualified than, the individuals who were promoted in order to establish a prima facie case. The Postal Service argued that Aiken should lose because he failed to make such a showing.

The Court rejected a ritualistic analysis that only considered whether Aiken had presented sufficient evidence for a prima facie case. The Court found that, by focusing on the question whether Aiken established a prima facie case, the district court had evaded the ultimate issue whether the Postal Service discriminated against Aiken.

26. *Id.*
27. 103 S. Ct. 1478 (1983).
32. 103 S. Ct. at 1481.
33. *Id.*
The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." In other words, is the "employer . . . treating 'some people less favorably than others because of their race, color, religion, sex or national origin.'" The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in the light of common experience as it bears on the critical question of discrimination."34

In short, Aiken stands for the proposition that the McDonnell Douglas test for determining whether a plaintiff has made out a prima facie case is only a useful way of evaluating the evidence. The Court made it clear that the federal courts should not permit a rigid application of the McDonnell Douglas test to divert them from deciding the ultimate issue: whether or not unlawful discrimination occurred. In addition to criticizing slavish adherence to the prima facie case requirements and reaffirming that the burden of proof always remains with the plaintiff, the Court's opinion in Aiken establishes that in order for a plaintiff to succeed in a Title VII discrimination case, there must be a finding that the employer intentionally discriminated against him.35 This finding of intentional discrimination is the sine qua non for recovery under the federal courts' interpretations of Title VII.

III. EMPLOYMENT DISCRIMINATION UNDER THE ALASKA HUMAN RIGHTS ACT: THE ALASKA SUPREME COURT CHARTS ITS OWN COURSE

A. Alaska USA Federal Credit Union v. Fridriksson: No Intentional Discrimination Is Necessary for Recovery

In October 1975, Valgerdi R. Fridriksson, a female employee of Alaska USA Federal Credit Union (Alaska USA), applied for the position of branch manager of the credit union's Adak office. She was rejected for the position, and a male applicant was hired. Fridriksson then filed a complaint with the Alaska State Commission for Human Rights, alleging sex discrimination in violation of the Alaska Human Rights Act.36

When she applied for the position, Fridriksson had been employed by the credit union for four months as a teller in Adak's two-

34. Id. at 1482 (citations omitted).
35. Id. See also International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-06 (1973).
person office. Her sole prior work experience included nineteen months as a teller for a bank in Iceland, and one year in that bank's savings and loan department. That employment ended in 1965, and Fridriksson had no further employment experience until she began working for the credit union in Adak ten years later.37

A hearing was held on Fridriksson's complaint in June 1977. The Commission ruled in Fridriksson's favor. Alaska USA appealed to the superior court. The superior court upheld the Commission's decision. Alaska USA then appealed to the Alaska Supreme Court. The supreme court also affirmed the Commission's finding that Fridriksson was the victim of illegal sex discrimination.38

Utilizing the McDonnell Douglas four-part test, the Alaska Supreme Court found that Fridriksson had made out a prima facie case of sex discrimination. Specifically, the court found that (1) as a woman she was a member of a protected class; (2) she applied and was qualified for the vacant branch manager position; (3) she was rejected despite her qualifications; and (4) the position remained open and Alaska USA continued to seek applicants for that position.39

Alaska USA argued that Fridriksson was not qualified for the position and, thus, that she failed to present a prima facie case of discrimination. The credit union contended that one of the qualifications for the position was that the branch manager have previous management experience or management education. Alaska USA's general manager testified that while there were no "hard cast qualifications"40 for the branch manager's position, the credit union was looking for the "best person."41 He specifically testified that the credit union was looking for someone with supervisory or administrative experience.42 Other testimony before the hearing officer indicated that a high school education was the only "educational" requirement for the branch manager position and that Fridriksson met this requirement.43 Furthermore, Alaska USA's prior branch manager at Adak and the credit union loan officer sent to Adak when the outgoing manager was terminated both indicated that Fridriksson was qualified for the branch manager position.

In an opinion written by Justice Matthews, the court rejected

38. Id.
39. Id. at 806.
40. Id. at 807 n.4.
41. Id.
42. Id.
43. Id. at 808.
Alaska USA's argument that Fridriksson was not qualified for the position. Of particular importance to Alaska employers is that the court noted that the qualifications component of the *McDonnell Douglas* test can be sensibly applied only if the qualifications are objective and actually established for the position in question.\(^{44}\) Although the court acknowledged that education or experience might constitute an objective qualification for the position, it found in this case that the only objective qualification for the branch manager position was a high school education. Alaska USA's desire for a person with managerial or supervisory experience was described as a "mere preference," not an objective qualification.\(^{45}\)

Having found that Fridriksson presented a prima facie case, the court then examined whether Alaska USA rebutted her case by articulating "some legitimate, non-discriminatory reason for the employee's rejection."\(^{46}\) Alaska USA presented four reasons for declining to promote Fridriksson: (1) that she would not commit herself to staying in Adak for a two-year period; (2) that Fridriksson's five-person family was too large to occupy the credit union's two-bedroom trailer at Adak; (3) that it would be too costly to train Fridriksson; and (4) that Fridriksson did not have substantial business management training or experience.\(^{47}\)

None of these justifications was accepted by the court. The court also agreed with the Commission that Fridriksson's application was not taken seriously by the credit union, and that her qualifications were not compared with those of other applicants for the position.\(^{48}\) Citing testimony from the Commission hearing, the court found Alaska USA's argument "unworthy of belief" and held that sex was a factor in Alaska USA's decision not to promote Fridriksson.\(^{49}\)

With respect to Alaska USA's contention that Fridriksson lacked substantial management training or experience, [the employer] never compared Fridriksson's qualifications with those of the successful applicant, Andrews, either in making the hiring decision, or in explaining it to the hearing officer. Nor was such a comparison offered in other testimony. There was thus no compelling evidence that Andrews was a preferable candidate to Fridriksson.\(^{50}\) Nor was the court bothered by the fact that the Commission found Alaska USA's conduct was not "intentionally and willfully discrimi-
The court stated: "Discrimination need not be purposeful to be unlawful under [the Alaska Human Rights Act]."\(^{52}\)

Justice Connor dissented, stating that he did not believe Fridriksson had presented a prima facie case of discrimination; he also stated that even if a prima facie case had been presented, Alaska USA had articulated legitimate, nondiscriminatory reasons for Fridriksson's rejection.\(^{53}\) Lack of experience was the main factor for not promoting Fridriksson, in Justice Connor's view. Fridriksson had no background in management or supervision and had not worked for ten years prior to her four-month employment with Alaska USA. In contrast, the individual hired by Alaska USA had completed numerous college courses in business administration. Additionally, the successful applicant "had worked in the business world, albeit in sales positions."\(^{54}\)

Moreover, in Justice Connor's opinion, Alaska USA's record for employing women did not evince a policy of discrimination. At the time Fridriksson applied for the manager's position in Adak, Alaska USA maintained four full-service branches. One of these branches was managed by a woman. Between this time and the time of Fridriksson's hearing before the Human Rights Commission, the credit union hired twelve women and twenty men as managers at eleven of its branches.\(^{55}\)

As stated above, the federal cases interpreting Title VII have consistently held that a plaintiff alleging disparate discriminatory treatment must show discriminatory motive.\(^{56}\) The Alaska Supreme Court in *Fridriksson* emphatically rejected this requirement when it held that Fridriksson was the victim of discrimination, despite the Commission's finding that the credit union's conduct was not intentionally and willfully discriminatory. The court did not explain why it rejected the federal model for analyzing disparate treatment cases. Instead, the court merely cited the concurring opinion of Justice Stevens in *Califano v. Goldfarb*\(^{57}\) for the proposition that unlawful discrimination could be an "'accidental byproduct of a traditional way of thinking about females.'"\(^{58}\) Reliance on *Goldfarb* is misplaced, however, since it involved a due process challenge to discriminatory

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\(^{51}\) Id. at 809 n.7.

\(^{52}\) Id.

\(^{53}\) Id. at 811 (Connor, J., dissenting).

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) See *supra* notes 10-35 and accompanying text.


\(^{58}\) 642 P.2d at 809 n.7 (quoting *Goldfarb*, 430 U.S. at 223 (Stevens, J., concurring in judgment)).
payments under the Social Security Act, not employment discrimination legislation.

B. Strand v. Petersburg Public Schools: The Burden of Persuasion Shifts to the Employer

On April 12, 1977, the principal of Petersburg Elementary School announced that he would resign at the end of the year. The superintendent formally advertised the position, but due to an informal school district policy of promoting Petersburg teachers to fill administrative positions, local applications were considered most strongly. Mel Stockton, a high school guidance counselor, applied for the principal position. Claire Strand, an elementary school teacher, also applied.

There were only two formal qualifications for the principal's job: a master's degree and a state-issued principal's certificate. Stockton had both. Strand had a master's degree, but did not have the necessary principal's certificate. Nevertheless, she informed the Board that she would receive the certificate before August 22, 1977, the beginning date of employment for the position.

On June 14, 1977, the Petersburg school board announced its decision to hire Stockton for the principal position. Six days later, Strand filed a complaint with the Alaska State Commission for Human Rights, alleging she was denied the position because of her sex and age.

When the statutorily required conciliation discussions failed, the Petersburg school district requested a public hearing. The hearing was held in Petersburg, on September 7, 1978. At the hearing, all four school board members, two women and two men, testified as to their reasons for hiring Stockton rather than Strand. Although the board members were unanimous in their choice of Stockton, individual board members expressed different reasons for selecting Stockton over Strand. Board members emphasized such attributes as "personality," "tact," "ability to deal with people," and "character." In addition, Stockton's rapport with teachers and parents and his leadership ability emerged as the prominent factors in the board's decision to choose him. Also important to some board members was their feeling that Strand had once acted in an unprofessional manner during negotiations with the school board. Board members felt that

60. 659 P.2d at 1219-20 nn.2 & 4.
such conduct was inappropriate for a person who would be charged with implementing school board policy as a principal.63

On November 29, 1978, the Commission's hearing officer found that the school district had unlawfully discriminated against Strand. In this proposed decision, the hearing officer awarded Strand back pay representing the difference between her teacher's salary and what she would have received as principal for the period of two years or the term of Stockton's initial contract, whichever was less. In addition, the hearing officer directed the school district to establish objective, nondiscriminatory hiring procedures and to submit them to the Executive Director of the Alaska State Commission on Human Rights for review and approval.64

At the administrative hearing in Petersburg, both parties agreed that the McDonnell Douglas four-part test was the appropriate framework for determining whether Strand had presented a prima facie case of sex and age discrimination under the Alaska Human Rights Act.65 In her proposed decision, the hearing officer discussed McDonnell Douglas at some length, analyzed the facts under McDonnell Douglas's four-part test, and apparently concluded that Strand failed to present a prima facie case. Citing Olson v. Philco-Ford,66 the hearing officer noted that something more than the fact that a qualified male was chosen over a qualified female for a position is necessary to show discrimination. "The mere fact that historically women, older people, minorities and other groups have been subjected to discrimination should not suffice to incriminate an individual employer who has picked one of two qualified people for a job."67

While having found, at least implicitly, that Strand had not presented a prima facie case of discrimination under McDonnell Douglas, the hearing officer went on to hold that Strand had made out a prima facie case under the standards of Muldrow v. State,68 a previous administrative decision of the Alaska State Commission for Human Rights. In Muldrow, the Commission for Human Rights held that a complainant established a prima facie case of discrimination by the mere showing that she was a member of a protected class,

63. Id. at 1225 (Rabinowitz, J., dissenting).
66. 531 F.2d 474 (10th Cir. 1976).
67. ASCHR proposed order, November 29, 1978, supra note 64, at 8 (citing Olson v. Philco-Ford, 531 F.2d 474, 478 (10th Cir. 1976)).
that she applied and was qualified for the position, and that she was rejected in favor of a white male. In short, according to the hearing officer's analysis, Strand made out a prima facie case of discrimination by showing that she had applied for the principal position, was qualified for the position, and was rejected in favor of Mel Stockton, a white male. According to the hearing officer, the school district bore the burden of rebutting Strand's prima facie case by presenting legitimate, nondiscriminatory reasons for hiring Stockton rather than Strand.

At the time the hearing officer's first proposed order was written, federal law was ill-defined regarding the appropriate burden of proof for a defendant seeking to rebut a prima facie case of employment discrimination. McDonnell Douglas required the defendant to "articulate" a legitimate, nondiscriminatory explanation for the allegedly discriminatory conduct. Some lower courts required the defendant to rebut a charge of discrimination by a "preponderance of the evidence." Just as she rejected the federal standard for establishing a prima facie case of employment discrimination, the hearing officer also rejected federal precedent regarding the defendant's burden of proof when rebutting a prima facie case. Relying in part on Brown v. Wood, an Alaska Supreme Court decision interpreting Alaska's Equal Pay for Women Act, the hearing officer ruled that the school district was required to rebut Strand's case by "clear and convincing evidence."

The hearing officer's proposed findings of fact and conclusions of law were forwarded to the Commission for Human Rights. The Commission determined that the hearing officer had misconstrued the Commission's previous decision in Muldrow in finding that Strand had established a prima facie case of discrimination. The Commission directed the hearing officer to submit a modified decision clarifying the Commission's intent in Muldrow and resolving the Strand case accordingly.

69. See ASCHR proposed order, November 29, 1978, supra note 64, at 8 (citing Muldrow).
70. Curiously, although the hearing officer held that Strand had made out a prima facie case of sex discrimination, she did not apply the Muldrow test to Strand's charge of age discrimination. Since Stockton was younger than Strand, under the hearing officer's analysis, Strand also made out a prima facie case of age discrimination.
71. 411 U.S. at 802.
72. See supra note 18 and accompanying text.
73. 575 P.2d 760, 768 n.11 (Alaska 1978).
75. ASCHR proposed order, November 29, 1978, supra note 64, at 11.
In the modified decision, the Commission explained:

[We have considered the entire record, the hearing examiner's proposed findings of fact, conclusions of law, and order and the written objections of the parties. In reading the hearing officer's recommendations, we observed that she felt constrained by our previous decision in Muldrow v. State of Alaska . . . to find that the complainant had established a prima facie case. We agree with the hearing examiner's conclusions that such a result would not comport with federal law or sound legal reasoning. It was, moreover, never our intent to have Muldrow interpreted as altering the nature of the prima facie case from that set forth in [McDonnell Douglas].]76

In the modified decision, the Commission for Human Rights embraced McDonnell Douglas as the appropriate test for establishing a prima facie case. The Commission then held that Strand failed to establish a prima facie case of sex or age discrimination. Following McDonnell Douglas, the Commission found that no inference of discrimination is raised from the selection of one qualified applicant over a qualified applicant from a protected class.77 Although the Commission found that the school district's hiring procedures were subjective, the Commission did not find this fact sufficient to establish Strand's prima facie case.

Nevertheless, in its decision the Commission deplored the school district's subjective hiring practices, and expressly found the Board's hiring procedures unlawful. Accordingly, the Commission did not disturb that part of the hearing officer's original proposed order requiring the school district to draft a written hiring policy and to submit the policy to the Executive Director of the Alaska Commission for Human Rights for approval.

Neither Strand nor the school district was satisfied with the Commission's decision. Strand filed a motion for reconsideration, and the school district filed a notice of appeal in superior court seeking to overturn that part of the decision requiring the district to redraft its hiring procedures. In response to Strand's petition for reconsideration, the hearing officer issued a new proposed decision revising the Commission's initial decision.78 This proposed decision was issued on July 19, 1979, and adopted by the Commission on August 17, 1979. In the new decision, the Commission found that Strand had indeed presented a prima facie case of sex discrimination under the McDonnell Douglas test. Moreover, the Commission ruled that the application of subjective hiring procedures to Strand was

76. ASCHR decision, May 24, 1979, supra note 61, at 1-2 (emphasis added).
77. Id. at 2.
78. ASCHR decision, August 17, 1979, supra note 6, at 7.
sufficient to establish a prima facie case under *McDonnell Douglas*’s four-part test.

The case is admittedly a “borderline” one, subject to different resolution, depending on which pieces of evidence are deemed relevant in evaluating complainant’s prima facie case and her satisfaction of her fundamental burden of proving discrimination by a preponderance of the evidence. It is now the Commission’s determination that application of the subjective hiring practices to Strand, along with her proof of the first three *McDonnell Douglas* elements, suffice to establish a prima facie case of discrimination.79

After reversing itself and finding that Strand had established a prima facie case of discrimination under *McDonnell Douglas*, the Commission went on to find that the school board had not established legitimate, nondiscriminatory reasons for hiring Stockton instead of Strand. According to the Commission, Strand had the burden of proving discrimination by a preponderance of the evidence. The school board, however, was required to rebut Strand’s prima facie case by the higher “clear and convincing evidence” standard.80 Moreover, the Commission found that the school district failed to rebut Strand’s case “by even a preponderance of the evidence.”81 Disposing of the school board’s testimony in perfunctory fashion, the Commission concluded by observing that the discrimination may arise from subtle preconceptions of which the respondents themselves are not completely aware. Until applicants are measured fairly and evenly against reasonably objective standards, the employer cannot know what the decision should be.82

The superior court overturned the Commission’s decision. The judge reversed both the Commission’s findings of fact and conclusions of law. With regard to the former, the judge challenged the Commission’s finding that the school district did not compare Strand and Stockton as to their administrative abilities and their ability to work with students, teachers, and parents.83 As the judge noted, the hearing record reflected that each school board member knew the applicants personally, and that each board member expressed his or her reasons for hiring Stockton over Strand. “[I]t simply flies in the face of the evidence,” the judge stated, “to find that the Board members did not compare the two candidates.”84

79. *Id.* at 6-7.
80. *Id.* at 11.
81. *Id.* at 8.
82. *Id.*
84. *Id.*
With regard to the Commission's conclusions of law, the judge ruled that Strand had failed to present a prima facie case of discrimination. Although he acknowledged the Commission's position that "lack of objective guidelines" might constitute a discriminatory practice, the judge did not believe there was sufficient evidence to support a finding that the hiring criteria were employed unevenly in this particular situation.\textsuperscript{85}

Both Strand and the Commission appealed the judge's decision to the Alaska Supreme Court. In the majority opinion, written by Justice Matthews,\textsuperscript{86} the superior court decision was reversed and the Commission's finding of discrimination was reinstated.\textsuperscript{87} According to the court, the Commission's finding that Strand was the victim of discrimination was based on substantial evidence. In particular, the court relied on the evidence suggesting the school board did not compare the personal qualities on which it relied in hiring Stockton with the same qualities in Strand. In addition, the evidence that Petersburg had hired nine administrators in twenty-five years, all of them male, was a significant factor in the court's decision.\textsuperscript{88}

In two previous decisions\textsuperscript{89} the court had accepted the four-part \textit{McDonnell Douglas} test as the analytical framework for establishing a prima facie case of employment discrimination. In the court's view, Strand met the first three requirements of the test: she was a member of a protected class; she applied and was qualified for the principal position; and she was rejected. With regard to the fourth element, the court adopted the view expressed in the Commission's revised administrative decision. "A wide variety of evidentiary patterns may suffice to establish a prima facie case; the primary inquiry is whether a claimant has demonstrated circumstances which, if otherwise unexplained by the employer, make it appear likely that impermissible factors played a role in the employer's decision."\textsuperscript{90}

According to the court, Strand established that the Petersburg school board failed to fairly compare her qualities with those of Stockton. "[T]hat is more than sufficient to give rise to a prima facie case."\textsuperscript{91} In addition, the court relied on "statistical evidence" to but-

\textsuperscript{85} Id. at 5.
\textsuperscript{86} The majority decision in Alaska USA Federal Credit Union v. Fridriksson, 642 P.2d 804 (Alaska 1982) was also written by Justice Matthews.
\textsuperscript{87} 659 P.2d 1223.
\textsuperscript{88} Id.
\textsuperscript{89} Alaska USA Federal Credit Union v. Fridriksson, 642 P.2d 804, 806 (Alaska 1982); Alaska State Comm'n. for Human Rights v. Yellow Cab, 611 P.2d 487, 490 (Alaska 1980). The supreme court decided both cases \textit{after} the Commission rendered its decision in \textit{Strand}.
\textsuperscript{90} 659 P.2d at 1222 n.7.
\textsuperscript{91} Id. at 1222 (footnote omitted).
tress its holding that Strand was a victim of sex discrimination. Citing Brown v. Wood,92 the court stated that once a prima facie case of discrimination is established, statistical evidence may be used to show that the employer's nondiscriminatory justification is only a pretext for active discrimination.93

Justice Rabinowitz filed a dissenting opinion, in which he was joined by Chief Justice Burke.94 Justice Rabinowitz pointed out that, under federal law, once a complainant establishes a prima facie case the employer is obligated only to articulate a legitimate, nondiscriminatory reason for the allegedly discriminatory conduct. This, according to Rabinowitz, the school board had done in Strand. Moreover, Justice Rabinowitz believed that the statistical evidence on which the majority relied was meaningless.

The fact that the Petersburg School System had not hired a female principal is in my view of little significance. That fact alone says nothing about discriminatory practices. Without information regarding the number of applicants for a given position and about the gender composition of the applicant pool, it is meaningless to state that an employer's past hiring decisions are evidence of discrimination. Obviously, if there were no qualified women in the applicant pool the fact that only men were hired indicates nothing about the employer's preferences.95

Justice Rabinowitz also noted that, in addition to those of Strand and Stockton, the school district received fourteen applications for the position of principal. At least thirteen of the applications were from men. The gender of the fourteenth applicant was not ascertainable. "I have a great deal of difficulty concluding that an employer who rejects thirteen, perhaps fourteen, men and one woman has thereby demonstrated its intent to discriminate on the basis of gender."96

Although the majority opinion in Strand did not address the issue of the employer's burden in rebutting a prima facie case, it seems clear that the court rejected the United States Supreme Court

93. 659 P.2d at 1222.
94. Id. at 1223 (Rabinowitz, J., dissenting).
95. Id. at 1226.
96. Id. Both Justices Rabinowitz and Burke have solid records supporting human rights; thus, the fact that they dissented in Strand is significant. Both voted with the majorities in Fridriksson and Yellow Cab, two decisions in which the supreme court upheld Human Rights Commission decisions finding sex discrimination in employment. Justice Connor, who had dissented in Fridriksson and Yellow Cab, did not participate in the Strand decision. Superior Court Judge Brian Shortell, sitting by assignment pursuant to ALASKA CONST. art. IV § 316, replaced Justice Connor. Judge Shortell voted with the majority. Had Justice Connor participated in the Strand decision, it is very likely that Rabinowitz's dissenting opinion would have been the majority opinion.
decisions under Title VII that place the burden of persuasion on the
plaintiff. In contrast to Texas Department of Community Affairs v.
Burdine, 97 which placed only the burden of production in rebutting
a prima facie case on the employer, the administrative decision in
Strand imposes the burden of persuasion on the school district once
a prima facie case is presented. The Alaska Supreme Court, by af-
firming the Commission's decision, rejected the federal model for
deciding employment discrimination cases.98

The Commission's decision relied on Brown v. Wood 99 and Mc-
Lean v. State100 to support its conclusion that the employer has the
burden of persuasion in rebutting a prima facie case. Both cases
provide flimsy precedent. In McLean, the employer defended its ad-
mittedly discriminatory hiring practices on the ground that the de-
mands of the job required sexually segregated positions. Although
Alaska law permits sex discrimination if the reasonable demands of
the position require a distinction based on sex,101 the court held that
an employer seeking to utilize this exception must prove "by clear
and convincing evidence" that the exception is "amply justified."102
Brown was decided under Alaska's Equal Pay for Women Act,103
not the Human Rights Act.104 In Brown, the Alaska Supreme Court
held that once an individual established that an employer paid em-
ployees of one sex more than employees of the other sex for equal
work, the employer must show by clear and convincing evidence that
this discrimination was justified.105

The Alaska Supreme Court, by affirming the Commission's de-
cision that Strand was a victim of discrimination, implicitly affirmed
the Commission's ruling that the burden of proof shifts to the em-
ployer in all cases after a claimant presents a prima facie case. This
extends the Commission's shift in the burden of proof to all cases
alleging discrimination, thus extending the holdings in McLean and

98. In Felten v. Trustees of Cal. Univs. & Colleges, 703 F.2d 1507 (9th Cir.
1983), a Title VII sex discrimination suit, the court reversed a district court's alloca-
tion of the burden of persuasion which was similar to the allocation in the Strand
decision. The Ninth Circuit rejected the district court's view that the employer bore
the burden of rebutting the plaintiff's prima facie case by clear and convincing evi-
dence in accord with Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248
(1981), and United States Postal Serv. Bd. of Governors v. Aiken, 103 S. Ct. 1478
(1983).
100. 583 P.2d 867 (Alaska 1978).
102. McLean, 583 P.2d at 869-70.
103. ALASKA STAT. § 23.10.155 (repealed 1980).
105. 575 P.2d at 768.
Brown much further than their logic dictates and further than is warranted to achieve the purposes behind the Alaska Human Rights Act. Since under McDonnell Douglas the plaintiff can make out a prima facie case of discrimination on sketchy evidence, the employer's burden in disproving discrimination is significantly greater than the employee's burden in showing discriminatory conduct. Without legislative sanction, such a shift in the allocation of the burden of proof appears to be, at worst, a violation of due process of law and, at best, a judicial intrusion into a sphere more properly reserved to the legislature. As a result of Strand's affirmation of the Commission's decision, the federal standard is discarded without explanation. All that is required for the imposition of substantial damages after a plaintiff accuses an employer of discrimination is the presentation of any evidence capable of being interpreted as indicating discrimination. The only way an employer can avoid this result under the current burden of proof requirement is to prove by clear and convincing evidence that he did not engage in discrimination.

C. The Result of the Court's Departure from McDonnell Douglas in Strand and Fridriksson: Affirmative Action

Under McDonnell Douglas, the plaintiff's prima facie case creates an inference of discriminatory intent which the employer can dispel by bringing forward legitimate, nondiscriminatory reasons for its hiring decision. The plaintiff's prima facie case and the employer's articulation of legitimate reasons in support of its actions constitute the two initial steps in the order of allegation and proof. The third step in the order of proof — the most important step under federal law — is the plaintiff's burden to persuade the court that the reasons articulated by the employer are a mere pretext for discriminatory intent. It is this third step which the Alaska Supreme Court, through Strand and Fridriksson, tacitly eliminated from litigation arising under the Human Rights Act. Apparently the litigation is at an end once the plaintiff establishes a prima facie case and the employer sets forth reasons in support of his decision. Unlike litigation under Title VII or the traditional common law order of proof, the ultimate question — whether the employer's choice violated the mandate of the Human Rights Act — now depends not on the plaintiff successfully carrying the burden of persuasion, but on the weight of the employer's evidence compared to the inference of discrimination produced by the plaintiff's prima facie case. Evidently the plaintiff need not attempt to persuade the court that the employer's evidence is a mere pretext for discrimination. Instead, the plaintiff may rest on the prima facie case and allow the court to determine
whether the employer's evidence sufficiently rebuts the inference of unlawful discrimination.

The court's abandonment of McDonnell Douglas's third step for the order of allegation and proof explains Fridriksson's holding that discrimination need not be willful or intentional to be illegal. In litigation arising under the Human Rights Act, the plaintiff is allowed to benefit from an inference of intent drawn by the court from the prima facie case if the employer fails to meet his burden of proof in disproving discrimination in hiring. In other words, shifting the burden of proof to the employer dispenses with the need for the third step of McDonnell Douglas. This eliminates the requirement that the plaintiff prove discriminatory intent.

The Strand and Fridriksson decisions are a radical departure from the original purposes of both the Human Rights Act and Title VII. The statutes are anti-discriminatory. To that end, they prohibit adverse action against members of protected classes. The statutes demonstrate neither a facial intent nor a legislative mandate that protected classes be treated more favorably than unprotected classes.

The court blurred this distinction between nondiscrimination and compensation in Strand and Fridriksson. When read together, these cases impose a type of affirmative action requirement on Alaska employers. In effect, these cases force an employer who seeks to avoid the burden of litigation to prefer an applicant from a protected class, who meets the minimal job qualifications, over an applicant from an unprotected class with the same qualifications. This is also true when the member of the unprotected class has qualities such as additional training or experience or a record of success in similar employment which would make him more attractive than the applicant from the protected class. Under Fridriksson these qualities are deemed "mere preferences" and cannot justify the employer's decision unless, at a minimum, they are listed as requirements for the position and documented as justifications when the hiring decision is made.

Members of a protected class are thus placed in a position superior to that of members of an unprotected class when competing for the same job. Such an interpretation of the burden of proof by the Alaska Supreme Court does not simply remove the barriers to employment heretofore experienced by protected classes, but also gives them an advantage over unprotected classes. This preference makes the Human Rights Act an affirmative action statute. If this result is to be the mandate of Alaska's law of employment discrimination, the legislature should amend the Human Rights Act. The choice between affirmative action and equal opportunity is more properly left to the legislature. The supreme court can best implement the princi-
ple of equal opportunity embodied in the language of the present Human Rights Act by retreating from the holdings in *Strand* and *Fridricksson* and adhering to federal precedent. But, for the time being, employers in Alaska will simply have to live with the fact that the supreme court, in rejecting *McDonnell Douglas*, has made employment discrimination litigation more onerous to defendants and the Human Rights Act more attractive than Title VII to potential plaintiffs. Under the court's present interpretation, employers bear not only the burden of proving they did not discriminate, but also a substantially greater risk of being deemed guilty of discrimination under state law than under federal law.

IV. *Strand* and *Fridricksson*: Hostility Toward Unquantified Subjective Hiring Criteria

Although the Alaska Supreme Court has often professed to adopt federal standards for analyzing employment discrimination cases,106 *Strand* and *Fridricksson* demonstrate that the court is only paying lip service to the federally fashioned analytical framework. These cases also reflect the court's hostile attitude toward any subjective hiring practices. Perhaps this unarticulated hostility best explains the *Strand* and *Fridricksson* departures from federal standards.

In neither *Strand* nor *Fridricksson* did the Commission for Human Rights find the employer guilty of intentional discrimination. In *Fridricksson*, the hearing officer specifically found that the employer did not intentionally discriminate.107 In *Strand*, the Commission originally held that the school district did not discriminate against Strand and later changed its mind. There seems little question the Commission would not have made its initial decision that the school district was innocent of discrimination if it believed that the school district's hiring decision was based on discriminatory motives. Moreover, the evidence of discrimination in both cases is extremely weak and contradictory. The Petersburg school board was made up of two men and two women, and yet three supreme court justices believed the four school board members committed an unlawful act of sex discrimination. Alaska USA Credit Union had a commendable record for hiring women as managers for its branch offices, but the credit union was found to have unlawfully discriminated when it failed to hire a woman with very meager credentials for a manager position.

In both *Strand* and *Fridricksson*, the Alaska Supreme Court demonstrated hostility toward subjective hiring practices. In *Strand*,

106. See cases cited supra note 3.
107. See 642 P.2d at 809 n.7.
the Petersburg school board was censured for failing to compare objectively the desirable qualities of a male applicant with similar qualities in a female applicant. In Fridriksson, the credit union's desire to hire a manager with supervisory experience was deemed a "mere preference" and not an "objective" criterion for the job. As in Strand, the court stated its belief that the credit union did not compare Fridriksson's qualifications with those of the male who was hired.

The most unfortunate aspect of the court's decisions is the cavalier disregard of federally sanctioned hiring practices for managers and supervisors. Many employers rely on subjective factors in their hiring decisions. In this context, the use of subjective hiring criteria means simply the common sense evaluation of a job applicant's qualifications and the position's requirements, both tangible and intangible. Factors such as personality, ability to deal with people, leadership skills, and similar intangible qualities generally enter into the hiring decisions for managers. Federal courts have recognized the employer's need to pick supervisory employees using these subjective hiring criteria. The rational justification for this consensus in the federal courts is that the objective hiring criteria appropriate for hiring blue collar workers and lower management personnel are inappropriate and incomplete for hiring supervisors, upper management personnel, professionals, and administrators.

Strand and Fridriksson are clear signals that the Alaska Supreme Court has rejected the federal view permitting subjective hiring criteria. Strand suggests that employers adopt a checklist whereby each job applicant is compared against each job criterion. There are two obvious problems with the court's approach.

108. 659 P.2d at 1221-22.
109. 642 P.2d at 807.
110. Id. at 809.
112. A discussion of the application of Title VII to professional and managerial positions is beyond the scope of this article. This topic has been the subject of much scholarly commentary. See Bartolet, Application of Title VII to Jobs in High Places, 95 HARv. L. REV. 947 (1982); see also Hunt & Pazuniak, Special Problems in Litigating Upper Level Employment Discrimination Cases, 4 DEL. J. CORP. 114 (1978); Maltz, Title VII in Upper Level Employment — A Response to Professor Bartolet, 77 NW. L. REV. 776 (1982). The federal courts have been particularly reluctant to involve themselves in the hiring and tenure decisions of educational institutions, and this phenomenon has been commented on extensively. See Friedman, Congress, the Courts, and Sex-Based Employment in Education: A Tale of Two Titles, 34 VAND. L. REV. 37 (1981); Yurko, Judicial Recognition of Academic Collective Interest: A New Approach to Faculty Title VII Litigation, 60 B.U.L. REV. 473 (1980); Note, Tenure and Partnership in Title VII Remedies, 94 HARv. L. REV. 457 (1980).
113. 659 P.2d at 1221.
First, a point-by-point comparison of job candidates against criteria may give the appearance of objectivity, but hiring decisions will obviously still be a subjective process. For example, in *Strand*, the school board members stressed the importance of "personality," "tact," and "ability to deal with people." Even if these traits were reduced to written form and both Strand and Stockton were compared based on these qualities, the process would be subjective. Each school board member still would have chosen Stockton over Strand, and each school board member would have done so for a subjective reason. It is difficult to understand why the failure to quantify this process rises to the level of illegal discrimination.

Second, the court's approach, taken to its logical conclusion, denies that application of any subjective criteria is proper in hiring decisions. In *Strand*, the Petersburg school board apparently gave less weight to Strand's lack of administrative experience than to a single incident of her "unprofessional" conduct during collective bargaining. Consideration of such unprofessional conduct was appropriate because the principal is part of an administrative team charged with implementing the school board's educational goals. Surely, a school board's responsibility to conduct the day-to-day operation of the schools should include the right to make subjective, nondiscriminatory decisions about who is best suited to administer and implement school policy.

V. A SUGGESTED APPROACH TO MINIMIZE THE EFFECT OF THE COURT'S DISCARDING OF THE FEDERAL STANDARD

Alaska employers rightfully may deplore the supreme court's decisions in *Strand* and *Fridriksson*; they would be wise, however, to reevaluate their hiring procedures in light of these opinions. Employers hiring school principals, bank managers, and other supervi-

114. *Id.* at 1220.
115. In Tunley v. Municipality of Anchorage School Dist., 631 P.2d 67 (Alaska 1981), the Alaska Supreme Court expressly recognized the school board's authority to administer the local schools.

Historically, Americans have considered schools to be an extension of the local community. Thus, although state legislatures possess plenary power over the educational system, local initiative with respect to education is so highly regarded that most states have delegated extensive authority over the actual administration of the schools to local institutions. States have divided their territory into "school districts" that perform the sole function of establishing and maintaining the public schools. Boards of education, commonly referred to as school boards, have been created as the governing body of the school district and are typically responsible for the day-to-day operation of the public schools.

*Id.* at 67 n.17 (quoting from Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1380 (1976) (footnotes omitted)).
sory or administrative employees should adopt formal, written criteria before filling these jobs. Thus, if leadership qualities, personality, and ability to deal with clients or the public are important, these criteria should be stated objectively in such a way that each applicant for a job can be quantitatively measured against such criterion. As a safeguard, employers should adopt formal written checklists against which prospective personnel are judged; these records should be retained. Such guidelines will provide evidence of an employer's objective, nondiscriminatory motive in the event a disappointed job applicant files an employment discrimination complaint. Employers who continue to rely on vague, undocumented generalizations to explain their employment decisions may find themselves in the position of the Alaska USA Federal Credit Union or the Petersburg public school system. In other words, the Alaska Supreme Court may be sitting in on the employers' hiring committees and making the final employment decisions.

VI. Conclusion

In Strand v. Petersburg Public Schools, the Alaska Supreme Court implicitly endorsed the Commission for Human Rights' standard for analyzing employment discrimination cases. The Commission's procedure provides that once a claimant has presented a prima facie case of discrimination, the employer must rebut that case by clear and convincing evidence. Thus, the employer's burden of disproving discrimination is far greater than the employee's burden of indicating discriminatory conduct.

In Alaska USA Federal Credit Union v. Fridriksson, the Alaska Supreme Court held that an employer may commit an unlawful discriminatory act without intending to do so. This holding rejects the United States Supreme Court decisions which require a plaintiff to prove discriminatory motive to prevail in a case alleging disparate, discriminatory treatment.

Both Strand and Fridriksson demonstrate the Alaska Supreme Court's hostility to the use of any subjective hiring criteria by employers, even when employers are hiring administrators or supervisors. Alaska employers would be wise to adopt written objective guidelines articulating the qualities they seek in an applicant for a position and to judge each applicant against the same criteria.

Strand and Fridriksson inject a great deal of needless uncertainty into employment discrimination law. Although the Alaska Supreme Court professes to accept federal case law analyzing em-

117. 642 P.2d 804 (Alaska 1982).
Employment discrimination, *Strand* and *Fridriksson* highlight the court’s radical departure from these federal precedents. As a result, it is almost impossible for employers to assess whether nonobjective hiring procedures will pass muster under Alaska law. Certainly, the *Fridriksson* ruling that employment discrimination can be unintentional makes it very difficult for an employer to know whether he is complying with the Alaska Human Rights Act.

If the court would adhere more closely to federal case law interpreting Title VII, Alaska employers could be more certain whether their hiring decisions will withstand potential allegations of unlawful discrimination in violation of the Human Rights Act. The United States Supreme Court’s holding in *Texas Department of Community Affairs v. Burdine*\(^{118}\) that the burden of persuasion in an employment discrimination case never shifts from the plaintiff is a sensible standard and should be adopted by the Alaska Supreme Court. The United States Supreme Court’s position that a plaintiff must show intentional discrimination in a disparate treatment case\(^{119}\) also makes sense, and is much easier to apply than the *Fridriksson* holding that an employer may commit an unlawful act of employment discrimination without intending to do so. An adoption of the federal standard would benefit employers without detracting from the ability of the Commission for Human Rights to protect Alaska employees from genuine unlawful discrimination.

\(^{118}\) 450 U.S. 248 (1981).

\(^{119}\) *See supra* note 12.