EMPLOYMENT LAW—TITLE VII—ONCE PLAINTIFF DEMONSTRATES ILLEGITIMATE FACTOR MOTIVATED EMPLOYMENT DECISION, DEFENDANT MUST SHOW THAT SAME DECISION WOULD HAVE BEEN MADE ABSENT THE UNLAWFUL FACTOR TO AVOID LIABILITY—*Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits an employer from discriminating against individuals on the basis of race, color, sex, religion, or national origin.[1] The statute is sweeping in its language.[2] Title VII includes neither a definition of discrimination, nor a standard for determining liability.[3] In effect, the language of Title VII requires the courts to interpret the causation requirement[4] and to allocate the burden of

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[1] 42 U.S.C. § 2000e-2 (1982). The pertinent portion of Title VII provides:

> Employer practices
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> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

[2] *See id.* at § 2000e-2(a)(1).

[3] *See id.* at § 2000e-2. One of the major statutory provisions on relief in employment discrimination is section 706(g) of Title VII which prescribes:

> If the court finds that the [defendant] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [defendant] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . . . No order of the court shall require [relief in any form] if such individual was refused admission, suspended . . . [or discharged] for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of the [substantive provisions of the Act].

Id. at § 2000e-5(g).

[4] Employment discrimination litigation is generally bifurcated into the issue of liability and the form of relief. Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1238, 1252-53 (1988). To determine substantive liability, causation analysis begins with an interpretation of the words "because of such individual's race, color, religion, sex, or national origin." *See* 42 U.S.C. at § 2000e-2(a)(1). "Because of" has been construed to mean "a substantial factor," a "motivating factor," and "but for" causation. *See* Brodin, *The Standard of Causation in the*

proof[5] when faced with a Title VII claim. For over two decades, a division of opinion among the circuit courts has resulted.[6] This uncertainty at the circuit court level has been aggravated by the United States Supreme Court's unsuccessful efforts to enunciate a central rule on both these issues.[7] The Supreme Court in *Price Waterhouse v. Hopkins*[8] attempted to advance the evolution of Title VII "disparate treatment" claims.[9] The *Price Waterhouse* Court held that once a plaintiff demonstrates that an illegitimate factor was a motivating part in an employment decision, the defendant must show that the same decision would have been made absent the unlawful factor to avoid liability.[10]

In 1989, Ann Hopkins, a senior manager in the Washington,

Mixed-Motive Title VII Action: A Social Policy Perspective, 82 COLUM. L. REV. 292, 293 nn.5-10 and accompanying text (1982).

5 The procedural aspect of causation requires the courts to allocate the burden of proof on the causation element and determine the proper evidentiary standard to judge whether the burden has been satisfied. Belton, *supra* note 4, at 1236. The burden of proof includes the burden of production and the burden of persuasion. E. CLEARY, MCCORMICK ON EVIDENCE § 336 (3d ed. 1984). The burden of production is the task of producing sufficient evidence on an issue to warrant a finding for the party alleging the violation. *Id.* Generally, the burden of production falls on the pleading party. *Id.* Once all of the evidence has been introduced, if the fact-finder is still in doubt, he must decide against the party with the burden of persuasion. *Id.* This is referred to as the risk of nonpersuasion. *Id.* The allocation of the burden of persuasion is decisive in cases where there is doubt as to the existence of the alleged fact. *Id.*

6 *See* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130-31 (1980); Note, *The Prima Facie Case Approach to Employment*, 33 ME. L. REV. 196 (1981).

7 *See* Mendez, *supra* note 6, at 1130-31; Note, *supra* note 6.

8 109 S. Ct. 1775 (1989).

9 The Supreme Court has adopted two principal theories of discrimination under Title VII: disparate treatment and disparate impact. *See generally* C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION §§ 3-5 (2d ed. 1988). Disparate treatment cases are those which involve claims that an employer treated one employee more favorably than another. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The disparate impact theory of discrimination was best summarized in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) as "the use of employment policies that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 325 n.16. *See also* Note, *United State Supreme Court Clarifies Standards for Statistical Evidence and Burdens of Proof in Private Litigation Under the Disparate Impact Theory*—Wards Cove Packing Co. v. Atonio, 20 SETON HALL L. REV. 831 (1990) (authored by E. Meyer).

Price Waterhouse is the Court's fifth attempt to clarify the allocation of the burden of proof. The first four decisions which also addressed disparate treatment issued were McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), Board of Trustees v. Sweeney, 439 U.S. 24 (1978), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

10 *Price Waterhouse*, 109 S. Ct. at 1795.

D.C. office of Price Waterhouse, brought suit against her employer.[11] Hopkins was the only woman among eighty-eight people selected as candidates for partnership in 1982.[12] At Price Waterhouse, partners are selected through a lengthy review process, initiated when a partner submits a senior manager's name as a candidate.[13] Thereafter, all of the firm's partners are invited to prepare written comments on the candidate.[14] Upon recommendation by the Admissions Committee, the Policy Board decides whether to submit the candidate's name for a vote, put the application on hold, or reject the application.[15] Hopkins' candidacy was put on hold.[16]

In recommending Hopkins, supporters emphasized her role in securing a twenty-five million dollar contract and described her as an "outstanding professional" who had a "deft touch, a strong character, independence and integrity."[17] Both support-

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11 *Id.* at 1780-81. On remand, a federal district court in Washington applied that holding and ordered Price Waterhouse to award a partnership to Hopkins. N.Y. Times, May 16, 1990, at A1, col. 2.

12 *Id.* at 1781. At the time that Hopkins initiated this case, there were 662 partners in the firm of which seven were women. *Id.* Hopkins was proposed for partnership by the Office of Government Services (OGS). *Id.* The OGS specialized in designing and implementing consulting projects for government agencies. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985), *aff'd*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). When Hopkins was proposed for partnership, there were no female partners in the OGS. *Id.* Significantly, Hopkins attempted to reinforce her claim of disparate treatment through the use of statistics showing the small number of female partners in the firm. *Id.* at 1116. The district court, however, found these statistics to be inconclusive, because women had not been in the accounting profession in large numbers long enough to infer that the low level of female partners was the result of discrimination, and because there was evidence that several potential female partners were hired away from Price Waterhouse. *Id.*

13 *Price Waterhouse*, 109 S. Ct. at 1781.

14 *Id.* The partners either submit long or short form evaluations depending on the extent of their contact with the candidate. *See Hopkins*, 618 F. Supp. at 1112. These forms include 48 different categories ranging from practice development and technical expertise to interpersonal skills and participation in civic activities. *Id.* In these categories, the partners are asked to numerically rank the candidate compared to recent partnership candidates. *Id.* The forms also include a space for comments on the candidate. *Id.* The firm's Admission's Committee evaluates all of the written comments and then makes a recommendation to the Policy Committee. *Price Waterhouse*, 109 S. Ct. at 1781.

15 *Price Waterhouse*, 109 S. Ct. at 1781. Of the 88 candidates considered, 47 were admitted to the partnership, 21 were denied admissions, and 20 of the candidates were put on hold. *Id.*

16 *Id.* There are no fixed guidelines for partnership; negative comments do not necessarily defeat the candidacy, nor do positive comments guarantee partnership. *Id.* The district court did emphasize that negative comments and "no" votes are given substantial weight by the firm. *Hopkins*, 618 F. Supp. at 1116.

17 *Price Waterhouse*, 109 S. Ct. at 1782.

ers and opponents, however, commented on her poor interpersonal relations with her staff.[18] These comments indicated that, at times, she appeared overly aggressive and unduly harsh.[19] There was also evidence that some partners reacted negatively toward Hopkins because she was a woman.[20] Certain partners described her as "macho," advised her to attend charm school, and criticized her for using unladylike language.[21] When told of the Policy Board's decision to put her candidacy on hold, the senior partner in her office, and perhaps her biggest supporter, counseled her regarding the problems the Board had with her candidacy.[22] He advised Hopkins that her chances for partnership would improve if she would "walk more femininely, wear more make-up, have her hair styled, and wear jewelry."[23] Less than one year later, Hopkins learned that she again would not be recommended for partnership.[24] Hopkins then sued Price Waterhouse in the United States Federal District Court for the District of Columbia under Title VII, claiming that Price Waterhouse had discriminated against her on the basis of sex.[25]

The district court held that Price Waterhouse violated Title VII by maintaining a partnership evaluation process that allowed stereotypical comments to flourish and possibly bias individual evaluations.[26] The district court also determined that Hopkins was not entitled to equitable relief if Price Waterhouse could prove by clear and convincing evidence that the same decision would have been made absent the unlawful discrimination.[27] In light of the evidence, the district judge determined that Price Waterhouse had not met this burden.[28]

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18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989)).

24 *Id.* at 1781 n.1.

25 *Id.* at 1781.

26 *Hopkins*, 618 F. Supp. at 1119-20. The district court found that Price Waterhouse should have known that women who were evaluated by male partners may receive stereotypical comments. *Id.* Yet, the court noted that Price Waterhouse did nothing to discourage this practice. *Id.* Price Waterhouse made no efforts to investigate whether comments were in fact the result of stereotyping, nor did they take any steps to exclude those individuals from the evaluation process. *Id.*

27 *Id.* at 1120 (citing Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980); Day v. Mathews, 530 F.2d 1083, 1085-86 (D.C. Cir. 1976)).

28 *Id.* The court, however, also determined that Hopkins had "the burden of proving that she was constructively discharged." *Id.* at 1121. The district court

The United States Circuit Court of Appeals for the District of Columbia affirmed the district court's decision on the issue of liability.[29] The appellate court noted that Hopkins produced sufficient direct evidence that her sex was a significant factor in Price Waterhouse's evaluation of her candidacy.[30] In accordance with the district court's analysis, the appellate court confirmed that Price Waterhouse did not demonstrate by clear and convincing evidence that the same decision would have been made absent the discriminatory factor.[31] The appellate court remanded the case, however, on the question of relief.[32] In the appellate court's view, the decision not to renominate Hopkins for partnership was, in effect, a constructive discharge.[33] Hopkins was thus entitled to backpay between the time of the partnership decision and her resignation.[34]

The United States Supreme Court granted certiorari.[35] In a plurality decision, the Court determined that once a plaintiff proves that illegitimate factors played a motivating role in an employment decision, the burden of proof shifts to the defendant.[36] The defendant, the plurality held, may avoid liability by establishing by a preponderance of the evidence that the same decision would have been made absent consideration of the discrimina-

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held that Hopkins failed to prove that she was constructively discharged, and thus, was not entitled to court order granting her partnership. *Id.* (citing Clark v. Marsh, 665 F.2d 1168, 1172-73 (D.C. Cir. 1981) (holding that Title VII plaintiff is deemed to have been constructively discharged in presence of aggravating factors)). Here, the court found that Hopkins resigned voluntarily and not as a result of intolerable working conditions. *Id. But see Clark*, 665 F.2d 1775-76 ("the predictable humiliation and loss of prestige accompanying her failure to obtain this particular position constitute[s] the 'aggravating factors' required"). Hopkins was thus entitled to a judgment in her favor on the issue of liability and attorney's fees. *Hopkins*, 618 F. Supp. at 1121. Backpay would have been awarded to Hopkins if both parties had not agreed, without prior consent of the court, to defer calculating backpay until after liability was determined. *Id.*

29 Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

30 *Id.* at 470. The court determined that once Hopkins presented direct evidence that sex was a significant factor in the evaluation process, the question of whether Hopkins herself was discriminated against because of her sex was no longer an issue. *Id.* (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)).

31 *Id.* at 472.

32 *Id.* at 473.

33 *Id.*

34 *Id.*

35 Price Waterhouse v. Hopkins, 108 S. Ct. 1106 (1988), *rev'd*, 109 S. Ct. 1775 (1989).

36 Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787-88 (1989).

tory factor.[37] The plurality remanded the decision to the appellate court for a determination of whether Price Waterhouse met this reduced burden.[38]

To appreciate the significance of *Price Waterhouse* and its affect on prior case law, it is important to trace the Court's historical development of standards governing the order and allocation of proof in Title VII disparate treatment cases.[39] Disparate treatment cases are those which involve claims that an employer treated one employee less favorably than another employee based on illegitimate criteria.[40] Allocating the burdens of production and persuasion can be determinative of the outcome of disparate treatment cases, given the typical imbalance between the information and resources available to employer-defendants versus that available to employee-plaintiffs.[41] Therefore, the Court developed relatively lenient requirements to establish a

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37 *Id.* at 1795.

38 *Id.*

39 *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (defendant bears only the burden of production to rebut prima facie case of discrimination, the burden of persuasion rests with the plaintiff at all times); Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (merely articulating a legitimate nondiscriminatory reason is sufficient to rebut prima facie case); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (scope of prima facie case and nature of evidence necessary to rebut it); Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (when plaintiff proves constitutionally protected conduct was a substantial part of employment decision, employer can avoid remedial action by demonstrating by preponderance of evidence that the same decision would have been made absent consideration of protected conduct); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (elements of prima facie case, and nature and order of proof). *See generally* Brodin, *supra* note 4 (reviewing development of mixed-motive causation in disparate treatment case law); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979) (Burger Court's influence in disparate treatment cases); Mendez, *supra* note 6 (reviewing disparate treatment case law in light of presumption of discriminatory motive, and advocating that employer's superior access to information should conform to evidentiary rule which places greater burden on employer).

40 *See supra* note 9 (defining the court's distinction between disparate treatment and disparate impact cases).

See generally C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION §§ 3, 4, & 5 (2d ed. 1988). There are two major subdivisions of the theory of disparate treatment: systemic disparate treatment and individual disparate treatment. *Id.* at 38. Both theories are used to address intentional discrimination. *Id.* Systemic disparate treatment applies to systems of intentional discrimination such as a policy requiring prison guards to be the same gender as inmates when in contact positions. *Id.* at 38-39 (citing Dothard v. Rawlinson, 433 U.S. 321 (1977)). Individual disparate treatment occurs when an employer treats some employees less favorably than others because of their race, color, religion, sex or natural origin. *Id.* at 39. Both individual and systemic disparate treatment require proof of discriminatory motive, but the methods of proof differ. *Id.*

41 Mendez, *supra* note 6, at 1130.

prima facie case of discrimination when it formulated an evidentiary framework for disparate treatment cases in *McDonnell Douglas Corp. v. Green*.[42]

In *McDonnell Douglas*, Green was a black civil rights activist and former employee of McDonnell Douglas who was fired and not rehired by the company.[43] Green was discharged in an overall reduction of McDonnell Douglas' work force.[44] Green claimed that the layoff as well as McDonnell Douglas' general hiring practices were racially motivated.[45] In protest, he illegally blocked access to its plant by way of a civil rights demonstration.[46] When Green was not rehired after responding to a subsequent public advertisement by McDonnell Douglas, he sued the company.[47] He claimed that the decision not to rehire him was because of his race and his participation in the civil rights protest.[48] Justice Powell, writing for a unanimous Court, set forth the essential elements of a prima facie discrimination case. The Court determined that the plaintiff must show that he belongs to a protected group, that he applied and was qualified for a job for which the employer was seeking applicants, that despite the qualifications, he was rejected, and that the job remained open and the employer continued to seek applicants with the same qualifications.[49] Once a prima facie case is established, the Court opined, the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[50] If successfully rebutted, the employee is

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42 411 U.S. 792, 802 (1973).

43 *Id.* at 796.

44 *Id.* at 794.

45 *Id.*

46 *Id.*

47 *Id.* at 796.

48 *Id.* Green first filed a complaint with the Equal Employment Opportunity Commission, but the Commission made no finding of racial bias. *Id.* at 796-97. The Commission, however, found it reasonable to believe that McDonnell Douglas had based its decision not to rehire Green on his civil rights activity. *Id.* at 797. After unsuccessful efforts by the Commission to resolve the dispute, Green was advised of his right to bring a civil rights action in federal court. *Id.*

Green claimed a violation of sections 703(a)(1) and 704(a) of the Civil Rights Act of 1964 *McDonnell Doulgas*, 411 U.S. at 796 (citing 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3(a) (1982)). Section 704(a) of the Civil Rights Act of 1964, in part provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." *McDonnell Douglas*, 411 U.S. at 796 n.4 (quoting 42 U.S.C. § 2000e-3(a) (1982)).

49 *McDonell Douglas*, 411 U.S. at 802.

50 *Id.*

then given the opportunity to demonstrate that the legitimate reason articulated was in fact a pretext.[51] This three tiered order and allocation of proof mirrors that typically used in civil cases.[52]

At this early stage in the development of Title VII case law, the Court addressed a related issue. A unanimous Court in *Mount Healthy City School District Board of Education v. Doyle*[53] examined the circumstances under which remedial action is justified when protected first amendment activity is a substantial part of an employment decision.[54] *Mount Healthy* was critical to the evolution of Title VII litigation.[55] The case involved the Mount

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[51] *Id.* at 807. *See generally* Zimmer & Sullivan, *The Structure of Title VII Individual Disparate Treatment Litigation:* Anderson v. City of Bessemer City, *Inferences of Discrimination, and Burdens of Proof*, 9 HARV. WOMEN'S L.J. 25, 41-43 (1986) (discussing difficulty of proving intentional discrimination). Pretext can be demonstrated by 1) showing that the reason provided does not apply, 2) producing evidence of prior unequal treatment, 3) demonstrating that the reason was not relied on previously or only is applied in a discriminatory manner, or 4) introducing statistics used to show systemic disparate treatment or disparate impact. *Id.* at 42.

[52] Federal Rule of Evidence 301 provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301; *see also* Mendez, *supra* note 6 (discussing burden of proof in disparate treatment case law, comparing it to traditional allocation of proof, and arguing that Federal Rule of Evidence 301 should be tailored with basic policies of Title VII to fashion more equitable distribution of order and allocation of proof). The *McDonnell Douglas* evidentiary approach primarily reflected the difficulty with proving unlawful motives in employment decisions. Stonefield, *Nondeterminative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFFALO L. REV. 85, 108 (1986). This three-tiered evidentiary approach is now well-entrenched in Title VII litigation, as well as in age discrimination cases. *Id.* at 108 n.78. Rarely are there cases where plaintiffs have direct proof, or "a smoking gun," of discrimination. *Id.* Therefore, the *McDonnell Douglas* framework created a rebuttable presumption that the employer discriminated against the employee. *Id.* at 109.

[53] 429 U.S. 274 (1977).

[54] *Id.* at 285. In *Mount Healthy*, the Court specifically addressed the scope of relief available to a plaintiff once liability was established. *See generally* Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L.J. 385, 392 (1980) ("the Court 'rejected the [district court's] view that a public employee *must be reinstated* whenever constitutionally protected conduct plays a "substantial" part in the employer's decision to terminate' ") (emphasis in original).

[55] *See* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1789-90 (1989). It is important to appreciate that the "same decision" test employed in *Mount Healthy* was directed to the appropriate remedy, while in *Price Waterhouse* it was invoked as an affirmative defense to liability. *See infra* notes 91-96 and accompanying text. *See also infra* notes 153-59 and accompanying text (arguing for "same decision" test to be applied only to determination of relief). This application of the "same decision"

Healthy Board of Education's decision not to renew the employment contract of Doyle, an untenured teacher.[56] The Board's decision was based upon a telephone call which Doyle made to a radio station voicing his opposition to the school's dress code.[57] The Court acknowledged that the telephone call was protected conduct under the first amendment.[58] The *Mount Healthy* Court reasoned, however, that an employee should not be placed in a "better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[59] Thus, the Court held that once a plaintiff demonstrated that constitutionally protected conduct was a substantial factor in an adverse employment decision, in order to avoid remedial action, the employer must show that the same decision would have been made in the absence of the protected factor.[60]

Although some circuits followed the *Mount Healthy* approach to causation in deciding Title VII cases, the Court did not incorporate a *Mount Healthy* standard in the Title VII disparate treatment cases which immediately followed.[61] Further, the framework presented in *McDonnell Douglas* did not prove adequate for the number of complex discrimination claims brought under Title VII during the next decade.[62] In particular, the

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test was proposed by Mark Brodin and has received support among notable commentators. *See* Brodin, *supra* note 4, at 323 (applying "same decision" test to determine the appropriate remedy serves deterrent and compensatory purposes of Title VII); Zimmer and Sullivan, *supra* note 51, at 48-49 ("separating the liability finding from the fashioning of relief and shifting the burden of persuasion on the intent issue in the remedy phase can vindicate the policy of eradicating all discrimination, while not giving undeserving plaintiffs a windfall"); Wolly, *supra* note 54, at 392 (*Mount Healthy* test should not be applied to evaluate "constitutional merits of the employer's decision," but to evaluate the injury itself).

56 *Mount Healthy*, 429 U.S. at 282-83.

57 *Id.* at 282. Doyle had also made obscene gestures to female students in the cafeteria when they ignored his directions. *Id.* at 281-82.

58 *Id.* at 283.

59 *Id.* at 285.

60 *Id.* at 285, 287 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977)).

61 *See* Wolly, *supra* note 54, at 390-91 n.48 (citing lower court cases which applied *Mount Healthy* standard to question of relief); *but cf.* Brodin, *supra* note 4, at 310 n.80 (citing lower court cases which applied *Mount Healthy* to determine liability).

The Supreme Court cases which immediately followed *Mount Healthy* applied the *McDonnell Douglas* three tier order and allocation of proof. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

62 *Compare, e.g.*, Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977) (if factual truth of employer's reason is disputed, employer has burden of proving by preponderance of evidence that there were legitimate, nondiscrimina-

lower courts struggled with standards to determine the sufficiency of the rebuttal.[63] In view of this confusion, the Court directly addressed the burden of proof issue on two separate occasions in 1978: *Furnco Construction Corp. v. Waters*,[64] and *Board of Trustees v. Sweeney*.[65] While both cases affirmed the *McDonnell Douglas* three step approach,[66] neither case added meaningful guidance regarding the employer's burden of rebutting a prima facie case.[67]

Furnco involved allegations that three brick layers were refused employment because of their race.[68] The Court applied the *McDonnell Douglas* framework and held that the plaintiffs met the basic requirements for a prima facie case.[69] The *Furnco* majority emphasized, however, that a prima facie case is not an ultimate finding of fact as to discrimination.[70] Again employing *McDonnell Douglas* language, the Court stated that the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection" to rebut the adverse inference arising from a prima facie case.[71]

Less than five months later, a sharply divided Court in *Swee-*

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tory reasons for action) *with* Barnes v. St. Catherine's Hosp., 563 F.2d 324, 329 (7th Cir. 1977) (simple introduction of evidence supporting legitimate reason for discharge is sufficient to require employee to show that reason offered was a pretext).

63 *See* Recent Cases, *When the Plaintiff Has Proven a Prima Facie Case of Discrimination, the Defendant Bears the Burden Only of Explaining Clearly the Nondiscriminatory Reasons for Its Actions—Texas Department of Community Affairs v. Burdine*, 50 CIN. L. REV. 628, 631 n.34 (1981) (citing cases which held that once employee establishes prima facie case of discrimination, "the employer bears the burden of showing by a preponderance of the evidence that legitimate, nondiscriminatory reasons existed for the action"); *but cf. id.* at 631 n.35 (citing circuits which place burden of articulation on employer).

64 438 U.S. 567 (1978).

65 439 U.S. 24 (1978).

66 *See* Note, *Title VII—Employment Discrimination—Defendant's Burden of Proof in Rebutting Plaintiff's Prima Facie Case*, 28 WAYNE L. REV. 1477, 1481-82 (1982) (describing lack of clarity in *Sweeney* and *Furnco*).

67 *Id.*

68 *Furnco*, 438 U.S. at 569. Furnco Construction did not maintain a permanent work force of bricklayers. *Id.* Instead, it hired a superintendent for each specific job, who in turn selected the necessary workers. *Id.* at 569-70. The chosen workers were generally either skilled firebricklayers or those recommended by the general foreman. *Id.* at 572.

69 *Id.* at 575.

70 *Id.* at 577. The Court stated that a prima facie case gives rise to an inference of discrimination because there is a presumption that, if unexplained, the decision was more likely than not based on impermissible factors. *Id.* (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977)).

71 *Id.* at 578 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

ney overturned an appellate court's decision requiring the plaintiff to "prove absence of discriminatory motive."[72] Reaffirming *McDonnell Douglas* and *Furnco*, the *Sweeney* Court distinguished "between merely articulat[ing] a legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive."[73] In a two paragraph *per curiam* decision, the Court emphasized that the mere articulation of a legitimate nondiscriminatory justification suffices to meet a prima facie case of employment discrimination.[74] Justice Stevens, in dissent, argued that "proving" and "articulating" conveyed the same meaning in the context of a trial—that proof must be offered to articulate a factual defense.[75] The *Sweeney* dissent criticized the majority's distinction between establishing a legitimate reason for the employment decision and demonstrating the lack of discriminatory motive.[76] Both, Justice Stevens noted, are simultaneously demonstrated.[77]

Three years later, the Court reconsidered this issue; lower courts were far from agreement on the appropriate standard of proof and neither *Furnco*, nor *Sweeney* eradicated these problems.[78] In *Texas Department of Community Affairs v. Burdine*,[79] the Court addressed a Title VII gender discrimination challenge involving Burdine's failure to be promoted and her subsequent termination.[80] Justice Powell, writing for a unanimous Court, de-

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[72] Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) (quoting Sweeney v. Board of Trustees, 569 F.2d 169, 177 (1st Cir.), *vacated*, 439 U.S. 24 (1978) (emphasis omitted)).

[73] *Id.* at 25.

[74] *Id.* at 24-25. The Court criticized the Court of Appeals for the First Circuit for imposing a heavier burden on the employer by requiring the employer "to prove absence of discriminatory motive." *Id.*

[75] *Id.* at 28 (Stevens, J., dissenting).

[76] *Id.* at 27-28 (Stevens, J., dissenting).

[77] *Id.* at 29 (Stevens, J., dissenting).

[78] *See, e.g.*, Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980) ("[T]he employer's burden . . . is satisfied if he simply explains what he has done or produc[es] evidence of legitimate nondiscriminatory reasons . . . . They do not have the burden of establishing that their basis was sound."); Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 (1st Cir. 1979) ("burden of persuasion at all times [stays] with the plaintiff, and . . . the employer's burden . . . . is a burden of production—i.e., a burden to *articulate or state* a valid reason, following which the complainant must show that the reason so articulated . . . is a mere pretext . . ."') (emphasis in original). In fact, the Fifth Circuit continued to apply the preponderance rule believing it to be consistent with *Sweeney*: "This court requires defendant to prove nondiscriminatory reasons by a preponderance of the evidence. This holding is not inconsistent with [*Sweeney*] which merely stated that defendant is not required to prove absence of discriminatory motive." Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563, 567 (5th Cir. 1979), *vacated*, 450 U.S. 248 (1981) (citations omitted).

[79] 450 U.S. 248 (1981).

[80] *Id.* at 250-51.

termined that the employer did not sufficiently rebut Burdine's prima facie case of gender discrimination simply by testifying that Burdine was refused a promotion because her poor interpersonal relations with two other employees would have adversely affected office efficiency.[81] The *Burdine* Court held that the burden which shifts to the defendant is one of production—to produce evidence that the plaintiff was rejected for legitimate, nondiscriminatory reasons.[82]

In unambiguous language, the *Burdine* majority stated that the employer need not persuade a court that the legitimate reason set forth was decisive in the challenged employment decision.[83] Rather, the employer must produce evidence only to raise a genuine issue of fact.[84] Once this is accomplished, the Court reiterated that the plaintiff must then demonstrate that the employer's proffered reasons did not dictate the ultimate decision.[85] In effect, the plaintiff must prove that they were the victim of discrimination as proscribed by Title VII.[86] In light of the *Price Waterhouse* decision, it is interesting that in both *Sweeney* and *Burdine* the Court criticized the lower courts for imposing a heavier burden on the employer.[87] The *Burdine* Court did, however, require the employer's reasons to be "clear and reasonably specific."[88]

On its face, the plurality's decision in *Price Waterhouse* appears inconsistent with this line of cases.[89] Justice Brennan, writing for

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81 *Id.* at 251-52. The Court stated that "[t]he Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production." *Id.* at 257 (emphasis in original).

82 *Id.* at 254-55.

83 *Id.* at 254. *See* Zimmer & Sullivan, *supra* note 51, at 39-41 (illustrating how an employer may rebut presumption of discrimination).

84 *Id.* at 254-55.

85 *Id.* at 256.

86 *Id.* The Court stated that the plaintiff had to prove that she was the victim of *intentional* discrimination. *Id.* Intention is a necessary element of a disparate treatment case, but is not a necessary element of a disparate impact case. For a brief discussion of the differences between disparate treatment and disparate impact see *supra* notes 9 & 39.

87 *See* Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978); *Burdine*, 450 U.S. at 258.

88 *Burdine*, 450 U.S. at 258. The Court further noted that the employer would still retain an incentive to convince the trier of fact that there was a lawful reason for the employment decision, because the plaintiff attempts to demonstrate pretext. *Id.*

89 *Compare* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787-88 (1989) (once plaintiff shows that gender played motivating part in employment decision, to avoid

the plurality, determined that the employer could avoid liability by demonstrating, through an affirmative defense, that a legitimate factor was the motivating part of the employment decision.[90] The plurality reasoned that the employer must persuade the fact finder that it would have reached the same employment decision, absent the illegal factor.[91] The plurality sought to distinguish this case, and thus preserve *McDonnell Douglas* and its progeny, by emphasizing that *Price Waterhouse* applied to cases involving mixed-motives and cases where the plaintiff demonstrated that the protected factor played a motivating role in the employment decision.[92] In so holding, the *Price Waterhouse* plu-

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liability, defendant must persuade court that same decision would have been made without consideration of gender) *with* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (employee must be given fair opportunity to establish that employer's reason for employment decision was pretext) *and* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) ("plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination") *and Sweeney*, 439 U.S. at 27 ("ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination") *and Burdine*, 450 U.S. at 253 ("ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").

90 *Price Waterhouse*, 109 S. Ct. at 1787-88. The Court reasoned that "the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Id.* at 1788.

91 *Id.* at 1787-88.

92 *Id.* at 1787-89. *McDonnell Douglas*, *Furnco*, *Sweeney* and *Burdine* are all pretext cases. This is the first occasion that the Court examined a mixed-motive case within the context of an individual disparate treatment claim, and therefore, distinguished between mixed-motive cases and pretextual cases. *Id.* A case involving mixed-motives arises when a personnel decision is motivated by both discriminatory and legitimate factors. *Id.* at 1791-92. A pretext analysis arises when the proffered reason for the employment decision is shown by the party alleging discrimination to be a disguise for discrimination. It presumes that the decision was based on a single motive, either legitimate or illegitimate. *See* Brodin, *supra* note 4, at 301 n.40. In a pretextual analysis, the plaintiff must show that the single motive was unlawful by demonstrating that the legitimate reasons offered were not the true reasons for the decision. *Id.* *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976). *McDonald* concerned a claim of unequal treatment by two white employees who were fired for stealing from a company's shipment of inventory, while a black employee who was also involved in the theft was retained. *Id.* at 275-76. The plaintiffs asserted that the employer's reliance on the theft incident as cause for dismissal was a pretext for reverse discrimination. *Id.* The Court explained:

> The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies . . . no more is required to be shown than that race was a "but-for" cause.

rality differentiated between mixed-motive cases and pretext cases.[93] In mixed-motive cases, Justice Brennan noted that the issue of whether the nondiscriminatory reason was the true reason—the question raised in *Burdine*—is inappropriate because no one reason dictates the ultimate decision.[94] The plurality contended that in mixed-motive cases, the employer considers discriminatory, as well as legitimate reasons.[95] The fact that gender was a motivating factor in the employment decision in *Price Waterhouse*, Justice Brennan reasoned, did not constitute a violation of Title VII.[96] Rather, the plurality concluded that the employer must show that the legitimate reason in and of itself would have been determinative in making the same decision.[97]

The plurality justified this causation requirement through an analysis of the history and statutory language of Title VII.[98] In Justice Brennan's view, Congress sought to balance the employer's freedom of choice with the employee's civil rights.[99] While the plurality admitted that a person's gender should not be considered in an employment decision, preserving the employer's freedom of choice in the plurality's view requires that an employer not be held liable if it would have made the same decision absent the protected factor.[100] Justice Brennan recognized that the employee's rights have been violated because an illegitimate factor was considered, but nonetheless allowed the em-

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Id. at 282 n.10. It is noteworthy that from this footnote, a pretextual analysis became equated with the "but-for" test of causation. *See* Belton, *supra* note 4, at 1260-61.

The *Price Waterhouse* plurality, however, did not suggest that a case must be classified as either a pretext case or a mixed-motive case. *Price Waterhouse*, 109 S. Ct. at 1789 n.12. The plurality stated that they expected plaintiffs to generally allege that their case is pretextual and, in the alternative, involved mixed-motive. *Id.* Upon discovery, the parties would determine whether both illegitimate and legitimate considerations played a role in the decision. *Id.* Once a district court decides whether an illegitimate factor played a part, it must apply either the *McDonnell Douglas* or the *Price Waterhouse* framework. *Id.* Contrary to the dissent, the plurality did not fear that this evidentiary scheme will confuse the factfinder. *Id.* The plurality supported its position by noting that the same scheme was endorsed in *Mount Healthy* and was subsequently followed. *Id. See also* Brodin, *supra* note 4, at 304-08 (describing the Court's treatment of mixed-motive causation claims).

93 *Price Waterhouse*, 109 S. Ct. at 1787-89.

94 *Id.* at 1788-89.

95 *Id.* at 1789.

96 *Id.* at 1786.

97 *Id.* at 1792.

98 *Id.* at 1784-86.

99 *Id.* at 1784-85.

100 *Id.* at 1785-86.

ployer to avoid liability.[101]

The plurality found support for this rationale in other Title VII and non-Title VII cases.[102] Justice Brennan noted that employers must demonstrate why gender was a criterion when the employer asserted that there was a bona fide occupational hazard within the meaning of Section 703(e) of the Civil Rights Act of 1964; employers must prove that payment of disparate salaries authorized under the Equal Pay Act are not sex linked; and employers must show why work limitations are imposed on pregnant women under the Pregnancy Discrimination Act.[103] Similarly, the plurality recognized that in first amendment challenges the Court has unanimously held that when constitutionally protected speech was a substantial or motivating factor in adverse treatment, the employer must prove by a preponderance of the evidence that the same decision would have been made absent consideration of the protected speech.[104] Justice Brennan also reiterated that the Court has held that an employer could avoid liability under the National Labor Relations Act, if, once it has been shown that union activities contributed to the em-

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101 *See id.* at 1785. More specifically, the plurality noted that "since we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* (emphasis in original) (footnote omitted). *But cf. id.* at 1786 ("the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision"). It appears that by absolving the employer from liability on this basis, the plurality effectively tipped the scale towards the employer.

102 *See id.* at 1784-94. *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (Title VII prohibits statutory weight and height requirements for correctional counselor trainee when employer failed to show evidence correlating such requirements to job performance; but evidence that use of women guards in "contact" positions in maximum-security male penitentiaries would be security problem falls within bona fide occupational qualification exception); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (Equal Pay Act does not allow male/female salary differentials based on work performed during day and night); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984) (under Title VII as amended by Pregnancy Discrimination Act employer retains burden of showing that work limitations on pregnant women are necessary).

103 *Price Waterhouse*, 109 S. Ct. at 1789.

104 *Id.* at 1789-90. *See supra* notes 54-61 and accompanying text. Professor Brodin criticized a *Mount Healthy* approach to liability in Title VII cases because it appeared to be an anathema to one of the primary goals of Title VII—elimination of discrimination in employment opportunities. Brodin, *supra* note 4 at 316-26. He asked why "an employer [should] be permitted to avoid liability completely by showing that his consideration of the unlawful factor happened in this particular instance to be 'harmless'?" *But see Price Waterhouse*, 109 S. Ct. at 1798 (O'Connor, J. concurring) ("Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.").

ployer's decision, the employer demonstrated by a preponderance of the evidence that the same decision would have been made absent the union activity consideration.[105]

In an attempt to provide guidance to the lower courts, Justice Brennan emphasized that gender must have been a motivating factor in the decision at the time it was made.[106] Remarks alone, the plurality explained, are not sufficient proof of discrimination.[107] The plaintiff must demonstrate that the employer relied on the illegitimate factor in arriving at its decision.[108] Justice Brennan refrained, however, from outlining ways of proving that stereotyping played a motivating role in an employment decision.[109] Nonetheless, the plurality found that Hopkins met this first hurdle by showing that the Policy Board relied on stereotypic views held by senior partners in making their decisions.[110] Thus, the *Price Waterhouse* plurality was unwilling to ignore the effect of sexual stereotyping; it perceptively understood the critical role these comments can play in promotional decisions.[111]

The plurality tempered its decision, however, by requiring the employer to meet its burden by a preponderance of the evidence, rather than applying the lower court's standard of clear and convincing evidence.[112] Thus, Justice Brennan applied conventional rules of evidence which generally govern civil litigation

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105 *Price Waterhouse*, 109 S. Ct. at 1790 (citing NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)).

106 *Id.* at 1791-92. The Court noted that it was not sufficient for an employer to show that, at the time the decision was made, the decision was "motivated only in part by a legitimate reason." *Id.* at 1791. The legitimate reason standing alone must have induced it to make the decision. *Id.* at 1792.

107 *Id.* at 1791.

108 *Id.*

109 *Id.*

110 *Id.* at 1794. The Court noted that negative comments may influence the partner to think less of a candidate. *Id.*

111 *Id. See generally* Taub, *Keeping Women In Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345 (1980). Professor Taub argued that stereotyping *per se* should constitute a recognized form of discrimination because "it focuses attention on, and thereby increases awareness of an important mechanism by which equal employment opportunity is denied." *Id.* at 402. She believes that if this is done, conduct which is seen as trivial will be perceived as harmful. *Id.* Professor Taub questioned whether " 'aggressiveness' [can] ever be a legitimate, nondiscriminatory reason for rejecting an applicant?" *Id.* at 395. She asserts that "by basing personnel decisions on the conclusory attribution of stereotypic traits, the employer may well be using means which are 'fair in form, but discriminatory in operation.' " *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). *See also* Zimmer & Sullivan, *supra* note 51, at 32-33 (elaborating on affect of stereotyping in employment decisions and demonstrating how the intent to discriminate can arise from inarticulate beliefs or unconscious assumptions).

112 *Price Waterhouse*, 109 S. Ct. at 1792.

in Title VII cases.[113] In so doing, the plurality differentiated between the standard of proof necessary to avoid equitable relief and that required to avoid liability under Title VII.[114] The preponderance standard which is required to avoid liability, the plurality reasoned, was appropriate in the instant case because it was consistent with the Court's holding that there is no violation of Title VII upon a showing that the same decision would have been made in the absence of the discriminatory factor.[115] Justice Brennan reasoned that the clear and convincing standard has been used when the government attempts to utilize unusual coercive action and is rarely used when a plaintiff seeks conventional relief.[116] Further, the plurality recognized that the higher standard was used in the Title VII area when dealing with the proper form of relief.[117]

Justice White, writing separately and concurring in the judgment, found the plurality's discussion of causation and its creation of an affirmative defense unnecessary.[118] *Mount Healthy*, in Justice White's view, provided the appropriate approach to the allocation of the burden of proof. Justice White reasoned that when constitutionally protected conduct was a substantial factor in an employment decision the employer must show by a preponderance of the evidence that, absent that factor, the same decision would have been made.[119] Justice White, however, departed from the plurality's requirement that the employer must introduce objective evidence to carry its burden.[120] In Justice White's judgment, the employer need only demonstrate through credible testimony that the employer's legitimate reasons would provide sufficient grounds for the contested decision.[121]

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113 *Id.* *See also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983) (lower courts should not treat discrimination differently from other ultimate questions of fact).

114 *Price Waterhouse*, 109 S. Ct. at 1792. *See also* Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (Court "noted the clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount"); 29 C.F.R. § 1613.271(c)(2) (1989) (involving the Equal Employment Opportunity Commission regulation which requires federal agencies that violate Title VII to demonstrate by clear and convincing evidence that the same decision would have been made in order to avoid relief).

115 *Price Waterhouse*, 109 S. Ct. at 1792.

116 *Id.*

117 *Id.*

118 *Id.* at 1795 (White, J., concurring).

119 *Id.* *See also* Brodin, *supra* note 4, at 306-08.

120 *Price Waterhouse*, 109 S. Ct. at 1796 (White, J., concurring).

121 *Id.*

In a lengthy concurring opinion, Justice O'Connor attacked the plurality's interpretation of Title VII's causation requirement and the broad application that the plurality afforded its holding.[122] Relying on the legislative history and statutory language of Title VII, Justice O'Connor asserted that in order for there to be a violation of Title VII, Congress intended that an illegitimate factor must be the cause of an adverse employment decision.[123] Justice O'Connor unconditionally equated this requirement with "but-for" causation.[124] She noted, however, that the legislative history was less clear regarding which party has the burden of proof on the issue of causation—the issue presented in this case.[125]

Justice O'Connor recognized that Congress intended the plaintiff to bear the burden of proof to establish the elements of her case.[126] Nevertheless, by looking to tort principles of multiple causation, Justice O'Connor noted that in some cases this allocation would be inconsistent with the policy considerations behind Title VII.[127] Justice O'Connor determined that in accordance with the intended deterrent effect of Title VII, the burden must shift once the plaintiff has shown that an illegitimate factor was given substantial weight in an adverse employment decision.[128] In Justice O'Connor's view, the presumption of good faith disappears at this point, and the employer must show that "despite the smoke, there is no fire:" that the same decision would have been made absent the discriminatory factor.[129]

In Justice O'Connor's view, a departure from the *McDonnell Douglas* standard was also justified because in *Price Waterhouse* the Court was presented with direct evidence of discrimination.[130] Alternatively, the Justice reasoned that the *McDonnell Douglas* prima facie case was based on the statistical probability that an illegitimate factor may have motivated the decision.[131] Justice O'Connor recognized that in *Price Waterhouse* the lower court

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122 *Id.*

123 *Id.* at 1797 (O'Connor, J., concurring). In Justice O'Connor's view, a violation of Title VII occurs when the discriminatory factor is the "but for" cause of an unfavorable employment action. *Id.*

124 *Id.* This is in opposition to the plurality's reading of Title VII's causation requirement. *See id.* at 1785 (O'Connor, J., concurring).

125 *Id.* at 1797 (O'Connor, J., concurring).

126 *Id.*

127 *Id.* at 1797-98 (O'Connor, J., concurring).

128 *Id.* at 1798 (O'Connor, J., concurring).

129 *Id.* at 1798-99 (O'Connor, J., concurring).

130 *Id.* at 1801-02 (O'Connor, J., concurring).

131 *Id.* at 1801 (O'Connor, J., concurring).

found that Hopkins had proved that Price Waterhouse relied on stereotypic attitudes toward women in arriving at its decision not to make her a partner.[132] Overt stereotyping was found in the partners' evaluations and in comments made directly to her.[133] Thus, Justice O'Connor would require the plaintiff to carry a greater burden than would Justice White.[134] She stressed that there must be direct evidence that discrimination was a substantial factor in the employment decision before a *Price Waterhouse* framework would apply.[135]

To justify this construction, Justice O'Connor reiterated that the allocation of the burden of proof often reflects a party's greater access to evidence.[136] In the instant case, Justice O'Connor recognized that once Hopkins established a quantum of discrimination, requiring Hopkins to show that discrimination was the exact cause of her injury would be unduly burdensome.[137] This is particularly true in a professional situation where promotional decisions are based on a myriad of reasons, many of which are subjective.[138] Like the plurality, however, Justice O'Connor failed to identify precisely what suffices as direct evidence of discrimination and at what point that evidence constitutes a substantial factor.[139]

In a vigorous dissent, Justice Kennedy joined by Chief Justice Rehnquist and Justice Scalia, criticized the plurality for departing from the *McDonnell Douglas* framework and aggravating a difficult area already wrought with confusion.[140] The dissent denounced the standard of causation employed by the plurality as inherently inconsistent and misdirected.[141] Like Justice O'Connor, the dissent argued that Title VII was aimed at employment decisions that resulted from illegal motives.[142] In Jus-

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132 *Id.* at 1802 (O'Connor, J., concurring).

133 *Id.*

134 *Id.* at 1801-02 (O'Connor, J., concurring). Justice White did not distinguish this case from the *McDonnell Douglas* line of cases by the existence of direct evidence. *See id.* at 1795-96 (White, J., concurring).

135 *Id.* at 1804 (O'Connor, J., concurring).

136 *Id.* at 1803 (O'Connor, J., concurring). *See also* Internationl Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977) ("[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof").

137 *Price Waterhouse*, 109 S. Ct. at 1802-03 (O'Connor, J., concurring).

138 *Id.* at 1803 (O'Connor, J., concurring).

139 *Id.* at 1804-06 (O'Connor, J., concurring).

140 *Id.* at 1806 (Kennedy, J., dissenting).

141 *Id.* at 1806-07 (Kennedy, J., dissenting).

142 *Id.* at 1807 (Kennedy, J., dissenting).

tice Kennedy's view, this was synonymous with "but-for" causation which, while facially rejected by the plurality, was later employed in the context of an affirmative defense.[143]

The dissent explained that *Burdine* offered two methods for the plaintiff to meet her ultimate burden of persuasion—either upon direct proof of discrimination or upon showing that the employer's justification was pretextual.[144] Thus *Burdine*, Justice Kennedy emphasized, provided a flexible framework within which the plaintiff could persuade the Court directly that a discriminatory reason motivated the employer, or indirectly by demonstrating that the legitimate reason offered was inadequate.[145] Moreover, the dissent argued that contrary to Justice O'Connor's concern with the employee's inferior access to evidence, the employee would not be disadvantaged because of the availability of liberal discovery rules and Equal Employment Opportunity Commission investigative files.[146] In addition, Justice Kennedy noted that requiring the employer to present clear and specific reasons for the contested decision would alleviate the possibility of a specious defense prevailing.[147]

Finally, the dissent expressed concern that the decision would prompt needless litigation regarding the determination of whether evidence was direct and constituted a substantial factor in the employment decision.[148] The dissent asserted that such illusory determinations unnecessarily complicate a difficult area.[149] These ramifications, Justice Kennedy concluded, will also be felt in areas which borrow from Title VII order of proof.[150]

The dissent's astute criticism that *Price Waterhouse* will spawn a generation of litigation regarding direct evidence and substantial factors, however, does not completely negate the Court's laudable effort to grapple with the deficiencies of the *McDonnell Douglas* framework. *Price Waterhouse* is an attempt to further the goals and intentions of Title VII by shifting the burden of per-

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143 *Id.*

144 *Id.* at 1810 (Kennedy, J., dissenting).

145 *Id.* (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983)). Justice Kennedy posited that the prima facie case was "never intended to be rigid, mechanized, or ritualistic." *Id.*

146 *Id.* at 1812-13 (Kennedy, J., dissenting).

147 *Id.*

148 *Id.* at 1812 (Kennedy, J., dissenting).

149 *Id.*

150 *Id.*

suasion to the employer in specific situations.[151] Here, Hopkins not only fulfilled the elements of a prima facie case, she demonstrated that her gender played a part in the decision making process—precisely what Title VII was intended to eradicate.[152]

Professional employment decisions, particularly those made at senior levels, involve a number of factors, many of which are subjective.[153] Permitting the employer to avoid liability by merely articulating a legitimate nondiscriminatory reason for the employee's rejection, when evidence has been presented that impermissible criteria played a motivating part in the employment decision, removes the bite of Title VII. Within the *McDonnell Douglas* framework, the employer's task in a mixed-motives case was minimal.[154] Articulating one legitimate nondiscriminatory factor neither proves the absence of discrimination, nor estab-

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[151] *Id.* It is noteworthy that during the Court's October 1988 term, the *Price Waterhouse* decision stood as a lone victory in the civil rights area. During that term, the Court simultaneously limited the scope and effect of well developed civil rights and Title VII case law. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (racial harassment in employment situation is not actionable under 42 U.S.C. § 1981—a section which only prohibits racial discrimination in making and enforcing of private contracts); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (Title VII statute of limitations commences at time of adoption of seniority system rather than when alleged adverse effects are felt thus barring claim of discrimination based on facially neutral seniority system); Martin v. Wilks, 109 S. Ct. 2180 (1989) (allowing white fire fighters to challenge reverse discrimination decisions despite their failure to timely intervene in employment discrimination proceedings); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (severely restricting kinds of statistical evidence that will be acceptable to support disparate impact claim under Title VII and holding that plaintiff alleging "disparate impact" retain burden of proof throughout case); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (requiring strict scrutiny analysis to affirmative action programs and firm evidentiary basis for determining that underrepresentation of minorities was result of past discrimination).

[152] Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1120 (D.D.C. 1985), *aff'd*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). The court noted that "in forbidding employers to discriminate against individuals because of sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Id.* (emphasis in original) (citations omitted). *See* Hauck, *Burdine: Sex Discrimination, Promotion, and Arbitration*, 33 LAB. L.J. 434, 441 (1982). In Price Waterhouse v. Hopkins, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989), Judge Green noted that the *McDonnell Douglas* framework is necessary to establish discrimination when there is no direct evidence of discrimination. *Id.* at 470. He stated that it would be inappropriate to require the defendant, simply on the basis of inference of discrimination to prove that discrimination was not "but-for" cause of challenged decision. *Id.* Rather, the *McDonnell Douglas* framework sought to establish whether employee was treated less favorably. *Id.*

[153] *Price Waterhouse*, 109 S. Ct. at 1803.

[154] *See* Recent Development, *Defendant's Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AM. U.L. REV. 755, 759 n.36 (1982) (citing cases which interpret elements of prima facie case as not being particularly burdensome).

lishes that a violation of Title VII has not occurred. The *Price Waterhouse* plurality, however, stopped short of fully extending the *McDonnell Douglas* framework by allowing the employer to escape liability through an affirmative defense once gender has been shown to have played a motivating part in the decision.[155]

The *Hopkins* district court offered a more equitable solution.[156] By reasoning that the employer cannot escape liability, but only equitable relief by meeting the "same decision" test, Judge Gesell was faithful to the policy considerations of Title VII. This outcome was also consistent with *Mount Healthy*.[157] In *Mount Healthy* the Court "rejected the view that a public employee must be *reinstated* whenever constitutionally protected conduct play[ed] a 'substantial' part in the employer's decision to terminate."[158] The difference in these two approaches is critical. In both situations, even if the same decision would have been made, the employer has allowed impermissible considerations to flourish in the decision-making process.[159] A finding of liability by the *Price Waterhouse* Court would have been a clear signal that this evaluation process was indeed improper. Such a finding would also allow the plaintiff an award of nominal damages and attorney fees.[160] By instead allowing Price Waterhouse to possibly escape liability, rather than simply avoid reinstating Hopkins, and/or paying her back salary, the Court has sanctioned an executive promotional system which is anathema to the principles behind Title VII. On remand, if *Price Waterhouse* satisfies its burden, the fact that gender was a motivating part of the employment deci-

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155 *Price Waterhouse*, 109 S. Ct. at 1787. It is important to note, however, that the employers burden may be interpreted by the courts to be heavy. For example, on remand the district court found that Price Waterhouse did not overcome this burden in spite of the firm's claims that Hopkins has poor interpersonal skills. N.Y. Times, May 16, 1990, at A1, col. 2.

156 *See supra* notes 26-28 and accompanying text.

157 *See supra* notes 51-59 and accompanying text.

158 Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979) (emphasis added) (citing Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977)). The *Givhan* Court repeated the concern voiced in *Mount Healthy* that a rule requiring reinstatement of employees "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* (citations omitted).

159 Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1120 (D.D.C. 1985), *aff'd*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). The district court emphasized that "the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole . . . . [P]laintiff appears to have been a victim of 'omissive and subtle' discrimination created by a system that made evaluations based on 'outmoded attitudes' determinative." *Id.* at 1119.

160 Stonefield, *supra* note 52, at 123-24.

sion becomes irrelevant. Granted, employers must have the ability to weed out unsatisfactory employees. But the Court's concern with this right has materialized into a framework where under certain circumstances proven acts of discrimination will get lost in the judicial maze.

Further, although Justice O'Connor distinguished herself from the plurality by attempting to clarify the circumstances under which the *Price Waterhouse* framework ought to apply, her distinctions may prove unworkable in the lower courts. Justice O'Connor's requirement of direct evidence is somewhat illusory given the widespread view that in many cases circumstantial evidence may be as compelling as direct evidence.[161] Furthermore, today the Court more often confronts situations where the intentional discrimination is covert.[162] Even assuming arguendo that Justice O'Connor is correct in her classification of Hopkins' evidence as "direct proof" of discrimination, one cannot help wondering why the existence of comments such as those from the senior partner present the only kind of situation where the burden of proof should shift to the employer.[163] Should not the combination of (1) Hopkin's innate talents,[164] (2) her uncontested ability to secure large fees which were critical to the office,[165] (3) her unsurpassed billable hours[166] (4) and her clients' praise,[167] coupled with (5) the insignificant number of female partners,[168] (6) the evaluations that characterized her as "aggressive,"[169] and (7) the fact that male managers with poor interpersonal skills were made partners[170] have been enough? Doesn't this set of circumstantial evidence establish a situation where

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161 J. WIGMORE, EVIDENCE AT TRIALS IN COMMON LAW 961 § 26 (1983). Wigmore cited cases which stand for the proposition that "there is no sound reason" for a drawing distinction between the value of direct and circumstantial evidence. *Id.* at 961 n.3 (citations omitted). Wigmore also provided a detailed definition of direct evidence and compared it to other kinds of evidence. *Id.* at 948-50.

162 Stonefield, *supra* note 52, at 108 n.74.

163 Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1802 (1989) (O'Connor, J., concurring) ("as the decisionmakers exited the room, she was *told* by one of those privy to the decision making process that her gender was a major reason for the rejection of her partnership bid" (emphasis in original)).

164 Hopkins v. Price Waterhouse, 825 F.2d 458, 462 (1987), *rev'd*, 109 S. Ct. 1775 (1989).

165 *Id.*

166 *Id.*

167 *Id.*

168 Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985), *aff'd*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

169 *Id.* at 1113.

170 *Id.*

"the employer [may have] created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion[?]"[171] Moreover, the fact that Judge Gesell and Justice O'Connor differ on the very classification of Hopkins' evidence as "direct" or "circumstantial" is perhaps a harbinger of the impending conflict which will likely result in the lower courts.[172]

Additionally, although *Price Waterhouse* may well be viewed as a narrow holding applicable to particularly egregious situations, the Court's unwillingness to clarify the criteria which necessitates *Price Waterhouse* analyses affords *Price Waterhouse* a more frequent application. Imagine the difficulty in deciding whether a particular case is one to which *Price Waterhouse* applies, or one to which *McDonnell Douglas* applies.[173] Before *Price Waterhouse* can be invoked, the judge must determine through discovery whether the plaintiff's evidence of discrimination is a motivating factor in the employment decision, and whether it is direct proof of discrimination. The later requirement of direct proof will only be necessary for those judges who read Justice O'Connor's, rather than Justice White's, opinion along with the plurality's opinion.

With either situation, plaintiff has established more than the prima facie case required by *McDonnell Douglas*. In *Price Waterhouse* if a majority is viewed as being formed with the addition of Justice O'Connor, the employer must then produce "objective evidence" of legitimate factors which motivated its decision.[174] The objective evidence must show that the same decision would have been made in the absence of the unlawful factor.[175] Presumably, statement that Hopkins' poor interpersonal skills prevented her from making partner would not be enough. Justice O'Connor appears to demand verifiable job evaluations which demonstrate that the lawful factor alone would have been determinative to the decision.[176]

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171 Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1796 (1989) (O'Connor, J., concurring).

172 *Compare Hopkins*, 618 F. Supp. at 1119 ("there is no direct evidence of a determined purpose to maliciously discriminate against women . . .") *with* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1805 (1989) (O'Connor, J., concurring) ("[w]hat is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision").

173 *Price Waterhouse*, 109 S. Ct. at 1798 n.12 (O'Connor, J., concurring). Indeed, the plurality noted that they expect plaintiffs to allege that their cases involve mixed-motives, and in the alternative, are pretextual. *Id.*

174 *Id.* at 1803 (O'Connor, J., concurring).

175 *Id.* at 1804 (O'Connor, J., concurring).

176 *Id.*

If the judge does not believe that the legitimate factors alone would have produced the same decision, the employer is liable under Title VII. Similarly, if the judge is uncertain as to which factors were critical to the decision, the employee is similarly entitled to a judgment in her favor. In this narrow situation, plaintiffs benefit from the addition of *Price Waterhouse* to Title VII individual disparate treatment case law.

A majority can also be formed, however, by adding Justice White's opinion to the plurality. Justice White differs from Justice O'Connor on the kind of the evidence necessary to invoke a *Price Waterhouse* framework, as well as the scope of evidence by which a defendant can escape liability.[177] First, in Justice White's view, the plaintiff need not demonstrate with direct evidence that "unlawful motive[s] [were] a *substantial* factor in the adverse employment action."[178] In substance, Justice White joins the plurality in requiring the plaintiff to show that the illegitimate criteria was a "substantial" or "motivating" factor. In addition, Justice White broadened the scope of admissible evidence available to the employer to show that the same decision would have been made.[179] For Justice White, the employer need only "credibly testify" rather than produce objective evidence that the same decision would have been made absent the unlawful factor.[180] A partner's testimony that Hopkin's failure to make partner was based on her poor interpersonal skills would presumably satisfy this requirement.

With the addition of Justice White's opinion to form a majority, once all the evidence is presented, if the judge does not believe that the decision would have been the same, then the outcome would be similar to those courts that find a majority with Justice O'Connor. Plaintiffs will benefit from those cases where the judge does not believe that the same decision would have been made based solely on the legitimate factor and where the judge is uncertain as to which factors were critical to the decision.

Alternatively, if the judge determines that the employee has only made out a prima facie case of discrimination, the *McDonnell Douglas* framework is invoked. Under *McDonnell Douglas*, the employer must articulate a legitimate reason for the challenged de-

177 *Id.* at 1795-96 (White, J., concurring).

178 *Id.* at 1795 (White, J., concurring) (emphasis in original).

179 *Id.* at 1796 (White, J., concurring).

180 *Id.*

cision.[181] If the employer's reason is found to be pretextual, the illegal reason, in effect, becomes the sole cause of the employer's action and the plaintiff is entitled to relief.[182] The underlying assumption in this scenario is that *Price Waterhouse* does not apply because it is a single motive rather than a mixed-motives case. That is to say that there are no legitimate reasons for the employment decision because the legitimate reasons are found to be a pretext for discrimination. Under this scenario, if the judge is uncertain of the employer's motives—whether the proffered reason is truly a pretext for discrimination—the employment decision will stand because under *McDonnell Douglas* the employer has the burden of persuasion.

Thus, irrespective of the Court's attempt to limit its decision, lower courts will undoubtedly be flooded with claims brought under Title VII alleging mixed-motives, and involving evidence which the plaintiff deems is direct proof that discrimination played a motivating part in the employment decision so as to invoke a *Price Waterhouse* analysis. In the pre-*Price Waterhouse* era, what may have constituted a pretext case, and therefore, require a *McDonnell Doulgas* three-tiered burden shifting analysis, may well be, post-*Price Waterhouse*, a mixed-motive, substantial factor case. In this respect, plaintiffs will be well advised to rely on *Price Waterhouse* to the extent that their situation warrants.

Thus, in *Price Waterhouse*, the Court advances toward adopting procedural rules which allow plaintiffs to recover for discriminatory actions in the workplace. The Court, however, simultaneously tempers the extent of that recovery by allowing employers to avoid liability through an affirmative defense once discrimination has been established. By failing to instruct the lower courts on the specific circumstances to which this framework should apply, the Court falls short of extending the *McDonnell Douglas* framework in a meaningful manner. This, combined with the Court's failure to delineate the application of the *Price Waterhouse* framework, does little to advance the objectives sought by Congress in enacting Title VII.

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181 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
182 *Id.* at 807.