Tulsa Law Review

Volume 38
Issue 3 *Torts and Sports: The Rights of the Injured Fan*

Spring 2003

Mixed Motives Mix-Up: The Ninth Circuit Evades the Direct Evidence Requirement in Disparate Treatment Cases

Brian W. McKay

NOTES & COMMENTS

MIXED MOTIVES MIX-UP: THE NINTH CIRCUIT EVADES THE DIRECT EVIDENCE REQUIREMENT IN DISPARATE TREATMENT CASES

I. INTRODUCTION

In the context of Title VII employment discrimination, two primary analytical frameworks for the treatment of litigation have emerged: pretext[1] and mixed motives.[2] Although these categories are recognized as distinct in most circuits,[3] the full Ninth Circuit declared that no such difference exists in *Costa v. Desert Palace, Incorporated*.[4] However, the Ninth Circuit's approach to Title VII litigation in this case omits a crucial stage of the analysis, making its conclusion questionable when examined in relation to Supreme Court precedent.[5] If permitted to stand, the *Costa* analysis could shift the balance of Title VII litigation and put employers at the mercy of litigation with questionable merits.[6] The Supreme Court has granted certiorari to the Ninth Circuit,[7] and in deciding the case should affirm the distinction between cases and provide guidance for the analysis of disparate treatment cases.

One reason for the Ninth Circuit's approach is apparently an effort to streamline Title VII litigation and avoid some of the confusion that has arisen in

1. The pretext framework is characterized generally by three steps: (1) the plaintiff has the burden of proving a prima facie case of discrimination, (2) upon the showing of a prima facie case, the employer must articulate a nondiscriminatory reason for the employment decision, (3) upon the satisfaction of the employers' burden of production, the plaintiff must prove that the reason proffered by the employer is pretextual. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

2. The mixed motives analysis is invoked when there is sufficient evidence to find that the adverse employment decision was motivated by two or more criteria, at least one of which is permissible. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (White, J., concurring).

3. *See e.g. Watson v. S.E. Penn. Trans. Auth.*, 207 F.3d 207, 214 (3d Cir. 2000); *Bickerstaff v. Vassar College*, 196 F.3d 435, 445 (2d Cir. 1999).

4. 299 F.3d 838, 854-57 (9th Cir. 2002) (en banc).

5. *Infra* pt. IV(B) (concluding that the Ninth Circuit bypassed a crucial aspect of Supreme Court precedent).

6. *Infra* text accompanying nn. 247-52.

7. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 816 (2003).

disparate treatment cases.[8] Whether a case is classified as pretext or mixed motives can be crucial to the outcome, and parties have been willing to litigate extensively to obtain a favorable classification.[9] The distinction is important to the parties because labeling a case as pretext or mixed motives carries important implications for the parties' burdens of persuasion.[10] Under pretext analysis, the burden of proving that an employment decision was made based upon a protected trait rests at all times upon the plaintiff;[11] however, mixed motives analysis is more forgiving for the plaintiff.[12] Under mixed motives analysis, if the plaintiff proves that the trait was a motivating factor in the employment decision—although perhaps not the sole reason—the defendant then has the burden of proving that the same decision would have been made absent any discriminatory intent.[13]

The key to differentiating between pretext cases and mixed motives cases has been the direct evidence requirement.[14] Under the direct evidence requirement, a mixed motives case is born when the plaintiff is able to prove by direct evidence that an improper characteristic was a motivating factor in the adverse action taken by the employer.[15] In the absence of such direct evidence, the case proceeds under the pretext framework.[16] A product of Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*,[17] the direct evidence requirement has found its way into Title VII jurisprudence in almost every circuit.[18]

Exactly what Justice O'Connor meant by direct evidence has generated considerable debate, and there have been conflicting interpretations of the requirement among lower courts.[19] In *Costa*, the Ninth Circuit has added yet another analysis to the mix by abolishing the direct evidence requirement

8. *See* Robert Belton, *Mixed-Motives Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 Mercer L. Rev. 651, 651 (2000) (characterizing the state of Title VII litigation as a swamp).

9. *See* Michael A. Zubrensky, Student Author, *Despite the Smoke, There Is no Gun: Direct Evidence Requirements in Mixed-Motives Employment Law after* Price Waterhouse v. Hopkins, 46 Stan. L. Rev. 959, 978-80 (1994).

10. *Infra* text accompanying nn. 11-13.

11. *Burdine*, 450 U.S. at 256-58.

12. *Infra* n. 51.

13. *See Price Waterhouse*, 490 U.S. at 244-45 (plurality). In addition to the differing burdens of proof, the pretext and mixed motives analyses differ according to the point at which liability is established. This is discussed further at *infra* text accompanying notes 66-68.

14. *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999).

15. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

16. *See Fernandes*, 199 F.3d at 580.

17. 490 U.S. 228.

18. *See Costa*, 299 F.3d at 866 (Gould, J., dissenting) (citing *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990); *Ostrowski v. A. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Assn.*, 989 F.2d 858, 861 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *Shleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990)).

19. *See* Belton, *supra* n. 8, at 662-63.

altogether.[20] The Ninth Circuit's proposed framework for Title VII litigation makes the mixed motives burden shift available to practically any plaintiff who is able to create an *inference* that a protected trait was a motivating factor, as opposed to requiring direct proof.[21]

This note contends that *Costa* contravenes Supreme Court precedent and wrongly states the proper analysis for Title VII litigation. Section II details the development of Title VII analysis, and Section III recounts the facts of the *Costa* case. Section IV demonstrates that, according to the Supreme Court's instructions for treatment of plurality decisions, the direct evidence requirement is part of the binding precedent of *Price Waterhouse*. Section V contends that collapsing the pretext/mixed motives distinction will effectively override the *McDonnell Douglas v. Green*[22] pretext framework in almost every case, just as the *Costa* dissent warns.[23] Section VI proposes that confusion and inconsistencies among the lower courts would best be mitigated by developing a uniform definition of direct evidence rather than abolishing the requirement altogether. The last section also proposes a uniform definition of direct evidence that is consistent with Justice O'Connor's opinion and the purposes of civil rights legislation.

II. DEVELOPMENT OF TITLE VII LITIGATION[24]

Congress' ratification of the Civil Rights Act of 1964 and its subsequent enactment made it illegal for an employer to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[25] The purpose of the Act was to eliminate discriminatory employment practices.[26]

In 1973, the Supreme Court addressed the fact that discriminatory intent is sometimes difficult to prove.[27] In *McDonnell Douglas*, the unanimous Court permitted a plaintiff to prove intent through pretext analysis.[28] Under this analysis, the plaintiff can build a presumption of unlawful discrimination by ruling

20. *Costa*, 299 F.3d at 853.
21. *See id.* at 853-54.
22. 411 U.S. 792 (1973).
23. *Costa*, 299 F.3d at 867 (Gould, J., dissenting).
24. It should be noted that several courts have adopted the view that the same analytical framework applies to litigation arising under Title VII, the Age Discrimination in Employment Act ("ADEA"), Americans with Disabilities Act ("ADA"), and other anti-discrimination legislation. *See e.g. Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997). Whether this view is accurate has not been expressly determined by the Supreme Court; however, it has been adopted *arguendo* at least once. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). Therefore, this note may use developments from caselaw involving ADEA and other anti-discrimination statutes to illustrate or explain Title VII litigation.
25. 42 U.S.C. § 2000e-2(a)(1) (1994) (as enacted by Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (1964)).
26. *McDonnell Douglas*, 411 U.S. at 800.
27. *See Lewis v. Univ. of Pitt.*, 725 F.2d 910, 923 (3d Cir. 1983) (noting that pretext analysis was constructed because "it often will be difficult for the plaintiff to obtain direct evidence of the employer's motive.").
28. *McDonnell Douglas*, 411 U.S. at 802-03.

out the most common lawful reasons for adverse employment action.[29] This presumption is created when the plaintiff builds a prima facie case of discrimination.[30] Once the presumption is created, the employer can rebut it by providing a legitimate, nondiscriminatory reason for the adverse employment decision.[31] Finally, if the presumption has been rebutted, the plaintiff is given an opportunity to discredit the proffered nondiscriminatory reason by proving that it is pretextual—in other words, that the proffered reason was not the true reason for the employment decision.[32]

The Supreme Court clarified pretext analysis in *Texas Department of Community Affairs v. Burdine*.[33] The Court held that the burden placed upon the defendant by the pretext presumption was merely a burden of production, and the defendant could not be obligated to prove its posited motivation by a preponderance of the evidence.[34] The defendant's reason must raise "a genuine issue of fact as to whether it discriminated against the plaintiff,"[35] and once such a requirement is met "the prima facie case is rebutted."[36] The Court noted, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[37]

Since *Burdine*, the Supreme Court has admonished that the focus of the pretext case should not be on a mechanical operation of the prima facie case, but instead on the ultimate question of "discrimination *vel non*."[38] Once the defendant's burden of production has been met, the presumption is eliminated and the plaintiff must then prove the ultimate question of discrimination by a preponderance of the evidence.[39] Justice Powell, in *Burdine*, noted that the plaintiff could prevail at this stage "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[40] When a plaintiff proceeds under the latter method, the finder of fact may treat the erroneousness of the defendant's proffered reason as probative on the issue of intentional discrimination;[41] however, successfully demonstrating that the

29. *Burdine*, 450 U.S. at 253-54.

30. *McDonnell Douglas*, 411 U.S. at 802. The Court noted that the formula is not a rigid structure, but instead must be varied according to the facts of the case. *Id.* at 802 n. 13. In *McDonnell Douglas*, the prima facie case was built by showing that (1) the plaintiff was a member of a protected class, (2) the plaintiff applied for and was qualified for a job for which the employer sought applicants, (3) the plaintiff was rejected for the job, and (4) after the rejection, the employer continued to seek applicants from persons with plaintiff's qualifications. *Id.* at 802.

31. *McDonnell Douglas*, 411 U.S. at 802.

32. *Id.* at 804.

33. 450 U.S. 248 (1981).

34. *Id.* at 256-58.

35. *Id.* at 254.

36. *Id.* at 255.

37. *Id.* at 253.

38. *U.S. Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711, 714 (1983).

39. *Burdine*, 450 U.S. at 255-56.

40. *Id.* at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

41. *Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination.").

employer's reason is false does not entitle the plaintiff to judgment as a matter of law.[42] In other words, the prima facie case coupled with demonstration of the tendered reason's falsity permits the fact finder to infer intentional discrimination but does not mandate it.[43]

One of the heavily anchored principles running throughout the Supreme Court's pretext analysis jurisprudence is that the plaintiff at all times bears the burden of proving discrimination.[44] To this end, a plaintiff may use circumstantial evidence to create inferences that a protected trait was a reason for the employment decision.[45] However, proving that the trait was the reason for a decision requires proof of the employer's state of mind, a burden that can be difficult to satisfy.[46] To some, the requirement that plaintiff prove subjective intent is simply too onerous.[47]

The mixed motives analysis sprouted up through the lower courts during the 1980s as trial courts struggled with the issue of causation when both legitimate and illegitimate factors were considered in an employment decision.[48] In these mixed motives cases, when the plaintiff was able to prove by a preponderance of the evidence that an illegitimate factor was considered in the employment decision, some lower courts began permitting a burden shift to the defendant whereby the defendant was required to prove that the adverse employment decision would have resulted even if the illegitimate factor had not been considered.[49] This claim is known as the "same decision" defense.[50] This analysis is considered plaintiff-friendly compared to pretext analysis.[51] The Supreme Court attempted to tackle the burden shifting issue in 1989 in *Price Waterhouse v. Hopkins*.[52]

---

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

43. *Supra* nn. 38-39 and accompanying text.

44. *See Reeves*, 530 U.S. at 143; *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *Hicks*, 509 U.S. at 507; *Aikens*, 460 U.S. at 716; *Burdine*, 450 U.S. at 253.

45. *Aikens*, 460 U.S. at 714 n. 3.

46. For a brief discussion of the difficulties involved in proving subjective intent, see William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employers at Will: Lessons from* McKinnon *and* Hicks, 30 Ga. L. Rev. 305, 351 n. 232 (1996).

47. *See e.g.* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 Berkeley J. Empl. & Lab. L. 183, 185 (1997) ("The Court has, in effect, placed upon plaintiffs in Title VII actions the burden of proving discrimination beyond any doubt.").

48. *See e.g. Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985).

49. Two lines of analysis developed in courts that permitted burden shifting. One analytical method permitted the defendant to avoid all liability by successfully asserting the same decision defense. Under the other method, liability attached when the plaintiff proved that the illegitimate factor motivated the employment decision, but the employer who successfully proved the same decision defense limited the damages to which plaintiff was entitled. *Compare Blalock*, 775 F.2d at 713 ("Metal Trades may avoid all liability by showing that even had Blalock maintained his initial religious views, his work performance was so intolerable to Metals Trades that he still would have been discharged.") *with Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) ("A defendant's showing that the plaintiff would not have gotten the job anyway does not extinguish liability. It simply excludes the remedy of retroactive promotion or reinstatement.").

50. *Costa*, 299 F.3d at 856.

51. *See* Benjamin C. Mizer, Student Author, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 Mich. L. Rev. 234, 242 (2001); Christopher Y. Chen, Student Author, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives*

In *Price Waterhouse*, the accounting firm declined to extend partnership status to Ann Hopkins.[53] Feedback from partners revealed that Hopkins' personality, described as brusque,[54] had adversely affected her partnership candidacy.[55] However, some comments indicated that partners' evaluations of her work had been colored by her gender, and that they "reacted negatively to [her] personality because she was a woman."[56] Hopkins brought suit under Title VII and prevailed at the trial level.[57] Although the District of Columbia Circuit Court of Appeals affirmed the outcome, the court pronounced that successful implementation of the same decision defense shields the employer from all liability in a Title VII case.[58] Arguing before the Supreme Court, Hopkins advanced two primary contentions: (1) the employer can be made to bear the burden of proving the same decision defense in mixed motives cases, and (2) successful use of the same decision defense does not shield the employer from liability, but instead merely limits the remedies to which plaintiff is entitled.[59]

Price Waterhouse was a plurality opinion, with four Justices joining in the opinion of the Court, three dissenting, and two separately concurring in the judgment.[60] The plurality and separately concurring Justices White and O'Connor agreed with Hopkins that the employer could be made to bear the burden of proving the same decision defense in a mixed motives case.[61] However, Justice O'Connor alone found that burden shifting could take place only in cases where the plaintiff had direct evidence of illegal discrimination.[62] On her second legal assertion, Hopkins did not prevail, as the plurality and concurring Justices established that the successful use of the same decision defense completely absolved the employer of liability.[63]

In passing the Civil Rights Act of 1991,[64] Congress took aim at Supreme Court decisions that were perceived as weakening the employment protections Congress had enacted in the 1964 Act.[65] Congress had the *Price Waterhouse*

Discrimination Claims, 86 Cornell L. Rev. 899, 907 (2001).

52. 490 U.S. 228 (plurality).

53. *Id.* at 233.

54. *Id.* at 234.

55. *Id.* at 234-35.

56. *Id.* at 235.

57. 490 U.S. at 236-37.

58. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 470-71 (D.C. Cir. 1987) (citing *Blalock*, 775 F.2d at 712).

59. *Id.* at 238.

60. 490 U.S. 228 (plurality); *id.* at 279 (Kennedy, J., dissenting); *id.* at 258 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring).

61. 490 U.S. at 244-45 (plurality); *id.* at 259-60 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring).

62. *Id.* at 276 ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

63. *Id.* at 242 (plurality); *id.* at 261 n. * (White, J., concurring); *id.* (O'Connor, J., concurring).

64. Pub. L. No. 102-166, 105 Stat. 1071 (1994).

65. Corbett, *supra* n. 46, at 340.

decision in its sights when it crafted Section 107 of the 1991 Act.[66] This section effectively adopted Ann Hopkins' contention that liability for a Title VII violation was established at the time plaintiff proved that the protected trait was a factor in the employment decision[67] and that successful use of the same decision defense merely limits the remedies available to plaintiff rather than absolving defendant completely.[68] Whether the Civil Rights Act of 1991 had any effect on the direct evidence requirement is unclear.[69] The Act did not specifically address whether direct evidence is the gateway into mixed motives analysis, and the legislative history of the Act yields no determinative clues.[70]

The contemporary analytical structure for Title VII cases embraces the two types of disparate treatment actions, pretext and mixed motives, as employing distinct analytical frameworks.[71] Under this view, direct evidence, whatever it may be, is the floodgate that determines whether plaintiffs can avail themselves of the calmer waters of mixed motives.[72] The Ninth Circuit abolished this distinction in *Costa*,[73] and its holding blew open the floodgate.

III. *COSTA V. DESERT PALACE, INC.*

Caesars Palace, a Las Vegas casino and hotel, employed Catharina Costa in its warehouse.[74] Her job duties entailed operating forklifts and pallet jacks to pull

66. Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. Rich. L. Rev. 757, 771-72 (1997).

67. *Civil Rights Act of 1991*, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991) (enacted as 42 U.S.C. 2000e-2(m)) ("[A]n unlawful employment practice is established 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.").

68. The enactment states in pertinent part:

> (B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-
>
> may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and
>
> shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(b), 105 Stat. 1071, 1075-76 (1991) (enacted as 42 U.S.C. § 2000e-5(g)(2)(B)).

69. *Infra* n. 70.

70. For thoughtful treatment of the issue of whether Congressional intent regarding the direct evidence requirement can be deduced from the legislative history of the Civil Rights Act of 1991, see Mizer, *supra* note 51, at 256-60. Additional discussion is available at Belton, *supra* note 8, at 661 ("[T]he legislative history [of the Civil Rights Act of 1991] is singularly uninstructive on the substantive standard to be applied in mixed-motive employment discrimination cases."). Because no meaningful and conclusive intent can be gleaned from the legislative history of the 1991 Act, its effect on the direct evidence requirement is outside the scope of this note. A review of the literature on the subject reveals that some commentators have proven themselves adept at divining supportive evidence from Congressional silence. This note seeks to avoid such practice.

71. *See e.g. Fernandes*, 199 F.3d at 579-80.

72. *See e.g. id.* at 580.

73. *Costa*, 299 F.3d at 857.

74. *Id.* at 844.

drink orders for the hotel, and she was the only female in this job.[75] Costa's job performance was satisfactory; however, she encountered friction with co-workers and management.[76] Costa was reprimanded, denied opportunities to work overtime, and eventually terminated.[77] She attributed the adverse employment decisions to gender discrimination.[78]

Costa's difficulties at work came to a head as a result of an altercation with another worker.[79] The other worker, upset over a report he believed she made about him, confronted Costa, and a physical altercation ensued in which Costa was bruised.[80] After investigation, Caesars disciplined both employees.[81] Costa, having already amassed a disciplinary record that included suspensions, was terminated.[82] The other employee, having served twenty-five years without any prior suspensions, was suspended for five days.[83]

Costa brought suit in the District of Nevada, contending that she suffered from disparate working conditions and was disciplined differently because of her gender.[84] At trial, Costa presented no evidence that directly linked her gender to any disciplinary decision by Caesars.[85] However, the presiding judge noted that, from the evidence presented, a reasonable mind could infer that Costa's gender was a motivating factor in Caesars' conduct toward her.[86] The court gave the jury a mixed motives instruction.[87] After deliberations, the jury returned a verdict that gender was a motivating factor in Caesars' treatment of Costa and that Caesars had failed to prove that the outcome would have been the same had gender not been taken into account.[88]

Caesars appealed its adverse ruling, contending that the trial court erred in giving the jury a mixed motives instruction.[89] Caesars asserted that the mixed motives instruction should not have been given because Costa failed to present direct evidence of discrimination.[90] A panel of the Ninth Circuit agreed with Caesars, ruling that the direct evidence requirement was a prerequisite for the

75. *Id.*
76. *Id.*
77. *Id.* at 844-45.
78. *Costa*, 299 F.3d at 846.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 845-46.
83. *Costa v. Desert Palace, Inc.*, 268 F.3d 882, 885 (9th Cir. 2001).
84. *Costa*, 299 F.3d at 846.
85. There was no evidence that directly showed a nexus between an adverse employment decision and Costa's gender. For instance, the Ninth Circuit panel noted that in her trial testimony, Costa stated that when she approached management about the reason a male coworker received a disproportionately large number of the overtime hours she was told that it was because he was a man and had a family to support. However, on cross-examination she retracted that statement and admitted that the supervisor's statement was gender neutral. *Desert Palace*, 268 F.3d at 888.
86. *Costa*, 299 F.3d at 846.
87. *Id.* at 858.
88. *Id.* at 862-63.
89. *Id.* at 844.
90. *Id.*

mixed motives instruction.[91] The Ninth Circuit permitted rehearing *en banc*[92] and reversed the panel's decision.[93]

By a five to four split, the *en banc* majority held that there is no direct evidence requirement for the mixed motives instruction, reasoning that the pretext and mixed motives cases are not exclusive types of Title VII actions.[94] In reaching its conclusion, the majority disregarded what it characterized as Justice O'Connor's "passing reference" to direct evidence in *Price Waterhouse*.[95] The Court also noted the disjointed state of mixed motives litigation among the circuits:

> The resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators. Within circuits, and often within opinions, different approaches are conflated, mixing burden of persuasion with evidentiary standards, confusing burden of ultimate persuasion with the burden to establish an affirmative defense, and declining to acknowledge the role of circumstantial evidence.[96]

The Court suggested that the direct evidence requirement, as implemented in other circuits, was simply used to substitute the courts' judgment for that of the jury.[97]

The Ninth Circuit looked to 42 U.S.C. § 2000e-2(m) and concluded that Congress did not intend to establish a different allocation of evidentiary burden in single motive and mixed motives actions.[98] Instead, the Court held, the plaintiff was merely required to prove that the protected trait was a motivating factor in the employment decision.[99]

The framework adopted by the Ninth Circuit makes no differentiation between pretext and mixed motives cases.[100] Instead, it treats the two cases as though they "are separate inquiries that occur at separate stages of the litigation."[101] Under this framework, pretext analysis is a tool used to help a plaintiff survive summary judgment.[102] The single or mixed motives distinction under this model is irrelevant as it relates to evidentiary availability because the plaintiff in either case is able to use any evidence to prove that the protected trait was a motivating factor, thus pushing the burden of proving the same decision

---

91. *Desert Palace*, 268 F.3d at 889.
92. *Costa v. Desert Palace, Inc.*, 274 F.3d 1306 (9th Cir. 2001).
93. *Costa*, 299 F.3d 838.
94. *Id.* at 857.
95. *Id.* at 851. This description of Justice O'Connor's requirement is curious in light of the fact that she mentions "direct evidence" or "direct proof" no less than fourteen times in her opinion and devotes considerable attention to giving a description, albeit not exhaustive, of what does not constitute direct evidence. The *Costa* dissent also took issue with this characterization of Justice O'Connor's requirement. *Id.* at 865 (Gould, J., dissenting).
96. *Id.* at 851.
97. *Id.* at 853.
98. *Id.* at 851.
99. *Id.*
100. *Id.* at 857.
101. *Costa*, 299 F.3d at 857.
102. *Id.* at 854.

defense upon the defendant.[103] This violates the guidance provided by *Price Waterhouse*, as will be demonstrated below.[104]

According to *Costa*, a trial court, after all evidence is heard, determines what inferences can be drawn from the evidence.[105] If the court determines that the evidence supports only the conclusion that discriminatory intent was the *only* reason for the employment decision or played *no part at all* in the decision, the jury is instructed to determine whether the decision was made "because of" gender.[106] The jury then determines whether the employer escapes all liability or is exposed to the full range of remedies.[107] However, if the evidence can support the inference that the protected trait was one of two or more reasons for the employment decision, the jury is instructed first to determine whether the trait was a motivating factor in the decision.[108] If the trait is determined to be a motivating factor, the jury then decides whether the defendant proved that the same decision would have been made without consideration of the trait.[109]

In extracting the direct evidence requirement from mixed motive analysis, the Ninth Circuit adopted an analytical model for differential treatment cases that is relatively novel among the circuits.[110] This fresh analysis is sound, however, only if the direct evidence requirement is not binding authority from *Price Waterhouse*.[111]

IV. *COSTA* UNDER THE SCRUTINY OF BINDING PRECEDENT

Had the direct evidence requirement been contained in a Supreme Court majority opinion there would be little doubt of its binding nature.[112] That it was born of a concurrence by a single Justice, however, may leave some question about whether it is binding at all.[113] Using the tools sanctioned by the Supreme Court, an authoritative resolution points out that the direct evidence requirement should be given the authority of binding precedent.[114]

---

103. *Id.* at 853-54.
104. *Infra* pt. IV(B).
105. *Costa*, 299 F.3d at 856.
106. *Id.*
107. *Id.* at 856.
108. *Id.* at 856-57.
109. *Id.* at 857.
110. *But see Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182-83 (2nd Cir. 1992) (noting that Justice O'Connor's direct evidence requirement was not part of the holding of *Price Waterhouse*).
111. An alternative argument is that the Civil Rights Act of 1991 legislatively overruled the direct evidence requirement. This argument is discussed *supra* note 70 and the accompanying text.
112. If the direct evidence requirement had been woven into a majority opinion, it is likely that Congress would have provided more purposeful consideration of it, ultimately making a more definitive judgment whether to retain or abolish the requirement.
113. *See Tyler*, 958 F.2d at 1182-83.
114. *Infra* pt. IV(A) & (B).

A. Treatment of a Plurality Case

In addition to resolving particular controversies, the Supreme Court must guide future decisions of courts and parties by articulating statements of the law.[115] However, when no single rationale is endorsed by a majority of the Court, it can be extremely difficult to determine whether a binding legal rule is supposed to be gleaned from the case, and if so, what that rule may be.[116] Such decisions may confuse lower courts and undermine the stability of the law.[117] Some in the legal community seem to take offense at the notion of a plurality decision, characterizing it as an abdication of the Court's responsibility and a failure of the Court to fulfill its obligations.[118]

The disfavor with which plurality decisions are received is perhaps due to the difficult position in which it places lower courts and the public, mandated to follow a legal rule from a Supreme Court that was unable to articulate a rule overtly supported by a majority of Justices. Yet for a considerable number of plurality opinions, the holding of the case is not impossible to ascertain.[119] Although not useful in every case,[120] the Supreme Court has articulated a rule that can help navigate the uncertainty of plurality opinions and thereby arrive at an authoritative rule.[121] In 1977, the Supreme Court decided *Marks v. United States*,[122] and in doing so, the Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[123] This rule has come to be known as the *Marks* rule or the narrowest grounds test.[124]

The methodology of the *Marks* rule is easily understood by operation of the following hypothetical. Imagine that a state enacts a law mandating that police place a newspaper notice identifying convicted sex offenders. This law applies to all defendants convicted after date of enactment and also to offenders who have completed their sentence, if a panel determines that the released offender poses a significant risk to the community. In this scenario, the law is applied to a specific offender who has completed his sentence but was found to pose a significant risk, and he litigates to enjoin the police from enforcement of the law against him. His

115. Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1128 (1981).

116. *See generally* Linda Novak, Student Author, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980).

117. *See* Note, *supra* note 115, at 1129.

118. *Id.* at 1128. An example of the frustration aimed at decisions is found in *Tyler*. 958 F.2d at 1182 (expressing frustration with having to determine the *ratio decindendi* of *Price Waterhouse*); *id.* (citing Note, *supra* n. 115, at 1128) ("Each plurality decision thus represents a failure to fulfill the Court's obligations.") (internal quotation marks omitted).

119. *Infra* nn. 121-24 and accompanying text (introducing narrowest grounds test).

120. *Infra* n. 141.

121. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977).

122. 430 U.S. 188.

123. *Id.* (quoting *Gregg v. Ga.*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (internal quotation marks omitted).

124. Adam S. Hochschild, Student Author, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 Wash. U. J.L. & Policy 261, 279 (2000).

case comes before the Supreme Court, and he contends that the statute violates the Double Jeopardy Clause.

Four Justices (A, B, C, and D) join a single opinion upholding the law because congressional findings indicate that sex offenders are especially harmful to society, and the law's intent is to provide community protection instead of punishment. Justice E separately concurs, upholding the law on the grounds that any such notices are permitted so long as they are not meant to punish. Justice F upholds the statute only because there is a mechanism whereby only offenders who pose a future danger fall under the requirement, thus ensuring the statute operates to protect, not punish. Finally, the three remaining Justices (G, H, and I) dissent because, according to their reading of the legislative history, the statute's purpose is primarily to humiliate and exact punishment. In this hypothetical, Justice F's rationale represents the narrowest grounds because Justice F's rationale is "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases."[125]

The underlying basis of the *Marks* rule is that the Justices supporting the broader rule must necessarily agree with the validity of the narrower rule.[126] Referring back to the hypothetical above, in each case where Justice F would uphold a notice requirement, the plurality and Justice E would also uphold it. For this reason the narrowest grounds may be said to be a rule that would garner the support of a majority of justices, although perhaps not the broadest statement of the rule to which some justices would join.[127] Some disapprove of the *Marks* rule on grounds that it is contrary to the principle of majoritarianism.[128] However, the *Marks* rule preserves the integrity of majoritarianism by instituting only the rationale to which a majority of justices would agree.[129]

---

125. Novak, *supra* n. 116, at 763.

126. Ken Kimura, Student Author, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603 (1992).

127. An alternate way of viewing the *Marks* rule is to shift it into the context of a false plurality. A false plurality is one in which a majority endorses a single rationale that supports the basis of the holding; however, some justices continue to avow additional ideas. *See* Note, *supra* n. 115, at 1130-31. Using the *Marks* rule, the narrowest grounds may be viewed as the rationale to which a majority would agree that is sufficient to support the holding. The other opinions concurring in the result are then viewed as additional statements that go beyond that necessary to support the holding.

128. Kimura, *supra* n. 126, at 1604.

129. Mr. Kimura asserts that the *Marks* rule is antimajoritarian and applies what appears to be imperfect logic to prove this point. *Id.* Although he acknowledges that the Justices supporting the broader rule (what I will call the plurality) would necessarily support the outcome obtained via the narrowest grounds, he contends that the narrowest grounds impermissibly sets up a "one-way flow of legitimacy." *Id.* The argument seems to be that where the plurality supports a decision based on the presence of A and the narrowest grounds concurrence is based on the presence of both A and B, the logic of the narrowest grounds seems sound. However, this argument would go, when another case comes before the Court with only A, "no basis exists for believing that the Justice supporting the broader rule will still accept the principles underlying the narrower rule." *Id.* This, however, does not warrant the label of antimajoritarian. The argument ignores the existence of the other, previously dissenting, Justices. Assuming a Court of static individual jurisprudence, the subsequent case would not be supported because the previously dissenting justices would continue to dissent and the justice previously concurring on narrowest grounds would not support upholding the case because B is not present. Therefore, this coalition would be turned into a majority (or perhaps a plurality with a concurrence).

Some criticism of the *Marks* rule has focused on difficulties related to its operation or its inapplicability to some types of plurality decisions.[130] For some cases the narrowest grounds are difficult to determine, if they exist at all.[131] Such was the case in *Baldasar v. Illinois*.[132] The Court addressed the question of whether use of an uncounseled prior conviction to enhance punishment for a subsequent conviction violated the Sixth Amendment.[133] A clear majority opinion did not emerge from the Court. Instead the Justices splintered into four separate opinions from which a clear rationale was not readily discerned.[134] Left to determine what *Baldasar* articulated as a rule, lower courts applied the *Marks* rule to inconsistent results.[135] Some courts determined that there were no "narrowest grounds,"[136] while others identified Justice Blackmun's rationale as the narrower ground.[137]

The Supreme Court addressed the dilemma presented by *Baldasar* in *Nichols v. United States*.[138] The Court recognized the difficulty and lack of uniformity that occurred when the lower courts attempted to apply the *Marks* rule to *Baldasar*.[139] Chief Justice Rehnquist, writing the opinion of the Court, acknowledged that the *Marks* test "is more easily stated than applied"[140] to *Baldasar*. Ultimately, the Court recognized that the *Marks* rule was not to be used as the exclusive test applied to all plurality opinions.[141]

The proper treatment of a plurality opinion where no narrowest grounds can be ascertained remains unclear; however, one principle is unambiguous: where the narrowest grounds can be gleaned from a plurality opinion, the *Marks* rule remains the only guidance supplied by the Supreme Court for interpretation of

130. *See e.g.* Novak, *supra* n. 116, at 763; *id.* at 767.

131. *See* Hochschild, *supra* n. 124, at 280-82.

132. 446 U.S. 222 (1980). *See* Hochschild, *supra* n. 124, at 280-81.

133. *Baldasar*, 446 U.S. at 222-24 (per curiam).

134. *See* Hochschild, *supra* n. 124, at 280 n. 133. The Supreme Court splintered into a confusing array of three concurring opinions to which a total of five justices subscribed and a dissenting opinion shared by the four remaining Justices. Justice Stewart, joined by Justices Brennan and Stevens, in a brief opinion stated that the use of a prior conviction for which defendant did not have counsel was not valid to be used to enhance a subsequent conviction and increase the incarceration period sentenced. *Baldasar*, 446 U.S. at 224 (Stewart, J., concurring). Justice Marshall, joined also by Justices Brennan and Stevens, noted that the prior uncounseled conviction permitted the subsequent charge to be enhanced to a felony and also concluded that the failure to provide an appointed attorney for the prior charge made it invalid for subsequent enhancement purposes. *Id.* at 225-29 (Marshall, J., concurring). Justice Blackman, referring back to his dissenting opinion in *Scott v. Illinois*, 440 U.S. 367 (1979), reintroduced a bright line test mandating appointed counsel for any defendant facing more than six months incarceration or actually imprisoned for conviction. *Id.* at 229-30 (Blackmun, J., concurring).

135. Hochschild, *supra* n. 124, at 280-81.

136. *See id.* at 281 n. 136 (citing *Nichols*, 511 U.S. at 745).

137. *See id.*, at 281 n. 135 (citing *Nichols*, 511 U.S. at 745).

138. 511 U.S. 738 (1994).

139. Hochschild, *supra* n. 124, at 281 (citing *Nichols*, 511 U.S. at 745).

140. *Nichols*, 511 U.S. at 745.

141. *See* Hochschild, *supra* n. 124, at 281 n. 138. In *Nichols*, the Court noted, "We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols*, 511 U.S. at 745-46.

plurality opinions.[142] The *Marks* rule, when used to examine *Price Waterhouse*, makes the binding authority from *Price Waterhouse* clear.

B. Marks *Applied to* Price Waterhouse

The product of the narrowest grounds rule as applied to the *Price Waterhouse* opinions has only been mildly debated in lower courts and scholarly writings.[143] Unlike the confusing opinions of *Baldasar*, applying the *Marks* rule to *Price Waterhouse* does not result in "baffling"[144] the lower courts. That Justice O'Connor's rationale was interpreted as the holding of *Price Waterhouse* soon after it was decided supports the notion that there was little to debate.[145]

The *Price Waterhouse* opinions can be classified on "broader-narrower" terms; therefore, it is appropriate to submit it to *Marks* inquiry.[146] There are two factors to be considered in each of the *Price Waterhouse* opinions: the magnitude to which the protected trait was considered and the quality of evidence used to connect the protected trait and the employment decision. The four-Justice plurality did not restrict the availability of the burden shift according to the degree to which the employer considered the protected trait; rather the plurality merely required that the plaintiff prove that the protected trait was given any consideration at all in the context of the employment decision.[147] Nor did the plurality restrict the availability of burden shifting according to the quality of

---

142. Kimura, *supra* n. 126, at 1603.

143. *Infra* n. 145. The disagreement regarding the holding of *Price Waterhouse* has not been focused on the product of the narrowest grounds test, but instead has been drawn on the issue of whether the narrowest grounds test should even be applied. *See e.g.* Mizer, *supra* n. 51, at 261 (arguing that the plain language of the Civil Rights Act of 1991 abolished the direct evidence requirement). Courts contending that the direct evidence requirement is not binding authority do not make their claim using *Marks*. *But see Tyler*, 958 F.2d at 1182-83. The *Tyler* Court endorses the *Marks* rule; however, it then restates it as something different: "In essence, what we must do is find common ground shared by five or more justices." *Id.* This is quite different than finding the opinion which concurs on the narrowest grounds; therefore, *Tyler* should not be viewed as applying the *Marks* rule.

144. *Nichols*, 511 U.S. at 745-46 (noting that attempts to determine the narrowest grounds of *Baldasar* had "obviously baffled and divided the lower courts.").

145. Justice O'Connor's direct evidence requirement was quickly interpreted as the holding of the Supreme Court in *Price Waterhouse*. Even the dissenting justices treated it as such:

> I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, *by presenting direct and substantial evidence of discriminatory animus*, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proved by *direct evidence* than an unlawful motive was a substantial factor actually relied upon in making the decision.

Price Waterhouse, 490 U.S. at 280 (Kennedy, J., dissenting) (emphasis added). It is noteworthy that both the *direct* evidence requirement and *substantial* evidence requirements were contained in Justice O'Connor's concurrence, and neither was found in the plurality opinion.

Additionally, several commentators interpreted the direct evidence requirement as the holding of *Price Waterhouse* shortly after it was decided. *See e.g.* Theodore Y. Blumoff & Harold S. Lewis, *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. Rev. 1, 51-53 (1990); Stuart H. Bompey, *What Will Congress Do Now?: Employment Related Legislation* 47 (PLI Corp. L. & Prac. Course Handbook Series No. B4-6956, 1991).

146. *See* Novak, *supra* n. 116, at 767.

147. *Price Waterhouse*, 490 U.S. at 244-45 (plurality).

plaintiff's evidence.[148] Justice White permitted burden shifting only after the plaintiff proved that the protected trait was a *substantial* factor in the employment decision, a slightly more stringent standard than the plurality.[149] However, Justice White did not require this proof to be made by any particular type of evidence.[150] Justice O'Connor, like Justice White, required that the protected trait be a substantial factor, but she also attached the additional restriction that the plaintiff had to prove this using direct evidence.[151]

Because Justice O'Connor's rule for burden shifting in Title VII cases requires both a showing of substantial factor and direct evidence, it is more restrictive than both the plurality's rule (no restrictions)[152] and Justice White's rule (substantial factor).[153] Applying the logic of the *Marks* rule, the Justices of the plurality and Justice White would necessarily concur in the result obtained each time Justice O'Connor permits burden shifting. Therefore, according to the Supreme Court's instructions in *Marks*,[154] the holding of *Price Waterhouse* encompasses Justice O'Connor's direct evidence requirement.[155] In rejecting the direct evidence requirement in *Costa*, the Ninth Circuit ignored the *Price Waterhouse* holding.[156] In addition to being contrary to Supreme Court guidance, the analytical creations of *Costa* jeopardize the broader condition of Title VII litigation in a manner the Ninth Circuit refuses to acknowledge.[157]

V. VIABILITY OF THE *MCDONNELL DOUGLAS* FRAMEWORK AFTER *COSTA*

The *Costa* majority contends that even after jettisoning the direct evidence requirement, the pretext analysis and mixed motives analysis coexist in harmony in Title VII analysis because they are performed at different stages of the litigation.[158] However, the dissenting judges argue that the analytical framework adopted by the majority jeopardizes the continued existence of the pretext framework.[159] This dissenting coalition is not the first to express concern that

148. *Id.* at 251-52.
149. *Id.* at 259 (White, J., concurring).
150. *Id.*
151. *Id.* at 276.
152. *Price Waterhouse*, 490 U.S. at 244-45 (plurality); *id.* at 251-52.
153. *Id.* at 259 (White, J., concurring).
154. 430 U.S. at 993.
155. *Supra* text accompanying nn. 138-39. Congress, through the Civil Rights Act of 1991, replaced the "substantial factor" requirement with the "motivating factor" test. Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga. L. Rev. 563, 585-86 (1996).
156. *Costa*, 299 F.3d at 851. Justice O'Connor may have recently hinted that she is unwavering in her differentiation of pretext and mixed motives analysis. Writing in *Reeves*, Justice O'Connor noted that the circuit court had "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Reeves*, 530 U.S. at 146. The implication inherent in this statement is that there is a different evidentiary burden borne by the plaintiff who seeks to prove intentional discrimination through direct evidence.
157. *Infra* pt. V (explaining that *Costa* analysis permits the destruction of pretext analysis).
158. *Costa*, 299 F.3d at 857.
159. The dissent cautioned:

abolition of the direct evidence requirement would lead to the effective destruction of the pretext analytical structure.[160] The Ninth Circuit's framework adopted in *Costa* threatens to effectively sound the eulogy of the *McDonnell Douglas* framework by enabling practically every plaintiff who can survive summary judgment to take advantage of the mixed motives jury instruction.[161]

According to *Costa* analysis, when the evidence can support one of only two possible conclusions—that discrimination was the sole reason or it played no part at all in the adverse employment decision—the jury is instructed to determine whether the employment action was taken "because of" the protected trait.[162] This means that no mixed motives instruction is given when the evidence shows that discrimination must be either zero percent or one hundred percent of the reason for the adverse employment decision. However, when evidence "*could* support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate,"[163] the jury is instructed according to the motivating factor test and same decision defense of mixed motives analysis.[164]

The fact that a single motive case[165] is a theoretical possibility seems to be the Ninth Circuit's basis for contending that the mixed motives analysis will not dominate Title VII litigation.[166] While theoretically possible, when probed further, a weakness in this claim is exposed. When would such a single motive case arise? According to the Ninth Circuit, it would arise when the evidence could support one of only two possible findings: (1) that discrimination is the only reason for the employment action or (2) discrimination was not a factor in the

---

> To keep the mixed motive framework from overriding in all cases the *McDonnell Douglas* and the pretext requirement, which it clearly was not meant to do, mixed motive analysis properly is available only in a special subset of cases. Justice O'Connor's direct evidence requirement meets this need ... As a practical matter, without this or some similar constraint on when a plaintiff may invoke the mixed motives test, any plaintiff would opt for the *Hopkins* framework to avoid having to show pretext.

Id. at 867 (Gould, J., dissenting).

160. *Fernandes*, 199 F.3d at 580 ("It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional McDonnell Douglas analysis.").

161. *Infra* text accompanying nn. 162-69.

162. *Costa*, 299 F.3d at 856 (citing 42 U.S.C. § 2000e-2(a)). In this instance "the employer does not benefit from the same decision defense." *Id.* (internal quotation marks omitted). Therefore, the employer is exposed to liability for the full range of damages and equitable relief permitted by 42 U.S.C. § 2000e-5(g)(1).

163. *Costa*, 299 F.3d at 856 (emphasis added).

164. *Id.* at 856-57. The employer, by successfully employing the same decision defense, does not avoid liability but instead limits the remedies available to the plaintiff to declaratory relief, injunctive relief (excluding reinstatement, hiring, or promotion) and attorney's fees and costs. 42 U.S.C.A. § 2000e-5(g)(2)(B) (West 1994).

165. The case where illegal discrimination was (1) the sole reason, or (2) not a factor at all in the adverse employment decision.

166. *See Costa*, 299 F.3d at 854-57. The majority's explanation of how a case may be maintained as a single motive case appears to be the only language that even nearly approaches a refutation of the dissent's concern that the abolition of the direct evidence requirement will also signal the effective end of pretext analysis. The implicit statement contained in the majority's explanation is that because the two types of cases "coexist without conflict," *id.* at 854, one will not significantly dominate the other.

decision.[167] Once the employer introduces any evidence that the action was based on some legitimate reason, assuming this evidence meets minimal requirements of credibility such that a jury could believe it, the action becomes a mixed motives case.[168] Theoretically, the defendant can discredit the plaintiff's evidence of discrimination, thereby keeping the litigation in the realm of "single motive."[169]

Although it is theoretically possible to have a single motive case, it is a *non sequitur* that the mixed motives analysis will not dominate Title VII litigation under the *Costa* regime. While the Ninth Circuit acknowledges that a single motive case is possible, what it does not express is the degree to which an employer must handicap its own defense to maintain a single motive case. In any usual case, an employer will provide a legitimate reason for the employment decision (*e.g.,* the person failed to meet certain criteria,[170] was derelict,[171] or was a discipline problem[172]). However, under *Costa* the employer advancing such a defense could open the door for a lower degree of scrutiny for the plaintiff's claim.[173]

The effect of the *Costa* framework is to constrain the defendant from presenting its most effective defense. Under *Costa*, a defendant accused of discrimination cannot put before the jury perhaps its most effective evidence—a legitimate reason for the employment decision—without invoking the considerable disadvantages of the mixed motives framework.[174] A defense of "discrimination is not the reason plaintiff was demoted," is likely to be much less persuasive to a jury than a defense of "discrimination is not the reason plaintiff was demoted; excessive absences and insubordination are the true reasons." For this reason, the concern that *Costa* would effectively lead to the death of pretext analysis is a credible one.

---

167. *Id.* at 856.

168. *See generally id.* at 856-57.

169. For instance, examine the hypothetical case filed by a female worker contending that she was passed over for promotion "because of" her gender. She may present evidence that co-workers who were not involved in the promotion decision often made sexist remarks and predicted that she would not be promoted because the company would not fill that position with a woman. To keep this litigation in the realm of single motives, the defendant could refute the evidence that these statements were made by co-workers.

170. *See e.g. Bickerstaff*, 196 F.3d at 442-44.

171. *See e.g. Plair*, 105 F.3d at 346.

172. *See e.g. Costa*, 299 F.3d at 846.

173. By articulating a nondiscriminatory reason for the employment decision (as is done in the second stage of the pretext analysis), the defendant can make it possible for the jury to find that the protected trait was one of at least two reasons for the employment decision, thus triggering the mixed motives instruction under *Costa*. *See id.*

174. Exactly what is sufficient to permit the conclusion that mixed motives are at issue is debatable; however, it seems that rather basic questioning of the plaintiff would open the mixed motives door. It is conceivable that simple cross-examination of the plaintiff may open the door. "You contend that the company fired you because you are Canadian. Isn't it true that you were at least one hour late to work every day for three weeks?"

VI. IMPROVING UPON DIRECT EVIDENCE

There can be little doubt that the direct evidence requirement has led to some bewilderment among the lower courts and a lack of uniformity even within single circuits.[175] The development of Title VII litigation should ensure that it properly balances the social goal of deterring discrimination and the need to preserve an employer's prerogatives. This effort would best be served by focusing not on abolishing the direct evidence requirement, but upon clarifying it.

A. Mixed Motives, Mixed Circuits

A review of the caselaw in the circuits shows the difficulty in distilling a definition of direct evidence in a manner consistent with Justice O'Connor's *Price Waterhouse* opinion.[176] From the attempts in the circuits, three principal definitions have emerged.[177]

1. The "Classic" Position. A number of circuits have espoused what Judge Selya has termed the "classic position."[178] According to courts in this camp, the direct evidence requirement is akin to its legal dictionary definition: that which proves a fact at issue "without inference, presumption, or resort to other evidence."[179] This definition of direct evidence has been adopted by the Fifth Circuit,[180] the Seventh Circuit,[181] and the Tenth Circuit.[182] It is arguable that the Eleventh Circuit's caselaw is best categorized similarly.[183] In *Plair v. E.J. Brach,*

175. *Compare Bass v. Bd. of County Commrs.*, 256 F.3d 1095, 1105 (11th Cir. 2001) ("Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption.") (internal quotation marks omitted) *with Wright v. Southland Corp.*, 187 F.3d 1287, 1298 (11th Cir. 1999) (defining direct evidence as "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic.").

176. *See* Belton, *supra* n. 8, at 662 (noting vast divergence among lower courts defining direct evidence).

177. In the First Circuit's examination of the direct evidence definition, Judge Selya named the three definitions and provided explanation of each. *Fernandes*, 199 F.3d at 582.

178. *Id.*

179. *Id.*

180. *Nichols v. Loral Vought Sys., Inc.*, 81 F.3d 38, 40 (5th Cir. 1996) (quoting *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993)) ("Direct evidence is evidence which, if believed, would prove the existence of a fact *without any inferences or presumptions.*") (emphasis original) (internal quotation marks omitted).

181. *Plair*, 105 F.3d at 347 ("In this circuit, direct evidence is defined as evidence which if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.") (internal quotation marks omitted). Judge Selya, in *Fernandes*, listed the Seventh Circuit as subscribing to either the animus or animus plus definitions of direct evidence. 199 F.3d at 582 (citing *Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995)). However, the frequency with which the circuit quotes *Plair*'s definition of direct evidence makes it apparent that it is properly classified in the Classic camp. *See e.g. Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999); *Eiland v. Trinity Hosp.*, 150 F.3d 747, 751 (7th Cir. 1998); *Cowan v. Glendbrook Sec. Servs., Inc.*, 123 F.3d 438, 443 (7th Cir. 1997).

182. *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) ("Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption.") (internal quotation marks and brackets omitted).

183. *See Bass*, 256 F.3d at 1105 (quoting *Earley v. Champion Intl. Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990)) ("Direct evidence of discrimination is 'evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption.'") (brackets original). The recitation of

Inc.,[184] the Seventh Circuit heard the case of a black employee with prior disciplinary problems who was fired for leaving his work area without authorization and for falsification of time records.[185] The former employee was replaced by a white employee, and the terminated employee brought a disparate treatment suit.[186] In concluding that the former employee had not produced direct evidence of discrimination, the court noted that "direct evidence would be what [the employer] and its employees said or did in the specific employment decision in question: terminating [the employee]."[187]

2. The "Animus Plus" Position. The animus plus position has become the operational definition of direct evidence in the Fourth Circuit,[188] Eighth Circuit,[189] and District of Columbia Circuit.[190] Under this designation, direct evidence is evidence of "conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision."[191] Both direct and circumstantial evidence can constitute direct evidence under this meaning.[192] The District of Columbia Circuit, in *Thomas v. National Football League Players Association*,[193] noted that direct evidence in this context could be circumstantial evidence "so long as it establishes that discriminatory motive played a substantial role in the employment decision."[194]

3. The "Animus" Position. Finally, the animus position is similar to the animus plus view but does not require that the evidence bear squarely on the employment decision.[195] Instead, the evidence is sufficiently direct if it is tied to the discriminatory animus.[196] The Second Circuit has endorsed this view.[197] In

---

direct evidence in *Bass* seems to be the predominate view in the Eleventh Circuit. *See e.g. Scott v. Suncoast Bev. Sales, Ltd.*, 295 F.3d 1223, 1227 (11th Cir. 2002); *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000); *Jones v. Bessemer Carraway Med. Ctr.*, 151 F.3d 1321, 1323 n. 11 (11th Cir. 1998). However, Judge Tjoflat has taken a position more consistent with animus plus. *See Wright*, 187 F.3d at 1298 (Treating direct evidence as "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."). It is noteworthy, though, that neither of the other two judges on the *Wright* panel joined the opinion of the court. Both concurred in the judgment but expressly refused to join Judge Tjoflat's opinion. *Id.* at 1036 (Cox, J., concurring); *Id.* (Hull, J., concurring).

184. 105 F.3d 343.

185. *Id.* at 344-46.

186. *Id.* at 346.

187. *Id.* at 347.

188. *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc).

189. *Thomas v. First Natl. Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997) ("[Direct evidence] is evidence showing a specific link between the [alleged] discriminatory animus and the challenged decision . . .") (second brackets in original) (internal quotation marks omitted).

190. *Thomas v. Natl. Football League Players Assn.*, 131 F.3d 198, 204 (D.C. Cir. 1997) ("[T]he notion of 'direct' evidence . . . means only that the evidence marshaled in support of the substantiality of the discriminatory motive must actually relate to the question of discrimination *in the particular employment decision*, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace.") (emphasis in original).

191. *Fernandes*, 199 F.3d at 582.

192. *Id.*

193. 131 F.3d 198.

194. *Id.* at 204.

195. *Fernandes*, 199 F.3d at 582.

196. *Id.*

197. *Ostrowski*, 968 F.2d at 182. The Sixth Circuit may be treated as subscribing to an animus

explaining what constitutes direct evidence, the Second Circuit acknowledged that direct evidence in the Title VII context could be circumstantial evidence, but it must be "tied directly to the alleged discriminatory animus."[198] The court continued to explain that neither purely statistical evidence nor stray remarks in the workplace made by persons not involved in the decisionmaking process were direct evidence.[199] Examples of direct evidence included policy documents or statements made by someone involved in the decisionmaking process "that reflect a discriminatory or retaliatory animus of the type complained of in the suit."[200]

4. Still More Confusion. As if it is not confusing enough that the circuits significantly diverge in relation to the definition of direct evidence, closer examination shows that the manner in which they apply the definition is cause for further confusion.[201] For instance, the Fifth Circuit has been labeled as clinging consistently to the classic position of direct evidence.[202] However, in *Brown v. East Mississippi Electric Power Association*,[203] the Fifth Circuit seemingly applied the animus plus definition.[204] Although the Court defined direct evidence as that which needs no inference or presumption,[205] one must make inferences to support its conclusion.[206] In that case Brown, a black serviceman, contested his demotion to line crewman following customer complaints.[207] His former supervisor, one of a group of three managers who authorized the demotion, was known to use a racial epithet regularly to describe black persons in conversation with other white persons and had addressed Brown directly by that epithet.[208] Although it recognized the definition of direct evidence as that which needs no inference to prove a point, the Fifth Circuit panel concluded that the supervisor's regular use of the epithet constituted direct evidence that race was a motivating factor in the disciplinary action.[209] The supervisor had stated to other white workers in the context of disciplining Brown, "I had to dust my little nigger again today,"[210] and the Court pointed to this statement as direct evidence that Brown's race had colored his employment record and extended to disciplinary actions taken against him.[211]

Although the Fifth Circuit's application of the direct evidence requirement is likely consistent with Justice O'Connor's true intent in constructing the direct

---

position that leans heavily toward animus plus. *See Jacklyn v. Shering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999).

198. *Ostrowski*, 968 F.2d at 182.
199. *Id.*
200. *Id.*
201. *Infra* text accompanying nn. 202-22.
202. *Fernandes*, 199 F.3d at 582.
203. 989 F.2d 858.
204. *Infra* nn. 191-94 and accompanying text.
205. *Brown*, 989 F.2d at 861.
206. *Infra* nn. 214-15 and accompanying text.
207. *Id.* at 859.
208. *Id.* at 859-60.
209. *Id.* at 861.
210. *Id.*
211. *Brown*, 989 F.2d at 862.

evidence requirement,[212] it is inconsistent with the classic position of defining direct evidence.[213] The facts of *Brown* required the court to infer from the supervisor's statements that (a) the supervisor harbored discriminatory animus, and (b) the animus motivated the supervisor to demote Brown in the decision that gave rise to the litigation.[214] The *Brown* Court's application of the direct evidence is more consistent with the animus plus position.[215]

Just as a circuit that adopted the classic position of direct evidence can actually apply it consistently with the animus plus position, the Fourth Circuit has shown a circuit that adopts the animus plus position can apply it in a restrictive manner more akin to the classic position.[216] In a suit against her former employer, Taylor, a former patrol officer for Virginia Union University, contended that she had been denied the opportunity to attend the police academy because she is female.[217] A lieutenant in the department testified, in the context of discussing whether a different female officer would attend the academy, that the chief stated he was "never going to send a female to the academy."[218] Sitting *en banc*, the Fourth Circuit noted that the direct evidence requirement mandated a showing of evidence that reflects both the discriminatory animus and that bears directly on the employment decision.[219] This view is seemingly consistent with the animus plus position.[220] However, in applying the definition of direct evidence the Court concluded that Taylor had not produced direct evidence.[221] The Court reasoned that she had satisfactorily shown the presence of discriminatory animus; however, the chief's statement was made in reference to a different female officer and did not bear squarely upon the decision not to send Taylor to the academy.[222] The Court was apparently unwilling to permit proof that discriminatory animus colored similar decisions for other officers to support an inference that it also colored the decision in Taylor's case.

B. Toward a Tenable Definition of Direct Evidence

Because Justice O'Connor's concurring opinion in *Price Waterhouse* created the direct evidence requirement,[223] it is wise to consult it in any attempt to assemble a rational and sound definition of direct evidence. An important initial

212. *Infra* pt. VI(B) (discussing Justice O'Connor's meaning of direct evidence).
213. *Infra* n. 214.
214. Evidence that would have been "direct" by the Classic position would have been statements by the supervisor such as "I demoted Brown because he is black." Such statement requires no inference or presumption to prove that racial animus motivated the employment decision.
215. *See supra* text accompanying notes 191-94 (discussing animus plus definition of direct evidence).
216. *See e.g. Taylor*, 193 F.3d 219.
217. *Id.* at 227.
218. *Id.* It is significant that the chief was authorized to select which officers attended the academy. *Id.* at 225.
219. *Id.* at 232.
220. *Supra* pt. VI(A) (discussing the animus plus definition).
221. *Taylor*, 193 F.3d at 232.
222. *Id.*
223. 490 U.S. at 261 (O'Connor, J., concurring).

observation is that Justice O'Connor's understanding of direct evidence is not a low hurdle for a plaintiff to surmount.[224] Comparing mixed motives analysis with the presumption created by pretext analysis, she notes that upon "this type of *strong* showing"[225] (referring to direct evidence) a plaintiff is able to benefit from the mixed motives burden shifting.[226] This preliminary observation tends to cast doubt upon any view that equates direct evidence with *any* evidence sufficient for a reasonable fact finder to infer intentional discrimination.[227]

It is clear that Justice O'Connor did not intend direct evidence in the Title VII context to mirror exactly the broader evidentiary definition of direct evidence as that which needs no inference.[228] In *Price Waterhouse*, no partner wrote on Ann Hopkins' evaluation that she was rejected because she was a woman. Instead, the evidence that gender was a factor in the firm's decision not to grant her partnership status included statements that she was macho,[229] that she "overcompensated for being a woman,"[230] and that she used profanity.[231] Additionally, the plurality labeled as the *coup de grace*, one partner's advice to Hopkins that if she wished to improve her chances of making partner, she should walk, talk and dress more femininely, "wear make-up, have her hair styled, and wear jewelry."[232] This evidence requires inferences to conclude that Hopkins'

224. *Id.* at 276.

225. *Id.* (emphasis added).

226. *Id.*

227. *See e.g.* Steven M. Tindall, Student Author, *Do as She Does, Not as She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 Berkeley J. Emp. & Lab. L. 332, 367-69 (1996). Professor Malamud has recommended a path that would arrive at the same result through her "open-ended discrimination standard." Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, 93 Mich. L. Rev. 2229, 2317-18 (1995).

The *Price Waterhouse* dissent also perceived that the holding of the Court would not be extended to every disparate treatment case. 490 U.S. at 280 (Kennedy, J., dissenting) ("I read the opinions as establishing that *in a limited number of cases* Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion . . .") (emphasis added).

228. Direct evidence, long used as the antonym of circumstantial evidence, is technically defined as evidence that proves a fact without inference or assumption. *Black's Law Dictionary* 577 (Bryan A. Garner ed., 7th ed., West 1999). Despite indications that Justice O'Connor did not intend to apply this definition to the burden shifting requirement, several commentators who call for the abolition of the requirement have assailed it as though the classic definition of direct evidence applied. *See e.g.* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 Brook. L. Rev. 703, 749 (1995). Professor Davis, in an attempt to expose logical inconsistency in Justice O'Connor's *Price Waterhouse* opinion, actually establishes the point above. The fact that the evidence of discrimination in *Price Waterhouse* was circumstantial yet satisfied Justice O'Connor's direct evidence requirement demonstrates that Justice O'Connor intended direct evidence in that context to mean something other than its legal dictionary definition. Of course, it is less likely that confusion would have abounded had Justice O'Connor attached a different moniker to her requirement, such as the "nexus requirement."

229. *Price Waterhouse*, 490 U.S. at 235 (plurality).

230. *Id.*

231. The Court noted that her use of profanity was objected to only because "it's a lady using foul language." *Id.* (internal quotation marks omitted).

232. *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.C. Cir. 1985)).

denial of partnership was because of her gender.[233] Because Justice O'Connor found this evidence to be sufficiently direct to warrant the mixed motives analysis,[234] it follows that Justice O'Connor did not intend direct evidence in the mixed motives analysis to mean the same as it does in broader sense. As if more proof were needed, she stated directly that evidence requiring inferences might be sufficient to invoke the mixed motives analysis.[235]

Rather than explain what direct evidence is, Justice O'Connor chose to state what direct evidence is not.[236] Excluded from her definition of direct evidence are stray remarks in the workplace, statements by nondecisionmakers, and statements by decisionmakers made unrelated to the decisional process itself.[237] Justice O'Connor also notes that testimony of sex stereotyping by a social psychologist is not sufficient on its own to invoke mixed motives.[238] By implication, the converse should be true. Statements and actions by decisionmakers made in a context related to the decisionmaking process should suffice as direct evidence.

Justice O'Connor's opinion most strongly agrees with the animus plus position adopted in some of the circuits.[239] By noting that statements made by decisionmakers "unrelated to the decisional process itself"[240] are insufficient to invoke mixed motives, it appears that she rejects the animus position. More convincingly, when describing the mixed motives procedure at trial, she notes the plaintiff should construct the *McDonnell Douglas* pretext presumption, then "should also present any direct evidence of discriminatory animus *in the decisional process*."[241] The last four words are more than mere surplusage; rather they support the conclusion that proof of discriminatory animus alone does not suffice to invoke mixed motives analysis.

Using Justice O'Connor's opinion as a guide, the Supreme Court should expressly define direct evidence as credible evidence that directly reflects a discriminatory animus and is rationally connected to the adverse employment

233. *See* Davis, *supra* n. 228, at 749. There is no statement directly stating that a partner did not vote for Hopkins because she is a woman. Such a statement would have been direct in the dictionary sense, in that it does not require any inference or assumption to prove that her gender was a reason for the decision not to make her a partner.

234. *Id.* at 277 (O'Connor, J., concurring) ("What is required [to trigger mixed motives analysis] is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.").

235. *Id.* at 278 ("Under my approach, a plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could *draw an inference* that the decision was made 'because of' the plaintiff's protected status.") (emphasis added).

236. *Id.* at 277-78.

237. *Id.* at 277.

238. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). In *Price Waterhouse*, Dr. Fiske, a social psychologist, testified at trial that she had discerned sex stereotyping in the evaluations completed by the firm's partners. *Id.* at 255. Justice O'Connor wrote that such evidence, standing alone, would not permit burden shifting. *Id.* at 277.

239. *Supra* pt. VI(A) (discussing the Amimus Plus definition of direct evidence).

240. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring).

241. *Id.* at 278 (emphasis added).

decision or the decisionmaking process. This definition should not differentiate between evidence that requires inference or assumption and that which does not.

The requirement that the evidence show a nexus between the animus and the decisionmaking process should incorporate some reasonable temporal relationship.[242] For instance, in *Taylor*, the Fourth Circuit held that Taylor failed to show the sufficient nexus between animus and the employment decision when the chief stated, in reference to another female officer, that he would never send a female to the academy.[243] The facts in *Taylor* do not make it clear when this statement was made; however, the fact that the other officer, in reference to whom this statement was made, brought suit as a plaintiff along with Taylor suggests that it was made as approximately the same time as Taylor's term of employment.[244] If that is true, it demonstrates that at the time the chief would have decided whether to send Taylor to the academy he was impermissibly denying the opportunity to other employees based on gender. Such evidence should be sufficient to trigger mixed motives analysis.

On the other hand, there are valid reasons not to permit mixed motives analysis where the evidence of animus tied to employment decisions lies in the distant past in relation to the decision at issue. For example, suppose the chief in *Taylor* had been serving in that capacity for twenty-five years. Evidence that he made the statement two decades ago about the decisionmaking process should not alone be sufficient to show that the animus impacted the employment decision at issue.[245]

This proposed definition of direct evidence best balances the goals of the Civil Rights Act of 1964[246] by setting up a process for penalizing illegal

---

242. What is envisioned is a test that could be satisfied through one of two pathways. Showing a nexus between the animus and the employment decision at issue is the preferable path. However, if the plaintiff is unable to tie it to the particular decision at issue, the plaintiff may still invoke mixed motives if there is production of sufficient evidence that ties the animus to the decisionmaking process in such a way that it can be said to reasonably related to the employment decision at issue.

243. *Taylor*, 193 F.3d at 232.

244. Keisha Johnson was also a plaintiff (with Taylor) in the suit against Virginia Union University. The chief's statement that he would not send a female to the academy was made in reference to Johnson. *Id.* at 232.

245. Whether or how a bright line test for a temporal relationship should be constructed is seemingly difficult to determine and beyond the scope of this note. I propose for consideration a method that would permit a hearing outside the presence of the jury. A hearing would be conducted when the defendant reasonably contends that the proof of the nexus between animus and the decisionmaking process precedes the employment decision at issue too remotely to be considered temporally related. The plaintiff would produce the evidence of the nexus, then the defendant would be permitted to show curative steps or other changes since that time which would effectively break the connection between the animus-process nexus and the decision at issue. For example, suppose a plaintiff contended that she was denied a promotion in 2001 because of her Islamic religious beliefs. The plaintiff demonstrated that in 1991, the director over the plaintiff's work unit, who made the promotion decision in 2001, stated to a supervisor, "There's no way I would promote someone who worships Allah to a supervisory position." After this showing, the defendant would be granted an opportunity to demonstrate that subsequent to this statement, the company implemented diversity programs, that the supervisor at issue promoted Islamic employees to supervisory positions, or that the company took other actions adequate to make the connection between the statement in 1991 and the employment decision in 2001 too tenuous to be considered direct evidence. Whether the evidence is sufficiently connected to the decision at issue would be determined by the trial court.

246. Pub. L. No. 88-352, 78 Stat. 241 (1964).

discrimination in the workplace without infringing upon employers' discretion related to legitimate employment factors.[247] The *Price Waterhouse* plurality noted that Title VII created a balance between employee rights and employer prerogatives and that "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice."[248] While ample attention has properly focused on the need of Title VII to weed out illegal discrimination in the workplace,[249] courts attain a worthy goal by ensuring that Title VII litigation does not become so undemanding of plaintiffs' claims that the legislation meant to promote equality in the workplace becomes a mill for frivolous lawsuits and extortionist settlement tactics.[250] A procedure that does not sufficiently hold a plaintiff to the burden of proof may foster a dramatic increase in litigation and drive up the cost of business for employers.[251] Justice O'Connor even implies that a low threshold for burden shifting in Title VII cases may promote the implementation of quotas in the workplace.[252]

This suggested definition of direct evidence also preserves Justice O'Connor's view that the mixed motives analysis should be invoked only upon a strong showing by the plaintiff.[253] Although some observers have criticized a rigorous direct evidence requirement as a penalty against those plaintiffs who

---

247. *See Price Waterhouse*, 490 U.S. at 239 (plurality).

248. *Id.*

249. *See e.g.* Zubrensky *supra* n. 9, at 983-84.

250. It is logical to believe that a system that tolerates suits with questionable merits is one that promotes them.

251. Joseph J. Ward, Student Author, *A Call for* Price Waterhouse II*: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 658-59 (1997). Some authors only superficially acknowledge the potential threat to legitimate employer interests. *See e.g.* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. Pa. J. Lab. & Emp. L. 65, 85 (2000). Professor Summers notes that antidiscrimination laws "limit employer prerogatives only to the extent of requiring that all employees be treated equally." *Id.* Although this may be considered truth, it glosses over the significant burden that would be placed upon employers if the mixed motives analysis is available to practically all Title VII plaintiffs. Employers may find themselves having to prove their innocence after a very weak evidentiary showing by the plaintiff. The retort to this contention is that the employer is protected by the initial requirement that plaintiff prove the protected trait was more likely than not a factor in the employment decision. However, this provides little protection to an innocent employer, as individuals in the nation seem more polarized than ever, especially on issues related to race and gender. *See generally* Sharon Linstedt, *Survey Finds Glaring Divide in Workplace Discrimination*, Buffalo News C1 (Feb. 18, 2002) (referencing a study that notes sharp contrast in perceptions of employment discrimination among blacks and whites). For many jurors racial or gender discrimination is likely the simplest answer applied in a sort of Ockham's Razor to the question, "Why did the employer make this adverse employment decision in relation to this plaintiff?" Johnny Cochran's conclusion that black NFL coaches are held to a higher standard than white coaches may be just one example of a unidimensional examination being heralded as conclusive "proof" of discrimination. *See generally* Bob Cohn, *Higher Standard?; The Facts Don't Fit in Report on NFL Hiring*, Wash. Times C01 (Oct. 8, 2002).

252. Justice O'Connor noted:

> [S]hifting the burden of persuasion to the employer in a situation like this one [where direct evidence is produced] creates no incentive to preferential treatment in violation of § 2000e-2(j). To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decision.

Price Waterhouse, 490 U.S. at 275 (O'Connor, J., concurring).

253. *Id.* at 276.

cannot satisfy it,[254] the plaintiff who does not have sufficient evidence to invoke mixed motives analysis may still rely upon the *McDonnell Douglas* framework.[255] This framework has been sufficient for many plaintiffs,[256] and simply requiring a plaintiff to make a strong showing to obtain the most favorable analytical process should not be viewed as a penalty. That the plaintiff must carry the burden of proving the claim is a bedrock principle of tort law in the American legal system.[257] Courts should not permit the stigmatizing labels that accompany a finding of discrimination to be affixed to defendants without considerable proof that there was actually discrimination that gave rise to adverse consequences.[258]

VII. CONCLUSION

Although the Ninth Circuit erroneously treated the direct evidence requirement as irrelevant in the analysis of Title VII litigation,[259] the requirement is part of the binding precedent of *Price Waterhouse*.[260] There is no clear indication that Congress intended to alter the requirement in its enactment of the Civil Rights Act of 1991.[261]

The direct evidence requirement has led to divergent definitions and even more conflicting treatments among the lower courts.[262] To allay confusion and promote proper analysis of litigation, courts should adopt a definition of direct evidence that focuses on proof of discriminatory animus that is tied to the adverse employment decision. Such a definition would best foster the goals of the Civil Rights Act of 1964 while preventing the threat of questionable litigation from holding employers hostage.

Brian W. McKay

---

254. *See generally* Tindall, *supra* n. 227, at 336.

255. Ward, *supra* n. 251, at 658.

256. *Id.* at 660-61.

257. *See Restatement (Second) of Torts* § 433B(1) (1965).

258. *Cf. Kilduff v. Adams, Inc.*, 593 A.2d 478, 487 n. 14 (Conn. 1991) (citing *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 737 P.2d 595, 605 (Or. 1987) and noting that one rationale for requiring a higher standard of plaintiffs proving fraud is that a finding of fraud imposes a "stigma of guilt" on the defendant). Because the "discriminator" label carries a similarly strong stigma, allowing plaintiffs to make viable legal claims of discrimination upon feeble evidentiary showings grossly inflates the settlement bargaining power for plaintiffs, as they can demand large sums from employers who wish to avoid a harmful public accusation of discrimination. For discussion of these issues, *see generally* Karen Jacobs, *More Companies Seek Diversity as Internal Bias Suits Increase*, Houston Chron. 2 (Feb. 10, 2002) and Amy Martinez, *Fighting Discrimination with What Business Fears: Big-Dollar Lawsuits*, Palm Beach Post 1A (March 4, 2001) (noting a plaintiffs' lawyer's use of marketing firms to draw publicity for discrimination suits and commenting that employers accused of discrimination by the lawyer profiled should "avoid a protracted, expensive and image-damaging trial - and pay up.").

259. *Costa*, 299 F.3d 838.

260. *Supra* pt. IV(B) (establishing that the direct evidence requirement is the narrowest grounds contained in the *Price Waterhouse* plurality and concurrences).

261. *See* Mizer, *supra* n. 51, at 257 ("[C]ombing the legislative history to discern Congress' intent regarding direct evidence becomes largely a task of inference from silence.").

262. *See* Belton, *supra* n. 8, at 662-63.