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Plaintiffs' Direct Evidence Burden in Mixed-Motive Disparate Treatment Cases: An Analysis in Light of *Costa v. Desert Palace*

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NOTES

PLAINTIFFS' DIRECT EVIDENCE BURDEN IN MIXED-MOTIVE DISPARATE TREATMENT CASES:

AN ANALYSIS IN LIGHT OF *COSTA V. DESERT PALACE*

INTRODUCTION

Catharina Costa was the only woman operating forklifts and pallet jacks in a warehouse at Caesar's Desert Palace, a casino in Las Vegas.[1] While Costa's work was described as "good" and "excellent," she was also the target of disciplinary action and sexist remarks to which her male counterparts were not subjected.[2] For example, when male workers missed work for medical reasons, they were given overtime opportunities to make up the time. When Costa missed work for similar reasons, she was disciplined. A supervisor followed Costa around the warehouse to such an extent that her coworkers characterized the activity as "stalking."[3] When Costa allegedly used equipment in a hazardous manner or used foul language, she was warned or suspended, while her male coworkers engaged in similar activity without penalty.[4]

Costa was terminated after a coworker physically assaulted her in an elevator. Costa immediately reported the incident to union officials and her story was corroborated with photographs of

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[1] Costa v. Desert Palace, Inc., 299 F.3d 838, 844 (9th Cir. 2002) (en banc), *aff'd*, Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

[2] *Costa*, 299 F.3d at 844-46.

[3] *Id.* at 845.

[4] *Id.* Costa was also called "the lady Teamster," "bitch," and was told she had "more balls than the guys," though trial testimony indicated that she got along with most of her coworkers, many of whom also engaged in swearing and physical altercations. *Id.* at 845-46.

her bruises and an eyewitness account of the incident. Purportedly because of conflicting stories told by Costa and her coworker, and despite the corroborating evidence, Caesar's terminated Costa but only suspended her coworker.[5] After an arbitrator upheld her discharge, Costa filed a disparate treatment claim in district court.[6] Caesar's maintained that Costa's history of disciplinary problems, culminating in the elevator incident, was the sole reason for the decision to discharge her. Costa did not claim that Caesar's proffered reason for her discharge was pretext,[7] but instead argued that her gender was also a motivating factor in the decision. Thus, the district court, and eventually the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court, was presented with a classic "mixed-motive" disparate treatment case.[8]

Originally, Title VII disparate treatment cases were analyzed under the assumption that there was only one reason for an adverse employment decision.[9] That reason could either be legitimate, such as poor performance, or illegitimate, such as unlawful discrimination based on the employee's race or gender, but it could not involve both legitimate and illegitimate factors.[10] Based on this assumption, and recognizing that evidence of unlawful discrimination is difficult for plaintiffs to obtain, the United States Supreme Court provided a framework for proving disparate treatment in employment decisions in *McDonnell Douglas Corp. v. Green*.[11] This framework has proved to be a useful tool for courts trying disparate treatment cases involving pretext in the nearly three decades since its inception.[12]

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[5] *Id.* at 846.

[6] *Id.* Costa also filed a sexual harassment claim, which was dismissed by the district court on summary judgment. *Id.*

[7] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (stating that the plaintiff must be afforded the opportunity to prove the employer's proffered reason for an adverse employment action is pretext for discrimination); *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (clarifying the plaintiff's opportunity to prove pretext); discussion *infra* Part II.

[8] *See* HENRY J. PERRITT, JR., CIVIL RIGHTS ACT OF 1991: SPECIAL REPORT 138 (1992) ("When one of the reasons for an adverse employment decision is race, sex, religion, or national origin, a court hearing a Title VII claim must deal with the mixed-motive problem."); *see also Costa*, 299 F.3d at 848 (noting that cases are "sometimes labeled with the 'mixed-motive' moniker" where a protected characteristic was a motivating factor in an adverse employment action).

[9] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000). The language and meaning of Title VII are discussed *infra* Part III.

[10] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) ("[T]he premise of [the pretext framework] is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision.").

[11] 411 U.S. 792 (1973).

[12] *See, e.g.*, Joseph J. Ward, Note, *A Call for* Price Waterhouse *II: The Legacy of Justice*

In creating this framework, however, the Supreme Court failed to acknowledge that discriminatory animus is not always the only factor motivating an employment decision.[13] The Court attempted to fashion a remedy for this oversight sixteen years later, in *Price Waterhouse v. Hopkins*.[14] Unfortunately, the Court's plurality opinion and two concurrences[15] created more problems than they solved.[16] Particularly controversial was Justice O'Connor's statement that in order to utilize mixed-motive analysis in Title VII disparate treatment cases,[17] plaintiffs were required to present "direct evidence" that discrimination was a "substantial factor" in the adverse employment action.[18] Courts and commentators alike have been unable to agree on the definition of "direct evidence."[19] Adding to the confusion was Congress' failure to specifically address the direct evidence requirement when it passed the Civil Rights Act of 1991.[20] Even until recently,[21] over ten years after that legislation and the *Price Waterhouse* decision, the circuit courts were in disarray over the requirement.[22]

O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims, 61 ALB. L. REV. 627, 660 (1997) (stating that the *McDonnell Douglas* framework has enabled plaintiffs to bring successful claims of intentional discrimination for decades).

[13] *See* PERRITT, *supra* note 8, at 185 (explaining that employment decisions are often made by institutions, as opposed to individuals, such that many different motives are factors in those decisions, and describing the appropriate method for assessing the role of discriminatory motives).

[14] 490 U.S. 228 (1989) (addressing mixed motives under Title VII for the first time). The Court had addressed the issue of mixed motives in the employment context after deciding *McDonnell Douglas* and prior to 1989, but not under Title VII. *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983) (analyzing the National Labor Relations Act); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (analyzing the First Amendment). These cases are discussed *infra* Part I.

[15] *See* 490 U.S. at 231 (plurality opinion); *id.* at 258 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring); *id.* at 279 (Kennedy, J., dissenting).

[16] *See, e.g.*, Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182 (2d Cir. 1992) (expressing frustration with the Supreme Court's "splintered" *Price Waterhouse* opinion).

[17] Mixed-motive analysis is discussed more fully *infra* Part II.

[18] 490 U.S. at 276 (O'Connor, J., concurring).

[19] *Compare* Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 583-84 (1st Cir. 1999), *and* Ward, *supra* note 12, at 662-64 (supporting a strict definition of direct evidence), *with* Wright v. Southland Corp., 187 F.3d 1287, 1300-02 (11th Cir. 1999), *and* Kelley E. Dowd, Casenote, *The Correct Application of the Evidentiary Standard in Title VII Mixed-Motive Cases:* Stacks v. Southwestern Bell Yellow Pages, Inc., 28 CREIGHTON L. REV. 1095, 1125-26 (1995) (concluding that direct evidence may include circumstantial evidence in mixed-motive cases).

[20] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075. The Act was passed in response to several 1989 Supreme Court decisions, including *Price Waterhouse*.

[21] In June 2003, the Supreme Court decided *Desert Palace, Inc. v. Costa*, specifically doing away with any requirement for direct evidence in mixed-motive Title VII cases. 123 S. Ct. 2148 (2003).

[22] *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 851 (9th Cir. 2002) ("[Justice

It should be noted at this point that the vast majority of this Note was written prior to the recent Supreme Court decision in the *Costa* case.[23] In that opinion, the Supreme Court recognized that the Civil Rights Act of 1991 provides the clearest answer to the mixed-motive problem: its language is clear and unambiguous and "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."[24] Furthermore, since Congress has specifically required direct evidence in other circumstances, its failure to do so in the 1991 Act demonstrated its intention *not* to require a higher evidentiary showing.[25]

While the *Desert Palace* decision was in line with the conclusion of this Note, the Court focused solely on the statutory language of Title VII and the Civil Rights Act of 1991, something that few lower courts had focused on in light of the *Price Waterhouse* decision. In doing so, the Court ignored its own precedent, the congressional history of both statutes, and the confusion over the meaning of direct evidence that was generated by *Price Waterhouse*. Thus, this Note addresses those issues that the Court did not, while also examining the statutory language of both Title VII and the 1991 Act.[26] Part I explores the history of mixed-motive analysis outside the Title VII context, examining First Amendment, equal protection, and labor cases. Part II discusses the genesis of both pretext and mixed-motive analyses in Title VII cases, focusing primarily on *McDonnell Douglas* and *Price Waterhouse*. Part III examines Title VII, the Civil Rights Act of 1991, and their legislative intent. Part IV discusses the different approaches taken by the circuit courts in applying Justice O'Connor's direct evidence standard. Part V explores whether or not direct evidence is really necessary in mixed-motive cases in order to achieve Title VII's goals. Finally, the Note concludes that the Supreme Court's decision in *Desert Palace* – affirming the Ninth Circuit's opinion that direct evidence is not necessary in mixed-motive cases – was

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O'Connor's reference to direct evidence] has spawned a virtual cottage industry of litigation over the effect and meaning of the phrase.").

[23] *See* Desert Place, Inc. v. Costa, 123 S. Ct. 2148 (2003).

[24] *Id.* at 2153.

[25] *Id.* at 2154 (noting that Congress has been "unequivocal" when it has required heightened proof in other situations).

[26] This Note does not dispute the Court's conclusion that the statutory text begins and ends the analysis in this particular case. *See id.* at 2153. The Note suggests, however, that there were additional factors the Court could have relied on in reaching its conclusion in order to definitively clear up the confusion among the lower courts over the meaning of direct evidence and the implications of its application.

the correct one, though the Court could have based its decision on a variety of factors, not just the language of the Civil Rights Act of 1991.

I. MIXED-MOTIVE ANALYSIS OUTSIDE TITLE VII

Prior to confronting the mixed-motive issue in Title VII employment discrimination cases, the Supreme Court addressed the issue in a variety of other contexts. Its decisions in these cases proved to be instructive when the Court decided *Price Waterhouse*.

A. Mixed Motives in the Context of Equal Protection

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[27] the Supreme Court addressed the issue of mixed motives in the context of an equal protection claim. The Village of Arlington Heights, a virtually all-white suburb of Chicago, was zoned primarily for single-family homes. In the early 1970s, a religious order that owned a large parcel of vacant land, surrounded by single-family homes, contracted with a nonprofit developer to build low- and moderate-income housing on the parcel. The developer, Metropolitan Housing Development Corp. ("MHDC"), was experienced in federal housing subsidies and had developed similar sites throughout Chicago. MHDC and the religious order entered into a 99-year lease and sale agreement that was contingent on MHDC's obtaining zoning clearances from the Village. MHDC contracted with an architect and went ahead with its plans to build the housing with the expectation that smaller units would attract elderly citizens, larger units would be available, and a large portion of the parcel would remain undeveloped with shrubs and trees.[28]

In order to build such units, MHDC needed the Village to rezone the parcel for multiple-family housing. MHDC followed the procedure for a rezoning request and the Village Planning Commission held three public hearings on the matter, each of which drew large crowds of residents, some in favor of the project but most in opposition. Some of the comments during these meetings targeted the desirability (or lack thereof) of having low- and moderate-income housing, which would probably be racially integrated, in the Village. However, most of the comments focused on the zoning aspects of the project, arguing that the surrounding area was zoned single-family and that citizens in those neighborhoods

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[27] 429 U.S. 252 (1977).

[28] *Id.* at 255-57.

had relied on that fact when purchasing their homes. In addition, rezoning the parcel would violate the Village's zoning requirement that multiple-family zoning only serve as a buffer between single-family zoning and commercial zoning because there was no commercial zoning near the planned project.[29]

The Planning Commission recommended that the Village Board of Trustees deny the rezoning request, but did not specifically state its reasons for doing so. The Board of Trustees adopted the Commission's recommendation and denied MHDC's rezoning request. MHDC and some minority individuals filed a lawsuit, claiming the Village had violated their equal protection rights.

The Supreme Court first noted that legislative and administrative bodies are generally accorded deference in their decision-making, unless the decisions are arbitrary or irrational. The Court noted that this deference would also not be justified where it was shown that discrimination was a motivating factor in a decision.[30] In determining whether discrimination was a motivating factor, "a sensitive inquiry into such *circumstantial* and direct evidence of intent as may be available" is required.[31] The Court provided examples of the types of evidence that could be used in making the determination.[32] The Court concluded that MHDC had failed to carry its burden of proving that discrimination was a motivating factor in the denial of the rezoning request.[33] In reaching this conclusion, the Supreme Court noted that had MHDC carried its burden, the burden of persuasion would have shifted to the Village to prove that it would have made the same decision regardless of any considerations of the racial makeup of the proposed development. If the Village were able to carry this burden, MHDC would not be able to claim that discrimination was an improper factor in the decision, and relief would be denied.[34]

With this decision, the Supreme Court first articulated the "same decision" affirmative defense available to defendants in mixed-motive cases.[35] In doing so, the Court recognized that ex-

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[29] *Id.* at 257-58.

[30] *Id.* at 265-66.

[31] *Id.* at 266 (emphasis added).

[32] *Id.* at 267 (explaining that the historical background of the decision, the specific sequence of events leading to the decision, and departures from normal procedures may all be potentially probative of discriminatory motivation).

[33] *Id.* at 270-71.

[34] *Id.* at 270 n.21.

[35] *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 857 (9th Cir. 2002) (explaining that the "same decision" defense allows employers to escape the imposition of some forms of relief, such as reinstatement and back pay).

amination of *both* direct *and* circumstantial evidence would be necessary for the plaintiff to satisfy his burden of persuasion and shift the burden to the defendant. The Court did not impose a higher evidentiary burden on the plaintiff before allowing the burden of persuasion to be shifted.

B. Mixed Motives and the First Amendment

The Court first recognized that both legitimate and illegitimate factors might affect employment decisions in *Mt. Healthy City School District Board of Education v. Doyle*,[36] decided the same day as *Arlington Heights*.[37] In *Mt. Healthy*, plaintiff Doyle worked as an untenured teacher from 1966 to 1971. During that time, he was also elected president of the Teachers' Association for a one-year term and served on the Association's executive committee.

Starting in 1970, Doyle was involved in a series of incidents related to his teaching position. In one incident, Doyle was involved in an argument with another teacher that resulted in that teacher slapping Doyle. Doyle refused to accept an apology, and both he and the other teacher were suspended. In other incidents, Doyle argued with a cafeteria employee over the amount of food given to him, referred to students as "sons of bitches," and made an obscene gesture toward two female students after they failed to obey him when he was supervising the cafeteria.[38] The straw that broke the camel's back, so to speak, was Doyle's call to a local radio station, revealing the contents of a memorandum circulated to teachers by the school principal. Doyle was displeased with the memorandum, which concerned instituting a teacher dress code, because he thought the matter was to be settled through negotiations with the Teachers' Association.

After the contents of the memorandum were broadcast as news by the radio station, Doyle apologized to the principal and conceded that he should have vented his frustration and concerns to the school board directly. Nonetheless, a month later the school superintendent recommended that Doyle not be rehired for the following year. The board adopted the recommendation and told Doyle that the decision was based on his "notable lack of tact in handling professional matters," the incidents he had with students,

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[36] 429 U.S. 274 (1977).

[37] *See supra* Part I.A.

[38] 429 U.S. at 281-82.

and his call to the radio station.[39] Doyle then sued the school board, claiming that his call to the radio station was protected free speech such that his First Amendment rights were violated when he was discharged.

The Supreme Court accepted the lower courts' findings that the call to the radio station was protected speech under the First and Fourteenth Amendments. However, the Court disagreed that reinstatement and back pay were appropriate. The Court explained that a rule requiring reinstatement any time protected conduct played a "substantial part" in an employment decision would often result in placing an employee in a better position than he would have been otherwise. Here, Doyle's call to the radio station occurred after the incidents with his coworkers and students. The school board very well could have decided not to rehire Doyle regardless of the call, simply based on the prior incidents. That the call then took place may have simply solidified the decision. In that case, reinstating Doyle would put him in a better position than he would have been had the protected call not been considered by the board at all.[40] With this in mind, the Court looked to criminal cases to fashion an appropriate rule where mixed motives were involved in employment decisions that had constitutional implications.[41]

The Court determined that the proper rule was one that protected constitutional rights without demanding consequences, such as reinstatement, that were "not necessary to the assurance of those rights."[42] The Court then concluded that the lower courts had properly required Doyle to prove that his conduct was protected. The lower courts had also properly held that Doyle bore the burden of proving that the protected conduct was a "substantial factor" in the adverse employment decision.[43] Once Doyle carried that burden, however, the Court held that the lower courts should have considered whether the school board had proven, by a preponder-

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[39] *Id.* at 282-83 & n.1.

[40] *Id.* at 285-86. The Court stated that "[a] borderline or marginal candidate . . . ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." *Id.* at 286.

[41] *Id.* at 286-87 (relying on Parker v. North Carolina, 397 U.S. 790 (1970); Wong Sun v. United States, 371 U.S. 471 (1963); and Lyons v. Oklahoma, 322 U.S. 596 (1944) to fashion a rule regarding causation).

[42] *Mt. Healthy*, 429 U.S. at 287.

[43] *Id.* In explaining that the plaintiff bears the burden of demonstrating that protected conduct was a "substantial factor," the Court stated that this is the same as the plaintiff demonstrating that protected conduct was a "motivating factor." *Id.*

ance of the evidence, that it would have made the same decision regardless of the protected conduct. If the board carried its burden, reinstatement with back pay would have been an inappropriate remedy.[44]

This decision by the Supreme Court reiterated the "same decision" affirmative defense articulated in *Arlington Heights*.[45] Once the plaintiff in a mixed-motive employment case proved by a preponderance of the evidence that protected conduct played a substantial part in an adverse employment decision, the burden of persuasion would shift to the employer to prove the affirmative defense. Nowhere in the Court's opinion was there any indication that the plaintiff in such cases must present direct evidence that protected conduct played a role in the decision before the burden would shift to the employer.[46] This decision was later relied on by the plurality in *Price Waterhouse*.[47]

C. Mixed Motives in the Labor Context

Six years after deciding *Arlington Heights* and *Mt. Healthy*, the Supreme Court considered the issue of mixed motives in yet another context: labor. *NLRB v. Transportation Management Corp.*[48] involved a bus driver, Santillo, who talked with his fellow drivers about the possibility of joining the Teamsters' Union. Santillo's supervisor, upon hearing of his union activities, told another driver that Santillo was two-faced and that the supervisor would get even with him. The supervisor then told a different driver that he took Santillo's union activity personally and that he would remember it the next time Santillo needed a favor. Three days later, Santillo was terminated. Santillo was told that he was discharged because he left his keys in his bus and because he took unauthorized breaks.[49]

Santillo filed a complaint with the National Labor Relations Board, claiming his union activities motivated his termination, in violation of the National Labor Relations Act.[50] The administrative law judge held that Santillo's discharge was indeed motivated by his supervisor's anti-union bias. The ALJ found that the super-

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[44] *Id.*

[45] *See supra* Part I.A.

[46] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 274 (1977).

[47] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 248-49 (1989) (discussing the holding of *Mt. Healthy* and the affect of the affirmative defense on liability).

[48] 462 U.S. 393 (1983).

[49] *Id.* at 395-96.

[50] *Id.* The NLRA makes it unlawful for an employer to discharge a worker because of union activity. 29 U.S.C. § 158(a) (2000).

visor did not know about Santillo's practice of leaving his keys in his bus until after the discharge decision had been made. Further, drivers frequently left their keys in their buses without penalty from the supervisor. Thus, the ALJ concluded that this reason was merely pretext. As for Santillo's taking of unauthorized breaks, the ALJ found that Santillo had not been warned about the impropriety of such behavior, and the supervisor had not followed the regular practice of issuing three written warnings prior to a discharge. As with leaving keys in buses, the taking of coffee breaks during working hours was allowed, as long as such breaks did not interfere with the drivers' routes. In fact, no adverse action had ever been taken against a driver for taking breaks. Thus, the ALJ found that Santillo would not have been fired had he not participated in union activity.[51]

The NLRB affirmed the ALJ's decision, clarifying that the employer had failed to carry its burden of proving the same decision affirmative defense by a preponderance of the evidence. The United States Court of Appeals for the First Circuit reversed, remanding the case for determination of whether Santillo had proven, by a preponderance of the evidence, that he would not have been fired had it not been for his union activities.[52] In essence, the First Circuit held that the burden of persuasion remains with the plaintiff to *disprove* the affirmative defense.

In its opinion, the Supreme Court noted that the NLRB had previously decided that an unfair labor practice occurred under the NLRA when anti-union animus was but one of several reasons motivating an adverse employment action.[53] The Court described this interpretation of the NLRA as "plainly rational and acceptable."[54] The Court also noted the NLRB's long-standing recognition of a same decision affirmative defense that was consistent with the affirmative defense articulated in both *Arlington Heights* and *Mt. Healthy*.[55] Under this framework, the Court concluded that the NLRB and the lower court had been correct in holding that the plaintiff, here Santillo, bore the burden of persuasion on the question of whether an unlawful reason was a motivating factor in the adverse employment action. However, the court of appeals had

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[51] 462 U.S. at 396-97.
[52] *Id.* at 397.
[53] *Id.* at 398.
[54] *Id.* at 399.
[55] *Id.*; *see supra* Parts I.A and I.B.

erred when it refused to shift the burden of persuasion to the employer on the affirmative defense.[56]

In its discussion of the NLRB's interpretation of the NLRA, the Court acknowledged that the same decision affirmative defense to liability was one possible interpretation. A viable alternative would have been for the affirmative defense not to operate as a bar to liability, but instead to operate as a limitation on the available remedies. The Court noted that in this situation, the "burden of proof could surely have been put on the employer."[57] The NLRB's interpretation of the affirmative defense as a bar to liability, however, and the accompanying allocation of the burden of persuasion to the employer, was reasonable: "It is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing."[58] The Court also pointed out that an analogy to its decision in *Mt. Healthy* was "a fair one," since the allocations of burdens there and under the NLRA were the same.[59]

While both *Arlington Heights* and *Mt. Healthy* dealt with constitutional issues instead of labor issues, the three opinions all make it clear that the Supreme Court did not feel it necessary to impose a higher evidentiary burden on the plaintiff before the burden of persuasion could shift to the employer to prove an affirmative defense. All that was necessary in these cases was that the plaintiff prove by a preponderance of the evidence, whether direct or circumstantial, that an unlawful consideration was a motivating factor in an adverse employment action. Once the plaintiff carried that burden, the defendant had the opportunity to assert the same decision affirmative defense. To do so, the defendant had to prove by a preponderance of the evidence that it would have made the same adverse employment decision even in the absence of the unlawful consideration. The burden of persuasion on the affirmative defense belongs with the defendant as long as the plaintiff has proven his case, regardless of the type of evidence he used to do so.

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[56] *Transp. Mgmt.*, 462 U.S. at 400-01.
[57] *Id.* at 401-02.
[58] *Id.* at 403.
[59] *Id.*

II. TITLE VII DISPARATE TREATMENT ANALYSES

Before the Supreme Court decided *Arlington Heights*, *Mt. Healthy*, or *Transportation Management*, it had laid out the basic framework for analyzing disparate treatment employment discrimination claims under Title VII. This framework was formed on the assumption that employment decisions involved only one reason, either legitimate or illegitimate, but not both. It was not until six years after the *Transportation Management* decision that the Court addressed the issue of mixed motives under Title VII.

A. The Initial Framework

The Supreme Court first laid the framework for analyzing disparate treatment claims under Title VII in *McDonnell Douglas Corp. v. Green*.[60] The framework provides a burden-shifting evidentiary scheme to be followed by the plaintiff and defendant in presenting their cases. Not only does the framework set forth the allocation of burden in a Title VII case, but it also gives structure to the presentation of evidence.[61] At the outset, the plaintiff is required to establish a prima facie case of discrimination.[62] To do so, the plaintiff must prove: (1) she is a member of a protected class;[63] (2) she is qualified and applied for an available position; (3) she suffered an adverse employment action;[64] and (4) the circumstances surrounding the adverse employment action give rise to an inference of discrimination.[65] The plaintiff bears the burden of persuasion on these elements, meaning that each must be proven by a preponderance of the evidence.[66] However, establishing a

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[60] 411 U.S. 792 (1973).

[61] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981).

[62] 411 U.S. at 802. While the Court refers consistently throughout the opinion to claims of racial discrimination, its methodology has been widely recognized as applying to all Title VII claims. *See, e.g.*, *Burdine*, 450 U.S. 248 (applying *McDonnell Douglas* to alleged gender discrimination).

[63] Protected classes under Title VII include gender, race, color, national origin, and religion. 42 U.S.C. § 2000e-2(a) (2000).

[64] In *McDonnell Douglas*, the Court phrased the prima facie elements as applying in the context of a failure-to-hire case. 411 U.S. at 802. However, it is recognized that these elements may be applied in other situations as well, such as failure to promote and wrongful termination cases. *See, e.g.*, *Burdine*, 450 U.S. at 253 (applying the elements of a prima facie case where the plaintiff alleged failure to promote and wrongful termination based on gender).

[65] The *McDonnell Douglas* decision phrased this last element as "after [the plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. However, the Court also recognized that the prima facie proof specified in *McDonnell Douglas* might not be applicable "in every respect to differing factual situations." *Id.* at 802 n.13. The language used in this Note is similar to that used by the Court in *Burdine*. *See* 450 U.S. at 253.

[66] 450 U.S. at 252-53.

prima facie case is typically not difficult.[67] Additionally, by establishing a prima facie case, the plaintiff eliminates what would be the most common reasons for her rejection and creates a presumption that the employer acted for discriminatory reasons.[68]

Once the plaintiff establishes her prima facie case, the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the adverse employment action.[69] While the employer is not required to convince the trier of fact that the reason articulated was the true reason for the decision, it must present some evidence of its reasoning.[70] If the employer fails to satisfy its burden of rebutting the inference of discrimination raised by the prima facie case, judgment is automatically entered for the plaintiff.[71]

If, however, the employer does satisfy its burden and articulates a legitimate, nondiscriminatory reason for its action, the burden shifts back to the plaintiff to prove that the employer's articulated reasons were not the true reasons for the adverse action.[72] The plaintiff at this point must prove by a preponderance of the evidence, not only that the employer's proffered reasons were not the true reasons for the employment decision, but also that the true reason was discriminatory.[73] Once the employer has produced evidence sufficient to shift the burden of production to the plaintiff, the *McDonnell Douglas* framework ceases to be relevant.[74] The evidence produced by both sides is weighed for its credibility,

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[67] *See id.* at 253 (stating that the plaintiff's burden in establishing a prima facie case of discrimination "is not onerous").

[68] *Id.* at 254 (explaining that by establishing a prima facie case of discrimination, the plaintiff creates a presumption that "the employer unlawfully discriminated against the employee").

[69] *McDonnell Douglas*, 411 U.S. at 802. It is important to note that the burden of persuasion, of proving discrimination by a preponderance of the evidence, remains with the plaintiff throughout the case. *See Burdine*, 450 U.S. at 256.

[70] *Burdine*, 450 U.S. at 254-55 (clarifying that the employer's reasons for the adverse action must be set forth clearly, by the use of admissible evidence, in such a way that would justify a finding for the employer).

[71] *Id.* at 254-55 & n.9 (stating that if an employer remains silent or merely voices its reasons in its answer to the complaint or in an argument during trial, without presenting evidence to support those reasons, the employer will fail to meet its burden).

[72] *Id.* at 255-56 & n.10 (discussing how this rebuttal by the employer serves to focus the issues of the case sufficiently to allow the plaintiff a "full and fair opportunity" to prove that the employer's proffered reasons were pretext).

[73] Since the employer merely articulates a nondiscriminatory reason for its action, and does not bear the burden of persuasion for that reason, there is no credibility assessment of the employer's evidence until *after* the burden has shifted back to the plaintiff. The employer satisfies his burden as long as his evidence, if "taken as true," would allow the trier of fact to conclude that the adverse action was taken for a nondiscriminatory reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508-09 (1993).

[74] *Id.* at 510.

and the trier of fact determines "the ultimate question: whether [the] plaintiff has proved 'that the [employer] intentionally discriminated against [her].'"[75] Cases analyzed using this framework are frequently termed "pretext" cases because the issue is whether the "true" reason for an employment action is an unlawful one.[76]

B. Dealing with Mixed Motives

In 1989, after sixteen years of applying the *McDonnell Douglas* framework to "Title VII case[s] alleging discriminatory treatment,"[77] the Supreme Court created a different methodology for analyzing Title VII cases involving mixed motives. This new methodology arose from the facts of *Price Waterhouse v. Hopkins*.[78]

1. The Facts of Price Waterhouse

Ann Hopkins worked as a senior manager in Price Waterhouse's Office of Government Services in Washington, D.C. After five years in this position, the partners in the office proposed that Hopkins be considered for partnership. Once a senior manager was proposed for partnership, partners throughout the firm were invited to submit evaluations of the candidate, either on a long form if the partner had quite a bit of contact with the candidate, or on a short form if the contact had been limited. The evaluations and any additional comments submitted by the partners were then evaluated by the firm's Admissions Committee, which would recommend to the Policy Board that the candidate be accepted for partnership, put on hold, or rejected for partnership. The Policy Board would then put the matter to a vote. There was no limit on the number of candidates who would be accepted or rejected for partnership in any given year. The year that Hopkins' name was proposed, a total of 88 people were nominated for partnership, with Hopkins being the only woman. In fact, of the 662 partners in the firm at the time, only seven were women.[79]

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[75] *Id.* at 511 (quoting *Burdine*, 450 U.S. at 253).

[76] *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 400 n.5 (1983) (stating that *Burdine* addressed "the pretext case" because of its either-or categorization of the issue); *see also* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1180 (2d Cir. 1992) (stating that employment discrimination cases typically are categorized as either "pretext" cases or "mixed-motives" cases).

[77] *Burdine*, 450 U.S. at 252 (1981) (stating that the Court set forth the framework for the "basic allocation of burdens and order of presentation of proof" for these types of cases in *McDonnell Douglas*).

[78] 490 U.S. 228 (1989).

[79] *Id.* at 233.

When the partners submitted Hopkins' name for consideration, they pointed to her diligence in securing a $25 million contract with the Department of State, stating that she carried out the deal "virtually at the partner level."[80] Additionally, the partners described Hopkins as "an outstanding professional" who had a "strong character, independence and integrity."[81] Trial testimony indicated that clients felt the same way about Hopkins.[82] The district court found that none of the other candidates for partner at that time "had a comparable record in terms of successfully securing major contracts for the partnership."[83] Despite this praise, Hopkins' partnership bid was put on hold and was ultimately rejected the following year.[84]

Price Waterhouse claimed that Hopkins was put on hold, and eventually rejected, because of problems with her interpersonal skills. Before being nominated for partnership, Hopkins had been counseled to improve relations with staff members. Most of the negative remarks on partners' evaluations in Hopkins' bid related that she could be too aggressive, harsh, and impatient with staff members working on her projects.[85] At the same time, there were many remarks that appeared critical of Hopkins' personality because she was female. Evaluations described her as "macho" and recommended that she go to charm school. Partners who had very little contact with Hopkins described her as "universally disliked by staff" and "consistently annoying and irritating."[86] In fact, Hopkins was advised by a member of the Policy Board that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances of being accepted for partnership.[87]

Hopkins was not the only woman candidate to have been evaluated in gender-based terms. The district court concluded that if partners believed a female candidate could retain her femininity while also being an effective manager, that candidate would be viewed favorably. The court also found that one partner consistently voiced his view that women could not function effectively as senior managers and that he would never seriously consider a

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[80] *Id.*
[81] *Id.* at 234.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 231-32.
[85] *Id.* at 234-35.
[86] *Id.* at 235.
[87] *Id.*

woman's bid for partnership, yet the firm did nothing to discourage his remarks and considered them when evaluating candidates.[88]

2. *The* Price Waterhouse *Plurality*

On appeal, a plurality[89] of the Supreme Court determined that the plaintiff in a Title VII mixed-motive case bears the burden of persuasion on the issue of whether discrimination was a factor in the adverse employment decision against her.[90] However, once the plaintiff proves by a preponderance of the evidence that a discriminatory factor played a "motivating part" in the employment decision, the employer can avoid all liability by asserting the same decision affirmative defense formulated in the Court's prior decisions in *Arlington Heights* and *Mt. Healthy*.[91] While the plaintiff retains the burden of persuasion as to whether a protected characteristic was a motivating factor in the adverse employment decision, the employer bears the burden of persuasion for the affirmative defense.[92]

The Court parted from the *McDonnell Douglas* framework in this case because that framework was based on the idea that *either* a legitimate *or* an illegitimate factor was the *sole* reason behind an adverse employment action.[93] The Court recognized that the words "because of" in Title VII do *not* indicate that discrimination must be the sole reason behind an adverse action in order for a statutory violation to be established. Instead, "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[94] The plurality decided that the *McDonnell Douglas* framework was inappropriate where a decision was based on both factors.[95] However, the plurality did not reject the possibility that a plaintiff could prove her case under the

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[88] *Id.* at 236.

[89] The six-member majority was split 4-1-1. *Id.* at 231.

[90] *Id.* at 246. The Court relied heavily on the legislative history of Title VII, as well as on the existence of an exception for "bona fide occupation qualifications," in determining that one of the statute's important goals was to preserve an employer's freedom of choice in making employment decisions. *Id.* at 242-44.

[91] *Id.* at 244-45, 246. See *supra* Part I for a discussion of the same decision affirmative defense.

[92] 490 U.S. at 245-46.

[93] *Id.* at 247.

[94] *Id.* at 241.

[95] *Id.* at 247. The Court clarified that the *McDonnell Douglas* framework was never intended to be applied in these situations but that it was still useful in cases involving pretext, or those involving a decision motivated by only one factor. *Id.* at 247 & n.12. The Court also relied on its previous decisions involving mixed motives in other contexts for support of its creation of an affirmative defense in this context. *Id.* at 248-49. The mixed-motive analyses undertaken in some of these contexts are discussed *supra* Part I.

mixed-motive scheme by using circumstantial evidence, as was allowed within the *McDonnell Douglas* framework.[96] Thus, under the plurality opinion, a plaintiff may prevail in a mixed-motive case by presenting either direct or circumstantial evidence that the employer's decision was based, in part, on unlawful discrimination.[97]

The plurality made the same decision affirmative defense a complete bar to liability under Title VII in an effort to recognize and retain the employer's freedom of choice in making employment decisions. The Court felt that the statutory intent to preserve this freedom was clear in both the statute's legislative and judicial history, pointing to the existence of the bona fide occupational qualification and "business necessity" defenses as evidence of the "awareness of Title VII's balance between employee rights and employer prerogatives."[98] Thus, according to the plurality, the same decision affirmative defense bar to liability was a "balance of burdens" that directly resulted from "Title VII's balance of rights."[99] Justice O'Connor, however, had a different view of the reasoning behind the "balance of burdens."

3. Justice O'Connor's Concurrence[100]

In her concurring opinion, Justice O'Connor characterized the *Price Waterhouse* decision as "a supplement" to the framework set forth in *McDonnell Douglas* and clarified in *Texas Department of Community Affairs v. Burdine*.[101] She noted, however, that a major problem in mixed-motive cases that was not present in pretext cases was the issue of causation. Relying on basic principles of tort law, Justice O'Connor pointed out that Title VII makes it clear that discrimination must be a "but for" cause of the adverse em-

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[96] To the contrary, the plurality specifically stated that it was not suggesting "a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." *Price Waterhouse*, 490 U.S. at 251-52.

[97] *Id.* at 251 ("In making this showing [that discrimination was a motivating factor], stereotyped remarks can certainly be *evidence* that gender played a part.").

[98] *Id.* at 242-43. The Court noted that while an employer is not allowed to take gender into account in making a decision, it is still allowed to take adverse action against a woman for other reasons. *Id.* at 244.

[99] *Id.* at 244-45.

[100] Justice White, in his concurring opinion, would have followed *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and shifted the burden to the employer only after the plaintiff provided evidence that discrimination was a substantial factor in the adverse employment decision. *Price Waterhouse*, 490 U.S. at 258-59 (White, J., concurring). Since Justice White's opinion was not the narrowest of the *Price Waterhouse* opinions, it has not been considered in much detail by the lower courts and thus is not examined in this Note.

[101] *Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring).

ployment action being contested.[102] As such, the plaintiff in a mixed-motive case must present, according to Justice O'Connor, "direct evidence that an illegitimate criterion was a substantial factor in the decision" of the employer.[103] If the plaintiff fails to provide direct evidence of discrimination, her claim is examined under the *McDonnell Douglas* framework.[104] If, however, the plaintiff does present direct evidence, the burden of persuasion shifts to the employer to justify its decision.[105] Justice O'Connor did not view this shift to the employer as an affirmative defense, but as a shift in the burden of persuasion generally, which would otherwise typically remain with the plaintiff throughout the case.[106]

The mixed-motive plaintiff is entitled to shift the burden of persuasion to the employer in this situation because she has presented direct evidence of the employer's wrongdoing but cannot "pinpoint discrimination as the precise cause of her injury."[107] At this point, it is only fair that the employer should have to prove the legitimacy of his decision.[108] Thus, when the plaintiff submits strong evidence that the employer considered discriminatory factors in its decision-making, a presumption is created that those factors actually made a difference to the decision.[109] If the employer then fails to persuade the factfinder that he was actually motivated by legitimate factors, the factfinder is allowed to conclude that the discriminatory factors were a "but for" cause of the employment decision and find for the plaintiff.[110]

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[102] Where there is only one factor motivating a decision, causation is clear regardless of whether the factor was lawful or unlawful. However, when both legitimate and illegitimate factors motivate an employment decision, the issue of causation becomes blurred. *See id.* at 263-66.

[103] *Id.* at 276. Direct evidence of a discriminatory animus is not necessary in pretext cases under the *McDonnell Douglas – Burdine* framework because it is assumed that the plaintiffs in such cases will have difficulty obtaining direct evidence of intentional discrimination. *Id.* at 271. Interestingly, Justice O'Connor apparently believes that direct evidence of partial discriminatory animus is easier for plaintiffs to come by.

[104] *Id.* at 278-79.

[105] *Id.* at 276 (explaining that the presentation of direct evidence of discrimination by the plaintiff will raise a presumption that "discriminatory animus" played a role in the employer's decision, a presumption which must then be disproved by the employer).

[106] *See id.* at 278-79 (pointing out that under a *McDonnell Douglas* pretext analysis, the burden of persuasion remains with the plaintiff, while under a *Price Waterhouse* analysis, it does not).

[107] *Id.* at 273 (stating that it only makes sense to shift the "risk of nonpersuasion" to the employer where the employer's consideration of an illegitimate criterion created the uncertainty as to causation in the first place).

[108] *See id.* (stating that making the plaintiff prove that any one factor, out of several, was *the* reason for the employer's decision would be akin to voiding Title VII liability in mixed-motive cases completely).

[109] *Id.* at 276.

[110] *See id.* at 277 (stating that "[i]f the employer fails to carry this burden, the factfinder is

Thus, Justice O'Connor concluded that the presentation of evidence in a Title VII disparate treatment case should follow the general framework outlined in *McDonnell Douglas*: the plaintiff must first establish a prima facie case. At that time, the plaintiff should present whatever direct evidence is available that discrimination was a motivating factor in the employment decision. Once the prima facie case is established, the defendant presents its case, including any available evidence that there were legitimate, nondiscriminatory reasons motivating the decision. Once the defendant has presented its case, the court must determine whether the plaintiff has met the *Price Waterhouse* threshold of presenting direct evidence that discrimination was a motivating factor in the employer's decision. If so, the court should proceed with a mixed-motive analysis. If the plaintiff has not met the direct evidence threshold, the court should proceed with the *McDonnell Douglas* pretext analysis.[111] The only distinction between the two analyses was based on the *type* of evidence presented.

III. TITLE VII AND THE CIVIL RIGHTS ACT OF 1991

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, sex, religion, color, or national origin. Specifically, Title VII makes it an unlawful employment practice for an employer:

> (1) to 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; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[112]

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justified in concluding that the decision was made 'because of' consideration of the illegitimate factor").

[111] *Id.* at 278-79 (commenting that under the pretext analysis, the burden of persuasion will remain with the plaintiff, instead of being shifted to the employer).

[112] 42 U.S.C. § 2000e-2(a) (2000).

In considering Title VII, the House of Representatives found that "in the last decade it has become increasingly clear that progress [towards eliminating discrimination] has been too slow and that national legislation is required to meet a national need which becomes ever more obvious."[113] Furthermore, the purpose of Title VII was "to eliminate . . . discrimination in employment based on race, color, religion, or national origin."[114] Additionally, both the House and the Senate refused to pass amendments to Title VII that would have recognized violations only when discrimination was the only ground for an adverse action.[115] In fact, Senator Clark argued that "[t]o discriminate is to make a distinction, to make a difference in treatment . . . and those distinctions or differences in treatment . . . which are prohibited by section [703] are those which are based on *any* five of [sic] the forbidden criteria: race, color, religion, sex, and national origin."[116] Thus, Congress explicitly recognized the potential for mixed-motive cases arising under Title VII.

In 1973, the Supreme Court recognized that the purpose of Title VII was "to assure equality of employment opportunities and to eliminate [the] discriminatory practices" that had disadvantaged minorities for years.[117] The Court further recognized that Title VII also served a broad, overriding societal and personal interest, which was shared by employer and employee alike: the "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[118] As such, the Court concluded, Title VII would not tolerate any form of discrimination.[119] It was with this understanding that the Court first formed the framework for analyzing discrimination claims brought under Title VII.

The Civil Rights Act of 1991 was passed in response to several Supreme Court decisions in the late 1980s, including *Price Waterhouse*.[120] The Act was motivated by "Congress' findings that the Supreme Court's recent employment discrimination deci-

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[113] H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393.

[114] *Id.* at 2401.

[115] *See, e.g.*, 110 CONG. REC. 13,838 (1964) (voting against the amendment).

[116] 110 CONG. REC. 7,213 (1964) (emphasis added).

[117] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[118] *Id.* at 801.

[119] *Id.*

[120] *See* H.R. REP. NO. 102-40(I), at 2, 4-5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549; Equal Employment Opportunity Comm'n, *The Civil Rights Act of 1991*, *at* http://www.eeoc.gov/35th/1990s/civilrights.html (last visited Nov. 11, 2003) ("Congress acted to address a series of no fewer than seven decisions by the Supreme Court . . . .").

sions have cut back dramatically on the scope and effectiveness of civil rights protections."[121] The goal of the Act, therefore, was to "restor[e] the civil rights protections that were so dramatically limited [by the Court], and to strengthen existing remedies to provide more effective deterrence."[122] Specifically, Congress sought to overturn the Court's creation of an affirmative defense to liability based solely on evidence that the employer would have taken an adverse employment action against the plaintiff even without considering a discriminatory factor.[123]

Thus, the Act amended Title VII to recognize the establishment of an unlawful employment practice "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[124] While Congress did not clearly address Justice O'Connor's direct evidence requirement,[125] the Act does define "demonstrates" to mean "meets the burdens of production and persuasion."[126] So, an unlawful employment practice is now established under Title VII when the plaintiff proves by a preponderance of the evidence that discrimination was a motivating factor in an employment decision.

The histories of both the 1964 and the 1991 Acts show that Congress' goal was to eliminate *all* forms of discrimination in the workplace. By passing the 1991 Act, Congress sought to make it easier for plaintiffs to recover in Title VII cases, thereby increasing the deterrent effect on employers. There is no indication in either the wording of the 1991 Act or in its legislative history, that Congress intended plaintiffs to bear a higher evidentiary burden, such as Justice O'Connor's direct evidence requirement.[127]

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[121] H.R. REP. NO. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549.

[122] *Id.*

[123] *Id.* at 45 (explaining that the creation of an affirmative defense to liability effectively permits prohibited employment discrimination to go unpunished under Title VII).

[124] 42 U.S.C. § 2000e-2(m) (2000).

[125] In fact, the House of Representatives relied on the plurality opinion in *Price Waterhouse*, indicating that it did not find Justice O'Connor's opinion definitive. *See* H.R. REP. NO. 102-40(I), at 46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549.

[126] 42 U.S.C. § 2000e(m) (2000). The Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), was largely based on the clarity of this language.

[127] To the contrary, the House reported: "The individual Title VII litigant acts as a 'private attorney general' . . . . It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest." H.R. REP. NO. 102-40(I), at 46-47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549.

IV. WHAT IS DIRECT EVIDENCE, ANYWAY?

Generally, a plaintiff "may prove his case by direct or circumstantial evidence."[128] The dictionary definition of direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."[129] While Title VII, as amended by the Civil Rights Act of 1991, does not indicate that plaintiffs are required to present direct evidence to merit mixed-motive analysis in disparate treatment cases, the circuit courts have focused on Justice O'Connor's requirement of direct evidence in *Price Waterhouse* in deciding mixed-motive cases.[130]

Unfortunately, Justice O'Connor did not define what she meant by direct evidence, saying only that it did not consist of "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process itself."[131] Thus, the circuit courts have utilized various definitions, often with different definitions being used even within circuits.[132] Both the First and the Eleventh Circuits have attempted to categorize the various definitions of direct evidence used by the courts. Most recently, the Ninth Circuit has chosen to avoid categorizing the different definitions and has simply done away with the requirement altogether. In making that decision, the Ninth Circuit provided a very brief overview of the categories developed by the First Circuit. For a better understanding of these categories, as well as those developed by the Eleventh Circuit, this Note explores both in greater detail.

A. The First Circuit's Categories

In *Fernandes v. Costa Brothers Masonry, Inc.*,[133] a mixed-motive disparate treatment case, Judge Selya tackled the daunting

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[128] United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983).

[129] BLACK'S LAW DICTIONARY 577 (7th ed. 1999). Circumstantial evidence, on the other hand, is "[e]vidence based on inference and not on personal knowledge or observation." *Id.* at 576.

[130] Justice O'Connor's concurrence is often viewed as the holding of *Price Waterhouse* because it was the most narrowly drawn concurrence. *See, e.g.*, Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 580 (1st Cir. 1999). *But see* Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 203 (D.C. Cir. 1997) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . so that it is far from clear that [it] . . . should be taken as establishing binding precedent.").

[131] Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

[132] *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 851 (9th Cir. 2002) ("The resulting jurisprudence has been a quagmire that defies characterization . . . . Within circuits, and often within opinions, different approaches are conflated . . . .").

[133] 199 F.3d 572 (1st Cir. 1999).

task of categorizing the various approaches to the direct evidence predicament taken by the circuit courts since *Price Waterhouse*. Judge Selya first noted that mixed-motive analysis could "swallow whole" the *McDonnell Douglas* framework.[134] Therefore, mixed-motive analysis was restricted to "those infrequent cases in which a plaintiff can demonstrate with a high degree of assurance" that discrimination was a motivating factor in the adverse decision.[135] In making the determination that ambiguous statements – those that could be interpreted as either discriminatory or benign – did not adequately demonstrate a discriminatory motive, Judge Selya described the "classic," "animus-plus," and "animus" approaches to direct evidence taken by the circuits.[136]

1. The "Classic" Approach

Judge Selya described the classic approach to the direct evidence requirement as that requiring a traditional form of direct evidence.[137] He characterized the Fifth and Tenth Circuits as consistently following this approach, with some other circuits adopting it occasionally.[138] Still other circuits have rebuffed this approach as being unworkable and not required under *Price Waterhouse*.

For example, the Second Circuit has stated that "[r]equiring 'direct evidence', i.e., non-'circumstantial' evidence, as a precondition to shifting into the mixed-motives analysis runs afoul of more general evidentiary principles."[139] In fact, the Second Circuit has characterized Justice O'Connor's "direct evidence" wording as "an unfortunate choice of terminology."[140] The court has correctly pointed out that "the only 'direct evidence' that a decision was

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[134] *Id.* at 580.

[135] *Id.* The court noted that "[b]ecause discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare." *Id.* If the plaintiff fails to produce direct evidence, he "must proceed under the conventional *McDonnell Douglas* framework." *Id.*

[136] *Id.* at 581-82; *see also* Elissa R. Hoffman, Note, *Smoking Guns, Stray Remarks, and Not Much in Between: A Critical Analysis of the Federal Circuits' Inconsistent Application of the Direct Evidence Requirement in Mixed-Motive Employment Discrimination Cases*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 181, 190 (2002) ("In order to make sense of the various approaches applied by the circuits, Judge Selya described three schools of thought that have emerged in the case law generated since Price Waterhouse . . . .").

[137] 199 F.3d at 582 (stating that the traditional definition is "evidence, which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence").

[138] *Id.*

[139] Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1184 (2d Cir. 1992) (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983), for the proposition that a plaintiff may prove her case with direct or circumstantial evidence).

[140] *Id.* at 1185.

made 'because of' an impermissible factor would be an admission by the decisionmaker such as 'I fired him because he was too old.'"[141] In 2001, the Second Circuit reinforced this view, stating "evidence of a forbidden factor may be direct or circumstantial, although the latter must be 'tied directly to the alleged discriminatory animus.'"[142]

Similarly, the District of Columbia Circuit has noted that "it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent."[143] Even if Justice O'Connor's opinion is taken as the holding of *Price Waterhouse*, the court explained that "[t]he emphasis of Justice O'Connor's opinion is on the substantial factor requirement, not on the distinction between types of evidence."[144] The difference between direct and circumstantial evidence purportedly required by Justice O'Connor does not make sense because "the decision to shift the burden of persuasion properly rests upon the strength of the plaintiff's evidence of discrimination, not the contingent methods by which that evidence is adduced."[145] This is true in many contexts – the quality of the evidence is the focus, not the type of evidence presented.

2. The "Animus Plus" Approach

Judge Selya explained that circuits that follow this approach define direct evidence as "evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision."[146] He placed only the Fourth and D.C. Circuits as consistently in this group, with the Third, Seventh, and Eighth Circuits occasionally supporting it. Judge Selya noted that the issue under this approach is not the type of evidence presented, but rather its connection to the discriminatory animus and the overall strength of the plaintiff's case.[147] The First Circuit recently

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[141] *Id.* (stating that even a statement like "You're fired, old man" requires the factfinder to draw an inference that age was a causal factor in the decision and thus is not truly direct evidence).

[142] Rose v. New York City Bd. of Educ., 257 F.3d 156, 161-62 (2d Cir. 2001) (quoting Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992), to explain that statistical evidence alone, stray remarks, or remarks by a non-decisionmaker would not suffice).

[143] Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 203 (D.C. Cir. 1997).

[144] *Id.* Justice White also focused on this aspect of Justice O'Connor's opinion. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 259 (1989) (White, J., concurring).

[145] 131 F.3d at 204.

[146] Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 582 (1st Cir. 1999) (citing Taylor v. Va. Union Univ., 193 F.3d 219 (4th Cir. 1999)).

[147] *Id.* at 582.

utilized this approach in *Patten v. Wal-Mart Stores East, Inc.*,[148] where the court defined direct evidence as "evidence that unambiguously implicates a [discriminatory] motive."[149] While this standard is not as restrictive as the classic approach, it still requires a higher standard for the plaintiff than the "not onerous" burden of proving the prima facie case under *McDonnell Douglas*.

The D.C. Circuit position, discussed above, also falls under the animus plus approach. In its opinion in *Thomas v. National Football League Players Association*,[150] the court specified that the emphasis is on the connection between the discriminatory animus and the adverse employment decision, "not . . . the mere existence of other, potentially unrelated, forms of discrimination in the workplace."[151] Thus, the evidence must relate to the particular decision at issue, and may include statements by decisionmakers as long as the plaintiff can establish that such statements were made in connection with the particular decision being contested.

The *Thomas* court also correctly pointed out that even Justice O'Connor did not rely on a strict definition of direct evidence in finding for Hopkins in *Price Waterhouse*. The partners responsible for rejecting Hopkins' bid for partnership never expressly stated, nor even admitted, that the decision was actually motivated by consideration of Hopkins' gender. Instead, Justice O'Connor drew an inference from the fact that gender-related comments were included on the partnership evaluations and that those evaluations were then considered in making the decision to conclude that gender bias caused Hopkins' rejection.[152] Justice O'Connor herself acknowledged that there was a strong showing that Price Waterhouse relied on an impermissible criterion in deciding to reject Hopkins, but "the connection between the employer's illegitimate motivation and any injury to the . . . plaintiff is unclear."[153] A causal inference was therefore necessary between the employer's

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[148] 300 F.3d 21 (1st Cir. 2002).

[149] *Id.* at 25 (stating that the court requires "statements that give us a 'high degree of assurance' that a termination was attributable to discrimination"); *see* Hoffman, *supra* note 136, at 199-200 (discussing the First Circuit's switch from the classic approach to the animus plus approach).

[150] 131 F.3d 198 (D.C. Cir. 1997).

[151] *Id.* at 204.

[152] *Id.*

[153] Price Waterhouse v. Hopkins, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring) (explaining that the members of a class action disparate treatment case stand in the same position as Hopkins and in such a situation, it was appropriate to shift the burden of persuasion to the employer to show the same decision would have been made even in the absence of the illegitimate factors).

motivation and the adverse employment decision. By its very definition, this type of evidence is circumstantial, not direct.

3. The "Animus" Approach

Judge Selya's animus approach is basically a relaxed version of the animus plus approach. Courts that follow this approach generally require only that the evidence presented reflect discriminatory animus by the employer, even if it is not directly related to the employment decision at issue. Judge Selya, and a review of recent cases, places the Second Circuit firmly in this category, with other circuits occasionally advocating its use.[154]

Under this approach, circuits allow the use of either direct or circumstantial evidence. The Second Circuit has aptly pointed out that "[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence."[155] It is widely recognized that circumstantial evidence may often be more reliable and more probative than direct evidence.[156] This is especially true in Title VII disparate treatment cases, where employers have become more sophisticated in disguising discriminatory motives under documentation of even the smallest transgressions on the part of employees.[157] Consequently, to ensure that employees who experience unlawful discrimination have access to the remedies available under the law, a strict definition of direct evidence cannot be used to trigger mixed-motive analysis. Instead, some allowance for circumstantial evidence is necessary. Consequently,

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[154] *See* Rose v. New York City Bd. of Educ., 257 F.3d 156, 161-62 (2d Cir. 2001) (stating that circumstantial evidence may be used as long as it is "tied directly to the alleged discriminatory animus"); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 582 (1st Cir. 1999) (explaining the animus position). *But see* Costa v. Desert Palace, Inc., 299 F.3d 838, 853 (9th Cir. 2002) (explaining that some courts interpret the Second Circuit's position in *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171 (2d Cir. 1992), as advocating a non-circumstantial evidence, or classic, position).

[155] Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1184 (2d Cir. 1992) (quoting 1 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.02, at 441-42 (3d ed. 1977)).

[156] *See* United States v. Cruz, 536 F.2d 1264, 1266 (9th Cir. 1976) (stating that circumstantial evidence is no less probative than direct evidence); RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 148 (3d ed. 2002) (describing that a blood spot or fingerprint found at the scene of a crime may be more accurate and reliable than much testimony of eyewitnesses).

[157] *See* Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 UTAH L. REV. 1029, 1055-56 (discussing how employers, before making adverse employment decisions, consult with attorneys who often advise against the decision until "sufficient, convincing evidence has been prepared, documenting the employee's unsatisfactory performance"). The Supreme Court also noted the reliability and equal weight of circumstantial evidence in the *Desert Palace* decision. 123 S. Ct. 2148, 2154 (2003).

either the animus plus or the animus approach would be most appropriate.

B. The Eleventh Circuit's Explanation

The Eleventh Circuit has taken a somewhat different approach to explaining the use of direct evidence. In *Wright v. Southland Corp.*,[158] the court explained that plaintiffs in employment discrimination suits, unlike breach of contract or tort cases, are put in the unenviable position of having to prove the employer's state of mind in making the adverse employment decision. The court further pointed out that typically, the employer's state of mind cannot simply be inferred from an adverse decision about someone in a protected class.[159] Thus, the plaintiff must present additional evidence of discriminatory intent.

Originally, the inference of discrimination raised by the *McDonnell Douglas* prima facie case was designed to aid the plaintiff in this daunting task by forcing the employer to articulate some reason for the decision, which the plaintiff could then attempt to rebut. The *McDonnell Douglas* framework, however, was designed for those instances in which the plaintiff had only circumstantial evidence of discrimination. If the plaintiff could present direct evidence of discrimination, he did not need to resort to the *McDonnell Douglas* framework, but instead could present his case, after which the employer would present his. Since the use of direct evidence is an alternative to the *McDonnell Douglas* framework, the Eleventh Circuit pointed out that "direct evidence" would have to be "evidence sufficient to prove . . . that the [employer's] decision was more probably than not based on illegal discrimination."[160]

The court noted that this definition of direct evidence, which the court termed the "preponderance definition,"[161] conflicts with the traditional "dictionary definition."[162] The court then recognized that the preponderance definition flows logically from employment discrimination law while the dictionary definition flows directly from the law of evidence. The Eleventh Circuit itself has

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[158] 187 F.3d 1287 (11th Cir. 1999).

[159] *Id.* at 1289-90 (comparing discrimination actions to an action for battery where the intent to cause harm can be inferred simply from the fact that the defendant swung at the plaintiff with a baseball bat).

[160] *Id.* at 1293.

[161] *Id.* at 1294.

[162] *Id.* (referring to the definition of direct evidence found in BLACK'S DICTIONARY, *supra* note 129).

been split between the two definitions.[163] However, after analyzing its decisions, the Eleventh Circuit found that where it had purported to use the dictionary definition, it had actually used the preponderance definition. The reason for this was that the only true direct evidence of the employer's state of mind at the time of the adverse decision, which is the evidence purportedly required of plaintiffs in Title VII disparate treatment actions, is testimony by the employer himself that the decision was based at least in part on a discriminatory consideration. All other evidence requires at least one inference to make the causal connection between the evidence of discriminatory animus and the adverse decision.[164] As pointed out above, Justice O'Connor in *Price Waterhouse* relied on evidence that did not meet the traditional dictionary definition of direct evidence.[165]

C. The Ninth Circuit's Abandonment of the Direct Evidence Requirement

In August, 2002, the Ninth Circuit Court of Appeals decided *Costa v. Desert Palace, Inc.*,[166] the latest foray by a circuit court into the proverbial "swamp"[167] of mixed-motive employment discrimination litigation in the federal circuit courts. Though the Ninth Circuit acknowledged the turmoil caused by Justice O'Connor's concurrence, described above, the court determined that the Justice's opinion had effectively been superseded by the passage of the Civil Rights Act of 1991, which made no mention of a direct evidence requirement. The court pointed out that in fact, the Act did not impose any heightened evidentiary burden on plaintiffs. So, the court concluded, "non circumstantial evidence is not the magical threshold for Title VII liability."[168] Instead, a plaintiff may prove her case using either direct or circumstantial

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[163] *Id.* The dictionary definition used in some of the Eleventh Circuit's cases appears as: "[I]f a remark can be interpreted only as an admission of improper discrimination in the relevant employment decision, then no inference or presumption is required to reach a finding of improper discrimination." *Id.* (citing Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999)). Definitions such as "[E]vidence that 'relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee,'" are equated to the preponderance definition. *Id.* (quoting Carter v. Three Springs Residential Treatment, 132 F.3d 635 (11th Cir. 1998)).

[164] *Id.*

[165] *See* discussion *supra* Part IV.A.2.

[166] 299 F.3d 838 (9th Cir. 2002). The facts are introduced in the Introduction to this Note, *supra*.

[167] *See* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 651 n.1 (2000).

[168] 299 F.3d at 853 (rejecting the approach taken by other circuits of "using 'direct evidence' as a veiled excuse to substitute their own judgment for that of the jury").

evidence, as long as she does so by a preponderance of the evidence.[169]

Not only is direct evidence, according to the Ninth Circuit, not necessary to warrant mixed-motive analysis, but mixed-motive cases also are not separate and distinct from pretext cases, contrary to the approach taken by many circuits.[170] Instead, courts should determine whether mixed-motive or pretext analysis is appropriate at the same point in the trial process. In order to survive summary judgment, the plaintiff must at least present a prima facie case, as set forth in *McDonnell Douglas*. The employer must then articulate the legitimate, nondiscriminatory reason for his actions. Once the employer does this, a genuine issue of material fact arises and the case proceeds to trial. At the trial stage, after all the evidence has been presented by both sides, the court determines whether the evidence supports a finding that one, or more than one, factor motivated the employment decision. If the evidence supports a finding that only one factor motivated the decision, then pretext analysis is warranted. In this type of case, the employer would not be entitled to take advantage of the same decision affirmative defense. However, if the evidence supports a finding that more than one factor motivated the decision, mixed-motive analysis is appropriate and the employer may use the same decision defense.[171]

Having reached this conclusion, the Ninth Circuit found that Catharina Costa had presented sufficient evidence that a reasonable jury could find the decision to terminate her was based in part on discriminatory animus. The court was careful not to view each item of evidence in isolation, but instead focused on the weight of all the evidence combined.[172] Since discriminatory or off-color comments are probably the easiest evidence for a plaintiff to ob-

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[169] *Id.* at 853-54. The United States Supreme Court reached the same conclusion in affirming the Ninth Circuit's decision. Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

[170] *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1180 (2d Cir. 1992) ("Employment discrimination cases . . . are frequently said to fall within one of two categories: 'pretext' cases and 'mixed-motives' cases.").

[171] 299 F.3d at 855-57. This view is supported by the plurality's view in *Price Waterhouse* that a plaintiff does not have to classify his case as either pretext or mixed-motive at the outset. Instead, at some point during the proceedings, the court will determine which analysis is most appropriate. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989). Note that Justice O'Connor also supports this view in her concurrence. She specified that the basic *McDonnell Douglas* framework was to be followed, with both sides presenting all of their evidence, at which time the court would determine which analysis was appropriate. Except for Justice O'Connor's imposition of a higher burden, which the Ninth Circuit disposes of, the two approaches are the same. *See id.* at 278-79 (O'Connor, J., concurring).

[172] 299 F.3d at 862 (refusing to determine whether gender-based language was determinative of discrimination, instead viewing it as "simply one more factor for the jury to consider in the face of repeated differential treatment").

tain and present, much of the discussion about direct evidence centers around what comments are made, by whom, and in what connection with the adverse decision. It is important to remember, however, that such comments should not be viewed in isolation, but must be taken into consideration as part of the entire employment situation in which the plaintiff was involved, as the Ninth Circuit made sure to do.[173] Even in the absence of traditional direct evidence, a court may still determine that an employer acted with mixed motivations by examining the entire situation and its effect on the individual plaintiff. This view of the evidentiary standard placed on a plaintiff in mixed-motive cases is more in line with what Congress intended when it passed the 1991 Act.

V. IS DIRECT EVIDENCE REALLY NECESSARY?

Given that the direct evidence requirement has not been required in mixed-motives cases outside the Title VII context, is not an intended result of the Civil Rights Act of 1991,[174] and has created so much confusion among the lower courts, one must ask whether the requirement is really necessary. The dissent in *Costa* felt that Justice O'Connor's concurring opinion was indeed the holding of *Price Waterhouse* and should thus be followed.[175]

A. Justice O'Connor's Causation Concerns

In her concurrence, Justice O'Connor stated that the "question for decision in [*Price Waterhouse*] is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII."[176] She pointed out that it was clear that Congress intended the plaintiff in mixed-motive cases to carry the burden of persuasion on "the elements critical to his or her case."[177] Justice O'Connor's concern was with who should bear the burden of proof as to causation, a point about which Congress was less than clear.

The Justice determined that the burden of persuasion on causation could only shift to the employer after the plaintiff had persuaded the factfinder that consideration of an unlawful factor was

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[173] *See* Bisom-Rapp, *supra* note 157, at 1048-53 (discussing how courts may miss discriminatory animus by focusing on employer accusations of the employee's poor performance, when that poor performance may have been caused by the employer's discriminatory animus).

[174] As determined by the Supreme Court in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003).

[175] 299 F.3d at 866-67 (Gould, J., dissenting).

[176] Price Waterhouse v. Hopkins, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring).

[177] *Id.*

a substantial motivation behind an adverse employment decision.[178] The plurality, according to Justice O'Connor, had misread the words "because of" in the statute and would allow a mere taint of unlawful consideration to constitute a violation of Title VII. She characterized the plurality's view as "effectively read[ing] the causation requirement out of the statute, and then replac[ing] it with an 'affirmative defense.'"[179]

Justice O'Connor did not view the shifting of the burden of persuasion to the employer as an affirmative defense. Instead, she felt that the shift was only appropriate when the plaintiff had strong, direct evidence of discriminatory motivation, but was lacking evidence that the motivation actually caused the adverse action. The plaintiff's proof would create a presumption of discriminatory animus on the part of the employer that could only be rebutted if the employer proved that the same decision would have been made regardless of any discriminatory motive. In a sense, making such a showing would allow the employer to justify his decision, the presence of unlawful discrimination notwithstanding, and avoid liability.[180]

The Civil Rights Act of 1991 clearly overturned Justice O'Connor's opinion that the employer's burden in mixed-motive cases was not an affirmative defense. Instead of shifting the burden of persuasion at the liability phase of the trial, the 1991 Act shifts the burden during the damages phase. Thus, under the Act, once a plaintiff has proven by a preponderance of the evidence that discrimination was a motivating factor in an adverse employment decision, liability automatically attaches to the employer. So, even if the employer then proves by a preponderance of the evidence that he would have taken the same action regardless of the discriminatory motive, the plaintiff may still be awarded declaratory and injunctive relief, as well as attorney's fees and costs.[181] The 1991 Act explicitly creates a burden-shifting structure in the form of an affirmative defense, as the plurality did in *Price Waterhouse*, thereby reading the causation requirement out of Title VII.

In addition to the Act itself creating the affirmative defense that Justice O'Connor declined to recognize, the legislative history of the Act specifies what types of evidence are sufficient to shift

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[178] *Id.* at 269.

[179] *Id.* at 275-76.

[180] *Id.* at 276. The employer could avoid liability even though the plaintiff's proof identified "those employment situations where the deterrent purpose of Title VII is most clearly implicated." *Id.*

[181] *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

the burden to the employer to prove the affirmative defense. The House of Representatives stated that "stray remarks" would not be sufficient evidence on the plaintiff's part to shift the burden to the employer, seemingly agreeing with Justice O'Connor.[182] The House further specified that the only conduct or remarks that would be relevant under the Act's test would be those that the plaintiff could show were connected to the adverse employment decision.[183] The House also stated, however, that such evidence should be examined "under the standards generally applied for weighing the sufficiency of evidence."[184]

Additionally, the House acknowledged that the Supreme Court had given an overly narrow construction to civil rights statutes during the 1980s, despite the general rule of statutory interpretation that such statutes be broadly construed.[185] The House further stated that "[d]eparture from the established rules of statutory construction, such as the rule favoring broad construction of civil rights laws, interferes with the ability of Congress to express its will through legislation."[186] Thus, while the House agreed that stray remarks and discriminatory thoughts would not be sufficient for the plaintiff to carry his burden, the House also did not intend for a higher, more restrictive evidentiary standard to be placed on the plaintiff. In light of this history, it is clear that the Ninth Circuit majority was correct in *Costa* when it declared that "the premise for Justice O'Connor's [direct evidence] comment is wholly abrogated: . . . there is no longer a basis for any special 'evidentiary scheme' or heightened standard of proof to determine 'but for' causation."[187] As such, the court correctly disregarded as unnecessary the Justice's direct evidence requirement.[188]

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[182] *See supra* note 131 and accompanying text.

[183] *See* H.R. REP. NO. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549. Notice that this comports with the "animus plus" position described *supra* Part IV.A.2.

[184] H.R. REP. NO. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549. In civil cases, the sufficiency of the evidence typically relates to whether the factfinder could find for the plaintiff by a preponderance of the evidence. In criminal cases, sufficiency relates to whether the factfinder could find guilt beyond a reasonable doubt. *See* Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 651 n.* (1993); *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (explaining that the burden of persuasion, to prove discrimination by a preponderance of the evidence, remains at all times with a plaintiff in a Title VII disparate treatment case).

[185] *See* H.R. REP. NO. 102-40(I), at 87-88 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549.

[186] *Id.* at 88.

[187] Costa v. Desert Palace, Inc., 299 F.3d 838, 850-51 (9th Cir. 2002).

[188] In her concurring opinion in *Desert Palace, Inc. v. Costa*, Justice O'Connor recognized that direct evidence is not required in light of the language of the Civil Rights Act of 1991. 123 S. Ct. 2148, 2154 (2003) (O'Connor, J., concurring).

B. *Overrunning the* McDonnell Douglas *Framework*

Not only did the dissent in *Costa* view Justice O'Connor's *Price Waterhouse* concurrence as decisive, but it was also concerned that mixed-motive analyses would overrun the *McDonnell Douglas* framework unless such analyses were "available only in a special subset of cases."[189] The dissent concluded that the direct evidence requirement created just that special subset by requiring "the plaintiff to produce highly probative, direct evidence, before she may utilize the more lenient, mixed motives test."[190] Otherwise, according to the dissent, "any plaintiff would opt for the [*Price Waterhouse*] framework to avoid having to show pretext," and the *McDonnell Douglas* framework would no longer be effective.[191] In turn, this would create uncertainty that certainly was not intended by the *Price Waterhouse* Court.[192]

The *Costa* majority, on the other hand, correctly concluded that the basic *McDonnell Douglas* burden-shifting framework would apply even in mixed-motive cases. In fact, Justice O'Connor advanced that view herself in *Price Waterhouse*.[193] She stated that a plaintiff in any disparate treatment case must first establish the *McDonnell Douglas* prima facie case. Then, the defendant would present its case, including any legitimate, nondiscriminatory reasons for the adverse employment action.[194] However, Justice O'Connor did not mention the fact that once the employer articulates his reason and the burden of production shifts back to the plaintiff, the *McDonnell Douglas* framework ceases to be relevant.[195] Instead, Justice O'Connor stated that the determination of whether the *McDonnell Douglas* burden-shifting, pretext framework applies occurs after all the evidence is in, at which point the plaintiff, if she has not produced direct evidence of discriminatory motivation, is required to prove pretext pursuant to *McDonnell Douglas*.[196]

The *Costa* majority recognized the flaw in the latter part of Justice O'Connor's analysis. First, the Ninth Circuit pointed out that parties in a Title VII disparate treatment case are not required

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[189] 299 F.3d at 867 (Gould, J., dissenting); *see also* Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 580 (1st Cir. 1999) ("It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis.").

[190] 299 F.3d at 867 (Gould, J., dissenting).

[191] *Id.*

[192] *Id.*

[193] *See supra* Part II.B.3.

[194] Price Waterhouse v. Hopkins, 490 U.S. 228, 278 (1989) (O'Connor, J., concurring).

[195] *Id.* at 278-79; *see supra* notes 70-74 and accompanying text.

[196] 490 U.S. at 278-79.

to use the *McDonnell Douglas* framework in the first place.[197] Additionally, the majority pointed out that at the evidence evaluation stage, the *McDonnell Douglas* framework unnecessarily ignores the ultimate issue of "discrimination *vel non*."[198] Therefore, the *McDonnell Douglas* framework necessarily applies at an earlier stage of the proceedings and mainly serves to direct the presentation of evidence.[199] Once at trial and after all the evidence has been presented, the question is not which framework to apply, as suggested by Justice O'Connor, but instead "what legal conclusions the evidence could reasonably support."[200] The decision about appropriately instructing the jury depends on a determination of "whether the evidence supports a finding that just one – or more than one – factor" motivated the adverse employment decision.[201]

If the trial judge finds that the evidence could support a conclusion that only an unlawful factor motivated the adverse decision or was not an issue at all in the decision, then a "pretext" instruction would be appropriate. In that case, the employer would not be entitled to the same decision affirmative defense to damages provided by the Civil Rights Act of 1991. If, on the other hand, the trial judge finds that the evidence could support a conclusion that the action was motivated by both a discriminatory factor and a legitimate factor, then a "mixed-motive" instruction would be appropriate. In that case, the employer could avail himself of the affirmative defense.[202] Since this is all determined after the *McDonnell Douglas* framework has been applied, if at all, concern that the *McDonnell Douglas* framework will be overrun is misplaced.

C. Making It Too Easy for Plaintiffs to Prevail

Whether or not allowing for mixed-motives analysis without direct evidence makes it easier for a plaintiff to prevail in a disparate treatment case is also debatable. The plaintiff must still prove

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[197] *Costa*, 299 F.3d at 855 ("Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence – direct or circumstantial – of discriminatory intent.") (citation omitted).

[198] *Id.* at 855-56 (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)).

[199] *See* discussion *supra* Part II.A.

[200] 299 F.3d at 856.

[201] *Id.* The Supreme Court failed to address this progression in its *Desert Palace* decision. As a result, confusion over the application of *McDonnell Douglas* in mixed-motive cases may prove to be a continuing source of confusion in the lower courts.

[202] *Id.* at 856-57.

by a preponderance of the evidence that discrimination was involved in the adverse employment action. As several courts and commentators have noted, evidence of discriminatory animus is not easy to obtain, especially given the savvy nature of today's employers and the subtle forms that discrimination can take.[203] While it may be somewhat easier for a plaintiff to prove that discrimination was *a* cause, rather than *the* cause, of an employment action, mixed-motive analysis has the distinct possibility of affording the plaintiff with less satisfactory remedies than would pretext analysis given the availability of the affirmative defense in mixed-motives cases. Since pursuing a claim is a time-consuming and costly venture, plaintiffs may actually be less likely to bring claims of disparate treatment at all, knowing that their efforts will not be fully compensated should the defendant prove the affirmative defense.

Additionally, under the *Price Waterhouse* framework, a plaintiff who fails to prove mixed motives must still prove pretext. This creates a problem in a genuine mixed-motive situation: the plaintiff will not be able to prove pretext because there is not any pretext to be proven – the employer really did rely on a legitimate factor. In those situations, the employers would get away with discrimination because the plaintiff could not obtain the necessary direct evidence of discrimination, which the Court has recognized is very difficult to obtain anyway. In such cases, not only are the goals of Title VII and the 1991 Act not attained, but the *McDonnell Douglas* framework fails as well, since it was designed to afford plaintiffs an avenue for proving discrimination in the absence of direct evidence.

Finally, as discussed above, the language and legislative history of both Title VII and the Civil Rights Act of 1991 indicate that Congress intended both to be read broadly so employers would feel their full deterrent effects. Congress was not intent on just eradicating the most obvious cases of discrimination, but eliminating *all* discrimination in the workplace. There was no indication that Congress intended for plaintiffs to bear a higher evidentiary burden in some cases but not in others. Instead, Congress wanted the courts to apply the same preponderance of the evidence standard as had been applied for years prior to the 1991 Act's passage. Congress was displeased with the Supreme Court's continued narrowing of remedial statutes generally and civil rights statutes in particular, and tried to send a distinct message to that

[203] *See supra* note 157 and accompanying text.

effect.[204] Given the language and history of Title VII and the 1991 Act, the *Costa* Court's interpretation of mixed-motive analysis is most in line with what Congress intended.

CONCLUSION

Much has been made of Justice O'Connor's direct evidence requirement for plaintiffs in mixed-motive Title VII disparate treatment cases. However, the Supreme Court has finally addressed, and put to rest, the direct evidence issue. By analyzing the clear and unambiguous language of the Civil Rights Act of 1991, the Court correctly concluded that Congress did not intend for there to be a heightened standard of proof in mixed-motive disparate treatment cases under Title VII. While the Court did briefly discuss the use of circumstantial evidence outside the Title VII context, its opinion did not address several other factors that help make it clear that direct evidence should never have been a requirement in mixed-motive analysis in the first place.

First, the direct evidence requirement conflicted with the Court's own precedent in mixed-motive cases. The Court's decisions in *Arlington Heights*, *Mt. Healthy*, and *Transportation Management*[205] dealt with mixed motives in contexts other than Title VII. In those cases, the Court required the plaintiffs to prove by a preponderance of the evidence, either circumstantial or direct, that discrimination was a motivating factor in the decisions at issue. The Court seemingly had no problem shifting the burden of persuasion to the defendants in those cases after the plaintiffs proved their cases, even when the plaintiffs did not use direct evidence. In fact, those cases involved shifting the burden of persuasion to the defendants on the issue of causation, the issue with which Justice O'Connor was most concerned in *Price Waterhouse*. Justice O'Connor provided no explanation for her deviation from prior precedent of allowing *either* direct *or* circumstantial evidence to suffice for the burden to shift.

Second, the direct evidence requirement conflicted with the intent *behind* (not just the clear language of) both Title VII and the 1991 Act. Congress made clear its intention of eliminating *all* forms of discrimination. It also made clear that the statutes are to be read broadly since "even the smallest victory advances [Title VII's] interests."[206] The direct evidence requirement would make

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[204] *See supra* Part III.

[205] *See supra* Part I.

[206] *See supra* note 127.

many small victories out of potentially large ones. In true mixed-motive cases, only those plaintiffs with direct evidence would have the potential for full relief. Even in those situations, full relief would be rare since employers could present the affirmative defense to limit damages.

In situations where a plaintiff does not have direct evidence, she would be forced to try to prove pretext, a proposition that would be next to impossible since the employer would have legitimately relied on a lawful motive in addition to the unlawful motive. Since direct evidence is difficult to obtain, most plaintiffs would fall into this latter situation and, not being able to prove pretext, would not be awarded any relief. The employers would be able to continue discriminating, as long as they did so rather subtly and as long as they could offer legitimate reasons for decisions. Such a result is clearly contrary to congressional intent and the goals of Title VII and the 1991 Act.

In addition to not addressing these other factors, the Supreme Court did not address how lower courts should analyze mixed-motive cases. The Court should have expressly adopted the framework formulated by the Ninth Circuit in *Costa v. Desert Place* in order to avoid confusion between the mixed-motive and pretext frameworks. In Title VII disparate treatment cases involving multiple motives, at least one discriminatory and one legitimate, the plaintiff would first present her prima facie case as outlined in *McDonnell Douglas*. As is usual in disparate treatment cases, this burden should not be onerous. However, the plaintiff should present all evidence of discrimination, both circumstantial and direct, at this stage. Once the plaintiff has presented her evidence, the employer should present all evidence of legitimate reasons behind the adverse employment action. Once all the evidence is presented, the trial court would determine whether the evidence could support a finding that either the employer discriminated and that his proffered reason was pretextual or that the employer did not discriminate at all. The trial court would either make a final judgment accordingly[207] or would instruct a jury in accordance with traditional pretext cases.

The trial court could, on the other hand, determine that the evidence does not support a finding of pretext, but instead could support a finding that either a legitimate and an illegitimate factor

[207] If the judge, as trier of fact, found the employer's explanation was pretextual and that discrimination was the real reason for the adverse employment decision, he would enter judgment against the employer.

motivated the adverse decision or that the employer did not discriminate. In that situation, the trial court would again either enter judgment accordingly[208] or would give the jury a mixed-motive instruction. If a judgment is made against the employer, he should then be given the opportunity to present the same decision affirmative defense at the damages stage of the trial. If he succeeds in proving the defense by a preponderance of the evidence, the damages assessed against him would be limited. Otherwise, he would be liable for the entire range of damages available under the statute.

The *Costa* format for deciding mixed-motive disparate treatment claims should prove to be relatively easy to understand and easy to implement in practice. It would eliminate any confusion created by the *McDonnell Douglas* framework and would serve the goals of Title VII and the Civil Rights Act of 1991. By making it possible for plaintiffs to hold employers accountable in true mixed-motive cases, the desired deterrent effects of the statutes would be more fully realized. At the same time, many plaintiffs will still refrain from filing frivolous claims of discrimination because of the high cost, both monetarily and time-wise, of litigation and the real possibility of a successful affirmative defense by employers.

JENNIFER R. GOWENS[†]

[208] If the judge, as trier of fact, found that the employer was motivated by both unlawful and lawful factors, then the employer would be automatically liable for a Title VII violation.

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