MIXED-MOTIVES FOR FIRING EMPLOYEES: ALASKA'S INCONSISTENT STANDARDS AND ITS FAILURE TO FOLLOW THE CHANGING FEDERAL TIDE

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In Desert Palace v. Costa, *the United States Supreme Court resolved much of the confusion that arose following its decision in* Price Waterhouse v. Hopkins, *which concerned the appropriate evidentiary standard to apply in mixed-motive employment discrimination cases. This Note suggests that Alaska's mixed-motive case law has diverged from the federal case law and has not yet established an internally consistent evidentiary requirement. This Note also suggests that by recognizing the* Desert Palace *decision, the Alaska Supreme Court may simultaneously realign itself with federal law and resolve the ambiguity within its own case law.*

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I. INTRODUCTION

The Civil Rights Act of 1964 was enacted to combat racism by prohibiting discrimination in a number of contexts including voting (Title I),[1] public accommodation (Title II),[2] public schools (Title III),[3] and federally funded programs (Title IV).[4] Title VII of the Act was designed to ensure equal opportunity in the context of private employment.[5] Since its enactment, Title VII has served as a model for civil rights legislation in many states,[6] including the Alaska Human Rights Act (AHRA).[7] One issue surrounding Title

1. 42 U.S.C. § 1973 (2000).
2. 42 U.S.C. § 2000a (2000).
3. 42 U.S.C. § 2000c (2000).
4. 42 U.S.C. § 2000d (2000).
5. *See* 42 U.S.C. § 2000e.
6. *See, e.g.,* Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) ("The [Florida Civil Rights Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964."); Irvin v. Aubrey, 92 S.W.3d 87, 90 n.3 (Ky. Ct. App. 2001) ("[T]he Kentucky Civil Rights Act mirrors Title VII of the federal Civil Rights Act, federal standards are used in evaluating discrimination claims under the Kentucky act."); Campbell v. Garden City Plumbing & Heating, Inc., 97 P.3d 546, 549 (Mont. 2004) ("Reference to federal case law is appropriate in employment discrimination cases filed under the Montana Human Rights Act (MHRA), Title 49, MCA, because the provisions of Title 49 parallel the provisions of Title VII."); Winters v. Chubb & Son, Inc., 132 S.W.3d 568, 574 (Tex. Ct. App. 2004) ("The [Texas Commission on Human Rights Act (TCHRA)] is modeled on the federal Civil Rights Act of 1991 (Title VII); therefore, Texas courts follow federal statutes and cases in applying the TCHRA.").
7. ALASKA STAT. § 18.80.220 (2006). *See* Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 43 (Alaska 2000) ("The Alaska Human Rights Act . . . mirrors Title VII of the Federal Civil Rights Act of 1964.").

VII, the AHRA, and other state employment discrimination statutes is the issue of mixed-motives for firing employees. Federal and state courts alike have struggled to deal with cases in which an employer bases an employment decision on a mixture of discriminatory and legitimate factors. Historically, one particular point of contention has been the type of evidence a plaintiff must produce in order to make use of the so-called "mixed-motive" framework.

While the United States Supreme Court addressed the evidentiary issue in mixed-motive cases head-on in *Desert Palace, Inc. v. Costa*,[8] Alaska courts have not followed suit. The Alaska Supreme Court has spent the past decade flip-flopping over what evidentiary standard is required, all the while purporting to adhere to a consistent standard mirroring federal case law. In fact, nothing could be further from the truth. With each mixed-motive case Alaska courts have decided, they have moved further from the federal standard and from internal consistency. In recent years, the Alaska Supreme Court has relied on the direct evidence requirement, despite its own precedent to the contrary and *Desert Palace*, which abandoned such a requirement. Because the Alaska Supreme Court claims to use Title VII to interpret the AHRA,[9] it is even more perplexing that the court has failed to recognize the change heralded by *Desert Palace* on not one, but three separate occasions.

Part II of this Note describes the federal framework, outlining how the evidentiary standard for mixed-motive cases has changed over time. Part III summarizes and analyzes the relevant Alaska case law on mixed-motive discrimination. It claims that Alaska case law, although internally inconsistent, holds plaintiffs to a higher evidentiary standard than does the federal case law. Part IV demonstrates how Alaska case law has diverged from federal case law and suggests that Alaska courts should abandon their reliance on direct evidence and follow the federal precedent.

II. THE FEDERAL FRAMEWORK

Title VII makes it unlawful for employers to rely on certain illegitimate factors when making employment decisions,[10] but the

8. 539 U.S. 90 (2003).

9. *See Era Aviation,* 17 P.3d at 43.

10. 42 U.S.C. § 2000e-2 (2000) ("It shall be an unlawful employment practice for an employer to fail to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

language is less clear as to what *degree* of reliance amounts to an unlawful employment practice.[11] Two different lines of cases have emerged. In pretext cases, an illegitimate factor is *the* reason for the employment decision.[12] In mixed-motive cases, an illegitimate factor is only *a* reason, accompanied by other legitimate reasons for the decision.[13] The pretext and mixed-motive cases also differ in the way burdens of proof are allocated.[14]

A. Pretext Cases

In the landmark case of *McDonnell Douglas Corp. v. Green*,[15] the United States Supreme Court made it clear that Title VII does not require employers to hire individuals because they are members of a minority group.[16] All that is required of employers "is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."[17] In order to ensure that employers were not surreptitiously erecting discriminatory barriers, the Court in *McDonnell Douglas* established a three-step approach for analyzing pretext cases.[18] The first step of the tripartite framework places the burden on the plaintiff to establish a prima facie case of discrimination.[19] Second, if the plaintiff establishes a prima facie case by a preponderance of the evidence, the burden then shifts to the employer to establish a legitimate business reason for the employment decision.[20] Finally, if the employer advances a legitimate reason, the burden shifts back to the plaintiff, who must prove that the employer's stated

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conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

11. Kelly Robert Dahl, *Price Waterhouse, Wright Line, and Proving a "Mixed Motive" Case Under Title VII*, 69 NEB. L. REV. 869, 874–75 (1990).

12. GEORGE RUTHERGLEN, MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 16 (4th ed. 2004).

13. *Id.*

14. *See* Sherry Evans, *Price Waterhouse v. Hopkins: Balancing Employees' Rights and Employers' Prerogatives: Allocation of the Burdens of Proof in a Title VII Mixed-Motive Case*, 43 SW. L.J. 1149, 1160 (1990).

15. 411 U.S. 792 (1973).

16. *Id.* at 800.

17. *Id.* at 800–01 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971)).

18. *Id.* at 802–05.

19. *Id.* at 802.

20. *Id.*

reasons for the employment decision were a pretext for discrimination.[21]

In a subsequent case, *Texas Department of Community Affairs v. Burdine*,[22] the Court discussed the nature of the evidentiary burdens that must be satisfied in each step of the pretext framework. The Court characterized the burden of establishing the prima facie case as "not onerous."[23] Therefore, the burden that shifts to the defendant to rebut the prima facie case is only a burden of production, not one of persuasion.[24] "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[25] In the third step of the tripartite framework, *Burdine* provided plaintiffs with the option of demonstrating pretext "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."[26]

B. Mixed-Motive Cases

The pretext framework assumed that the employment decision in question was made for a single reason and that the trier of fact must determine what the "true" motivation was—the discriminatory factor advanced by the plaintiff or the legitimate reason suggested by the employer.[27] As courts decided more employment discrimination cases, it became clear that it was not always easy to pinpoint a single cause for an employment decision. Sometimes there was evidence that both legitimate and illegitimate reasons played a role, and these situations became known as mixed-motive cases.[28]

In *Price Waterhouse v. Hopkins*,[29] the United States Supreme Court, in a plurality opinion, concluded that a different allocation of burdens should apply in mixed-motive cases that arise under

21. *Id.* at 804.
22. 450 U.S. 248 (1981).
23. *Id.* at 253.
24. *Id.* at 254–55.
25. *Id.* at 253.
26. *Id.* at 256.
27. *See* Kerry S. Acocella, Note, *Out with the Old and In with the New: The Second Circuit Shows it's Time for the Supreme Court to Finally Overrule McDonnell Douglas*, 11 CARDOZO WOMEN'S L.J. 125, 129 (2004).
28. *Id.*
29. 490 U.S. 228 (1989) (plurality opinion).

Title VII.[30] In clarifying the evidentiary burdens shouldered by each party, the Court distinguished *Burdine*, stating that "the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision . . . *Burdine*'s evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations."[31] Like in the pretext cases, "the plaintiff retains the burden of persuasion on the issue of whether [an unlawful factor] played a part in the employment decision."[32] After the plaintiff has proven that an illegitimate motive played a role in the employment decision, an employer can only avoid liability by demonstrating by a preponderance of the evidence that it would have reached the same decision based on the legitimate motive.[33] The plurality did not see this as a shifting of burdens; rather, it characterized the employer's burden as "an affirmative defense."[34]

The employer's burden in mixed-motives cases is thus more rigorous than in pretext cases. In pretext cases, the employer bears only the burden of production, and that burden is satisfied once the employer produces evidence of a legitimate reason for the employment decision.[35] In mixed-motives cases, the employer "must show that its legitimate reason, standing alone, would have induced it to make the same decision,"[36] and it must do so by a preponderance of the evidence.[37] It is insufficient for an employer to show that it was motivated in part by legitimate factors or that the decision *could* be justified by a legitimate reason.[38] Mixed-motive cases thus put an emphasis on causation, because the present tense language of § 703(a)(1) of the Civil Rights Act of

30. *Id.* at 250 (plurality opinion) ("[T]he plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that he would have made the same decision in the absence of the unlawful motive.").

31. *Id.* at 247 (plurality opinion).

32. *Id.* at 246 (plurality opinion).

33. *Id.* at 244–45 (plurality opinion). After the Civil Rights Act of 1991 was passed, however, employers could no longer avoid liability through the same decision defense. The 1991 Act moved the defendant's burden to the remedy phase of litigation, and thus the same decision defense could only be used to limit damages. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

34. *Price Waterhouse,* 490 U.S. at 246 (plurality opinion).

35. *See supra* Part II.A.

36. *Price Waterhouse,* 490 U.S. at 252 (plurality opinion).

37. *Id.* at 253 (plurality opinion).

38. *Id.* at 252 (plurality opinion) ("An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.").

1964 dictates that the inquiry focus on the employer's motives at the actual moment the decision was made.[39]

The concurring opinions authored by Justice White and Justice O'Connor agreed with the allocation of burdens of persuasion, but disagreed when it came to what evidence would be sufficient to satisfy those burdens. The plurality opinion required plaintiffs to demonstrate only that a discriminatory criterion played a "motivating part" in the decision.[40] Justices White and O'Connor, in contrast, would have required the plaintiff to show that the discriminatory criterion was a "substantial factor" in the employment decision.[41] Furthermore, the plurality only briefly discussed the type of evidence that would be sufficient to establish a plaintiff's case. While stating that stereotyped remarks could be evidence of an impermissible motive, "stray remarks," standing alone, are not sufficient.[42] O'Connor's concurrence tackled the issue of the plaintiff's evidentiary standard head-on, stating that a "plaintiff must show by *direct evidence* that an illegitimate factor was a substantial factor in the decision."[43] Elaborating on the direct evidence requirement, O'Connor's concurrence suggested that the real difference between pretext and mixed-motives cases lies not in the number of motivating factors but in the type of evidence presented.[44] O'Connor envisioned that the *McDonnell Douglas-Burdine* and the *Price Waterhouse* frameworks would exist side-by-side; she suggested that after all the evidence had been presented, the court could determine which framework to apply.[45]

Although the plurality downplayed the importance of the direct evidence requirement,[46] Justice Kennedy's dissent clearly

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39. 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer to *fail or refuse to hire* . . . ." (emphasis added)). *See Price Waterhouse,* 490 U.S. at 240–41 (plurality opinion) ("The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*"); *see also* Dahl, *supra* note 11, at 881–82 (discussing the plurality's focus on causation).

40. *Price Waterhouse,* 490 U.S. at 250 (plurality opinion).

41. *Id.* at 259 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring).

42. *Id.* at 251 (plurality opinion).

43. *Id.* at 276 (O'Connor, J., concurring) (emphasis added).

44. *Id.* at 278 (O'Connor, J., concurring).

45. *Id.*

46. *Id.* at 250 n.13 (plurality opinion) ("After comparing this description of the plaintiff's proof to that offered by Justice O'Connor's opinion concurring in the judgment . . . we do not understand why the concurrence suggests they are meaningfully different from each other.").

viewed O'Connor's opinion as the rule of *Price Waterhouse*.[47] The direct evidence requirement became the subject of much commentary,[48] and many lower courts followed O'Connor's direct evidence requirement, viewing it as the narrowest grounds for the decision.[49]

The increased reliance on the direct evidence requirement, however, was problematic, because O'Connor did not define direct evidence. Instead, O'Connor only provided examples of what is *not* direct evidence, siding with the plurality in stating that "stray remarks in the workplace" would not satisfy the plaintiff's burden.[50] Additionally, "statements by nondecision-makers or statements by decision-makers unrelated to the decisional process itself" would not be considered direct evidence.[51] The lack of a definition for direct evidence caused confusion among the lower courts over when to apply *Price Waterhouse*.[52] The dissent foresaw this problem, predicting that "[c]ourts [would] also be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence."[53] Another concern with the reliance on direct evidence is that it is often hard to come by, because following the Civil Rights Act of 1964 employers have become increasingly covert about their discriminatory motives.[54]

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47. *Id.* at 280 (Kennedy, J., dissenting).

48. *See, e.g.,* Steven M. Tindall, Note, *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 (1996); Joseph J. Ward, Note, *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 (1997); Michael Zubrensky, *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 (1994); Dahl, *supra* note 11.

49. *See* Michael Abbott, Note*, A Swing and a Miss: The U.S. Supreme Court's Attempt to Resolve the Confusion over the Proper Evidentiary Burden for Employment Discrimination Litigation in* Costa v. Desert Palace, 30 J. CORP. L. 573, 578 (2005); Acocella, *supra* note 27, at 130.

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

51. *Id.*

52. *See infra* Part II.D.

53. *Price Waterhouse,* 490 U.S. at 291 (Kennedy, J., dissenting).

54. Tristin K. Green, Comment, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. REV. 983, 985 (1999).

C. Civil Rights Act of 1991

The Civil Rights Act of 1991[55] superceded much of the *Price Waterhouse* decision shortly after it was decided.[56] It is still important to understand *Price Waterhouse*, not only because Congress codified much of the Court's decision, but also because the 1991 Act still left many questions unanswered.[57] The Act codified *Price Waterhouse*'s allocation of the burdens of production and persuasion in mixed-motive cases.[58] The 1991 Act resolved one point of contention between the Justices: "[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."[59]

One major question that the 1991 Act left unanswered, however, was whether direct evidence is required to apply the mixed-motive framework. The Act itself makes no mention of the type of evidence required,[60] and the legislative history sheds little light on the matter.[61] Some have interpreted the absence of a reference to direct evidence to mean that "a plaintiff may rely on direct or circumstantial evidence of discriminatory intent under the

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55. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

56. Landgraf v. Usi Film Products, 511 U.S. 244, 251 (1994) ("[Section] 107 responds to *Price Waterhouse* . . . by setting forth standards applicable in "mixed motive" cases.").

57. *See* Acocella, *supra* note 27, at 131–33 ("[T]he 1991 Act did little to elucidate whether direct evidence was required in order for a plaintiff to obtain a mixed-motive jury instruction."); Green, *supra* note 54, at 993–96 ("[D]iffering interpretations of the 1991 Act's effect on individual disparate treatment jurisprudence illustrate the need for clarification about the appropriate framework and its relationship to the methods of proof.").

58. The complaining party has the initial burden of "demonstrating" that an illegitimate factor motivated the employment decision. 42 U.S.C. § 2000e-2(m) (2000). The burden then shifts to the respondent to "demonstrate" that he or she would have made the same decision in the absence of the illegitimate factor. 42 U.S.C. § 2000e-5(g)(2)(B). "The term 'demonstrates' means meets the burdens of production and persuasion." 42 U.S.C. § 2000e-2(m).

59. Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m).

60. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

61. Acocella, *supra* note 27, at 131–32 ("The history surrounding the 1991 Act is inconclusive as to whether Congress agreed or disagreed with the direct evidence requirement set forth in Justice O'Connor's *Price Waterhouse* opinion. The concept of direct evidence appears only once in the record of Senate hearings on this matter, in comments made by a Georgetown University law professor.").

Act."[62] Others believe that since Congress chose to codify much of *Price Waterhouse*, it implicitly intended to codify the direct evidence requirement as well.[63]

D. Problems Decoding the Direct Evidence Requirement

Justice Kennedy's assertion that courts would struggle with drawing the line between direct and indirect evidence turned out to be prophetic.[64] Federal circuit courts have split over what type of evidence is required under the mixed-motive framework,[65] and some courts—including the Alaska Supreme Court—have flip-flopped over whether direct evidence is necessary.[66]

Following *Price Waterhouse*, three basic approaches emerged with respect to the type of evidence required. Some circuits[67] and many state courts[68] initially adopted a requirement for direct evidence; some of these courts, however, adopted a non-literal definition of "direct evidence."[69] Other courts required what became known as "circumstantial-plus" evidence.[70] In

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62. Ward, *supra* note 48, at 646–47.

63. Acocella, *supra* note 27, at 132.

64. Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting).

65. *See* Zubrensky, *supra* note 48, at 970–80 (discussing the varying standards that emerged shortly after *Price Waterhouse*).

66. *See infra* Part III.

67. As of 1994, "[h]alf of the nation's circuit courts—the First, Fifth, Sixth, Seventh, Tenth, and Eleventh—impose[d] a direct evidence requirement on mixed-motive plaintiffs." Zubrensky, *supra* note 48, at 973. Many circuits later relaxed their standards, but there was considerable flip-flopping among the courts in the 1990s. *See* Ward, *supra* note 48, at 650–57. By 1997, the Second, Third, Fourth, Seventh, Eighth, Ninth, and Eleventh circuits had moved to a more relaxed standard, akin to the circumstantial-plus requirement. *Id.*

68. *See, e.g.*, Levy v. Comm'n on Human Rights & Opportunities, 646 A.2d 893, 896 n.6 (Conn. App. Ct. 1994) ("Our Supreme Court, in applying the *Price Waterhouse* analysis, has adopted the term 'direct evidence theory.' Accordingly, we use the term 'direct evidence theory' in the present case, in place of the term 'mixed motives' theory."); Chicago Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 47–48 (Ill. App. Ct. 2001) (requiring plaintiff-employees to present direct evidence in order to proceed under the mixed-motive framework); Appeal of Montplaisir, 787 A.2d 178, 181–82 (N.H. 2001) (using federal standards to evaluate a retaliation claim under state law and noting that the mixed-motive framework applies only when there is direct evidence of retaliation).

69. *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 204 (5th ed. 2000) (discussing circuits that expanded their definition of direct evidence).

70. *See* Zubrensky, *supra* note 48, at 976–78.

circumstantial-plus circuits, the courts required either direct evidence or "circumstantial evidence that is 'tied directly to the alleged discriminatory animus.'"[71] The evidence must "directly reflect" a discriminatory motive.[72] Like O'Connor in *Price Waterhouse*, the circumstantial-plus courts have largely defined the evidence requirement by stating what would not satisfy it, so there is still much uncertainty.[73]

The final approach courts adopted with respect to evidentiary requirements in mixed-motive cases was to allow any evidence that would persuade a jury—be it direct, indirect, circumstantial, or circumstantial-plus.[74] Rhode Island is unique in that it responded legislatively to the question of what evidentiary standard is required in mixed-motives cases.[75] Rhode Island decided to allow all types of evidence, stating that "[n]othing contained in this section shall be construed as requiring direct evidence of unlawful intent or as limiting the methods of proof of unlawful employment practices."[76]

E. The Death of the Direct Evidence Requirement

In the decade following *Price Waterhouse*, courts all over the country became hopelessly entangled in the quagmire of the direct evidence requirement, struggling with both its definition and whether it was actually required for the mixed-motive framework.[77]

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71. Fields v. New York State Office of Mental Retardation, 115 F.3d 116, 122 (2d Cir. 1997) (quoting Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992)). *But see* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1185 (2d Cir. 1992) ("When a case is submitted to a jury, and the jury then concludes that a preponderance of *all* of the evidence (of whatever kind) shows that age was a motivating factor in the employer's decision, that is enough for the jury to shift its glance to the employer and require it to prove its affirmative defense that the decision would have been the same regardless of [an impermissible factor]."). This is an example of how some circuits changed their evidentiary standards over time.

72. Hook v. Ernst & Young, 28 F.3d 366, 374 (3d Cir. 1994).

73. *Fields*, 115 F.3d at 122 ("[W]e have cautioned that purely statistical evidence would not warrant such a charge; nor would evidence merely of the plaintiff's qualification for and the availability of a given position; nor would 'stray' remarks in the workplace by persons who are not involved in the pertinent decision-making process."); *see also Hook,* 115 F.3d at 373–75.

74. *See Tyler*, 958 F.2d at 1183–85. However, the Second Circuit has since adopted a circumstantial-plus standard. *See supra* notes 70–72 and accompanying text.

75. R.I. GEN. LAWS § 28-5-7.3 (2006).

76. *Id.*

77. *See supra* Part II.D.

In 2003, the United States Supreme Court finally addressed the issue when it decided *Desert Palace, Inc. v. Costa*.[78] The Court unanimously held that a plaintiff need not present direct evidence of discrimination in order to fall within the mixed-motive framework under Title VII.[79] Justice O'Connor filed a brief concurrence, explicitly conceding that direct evidence is no longer required.[80] This united decision was surprising, given how the Court splintered in *Price Waterhouse*. The change can be explained by a single factor—the passage of the Civil Rights Act of 1991.[81]

The Court began its analysis with an examination of the language of the 1991 Act and its legislative intent.[82] The Court explained that the statute makes no mention of a direct evidence requirement.[83] Instead, the 1991 Act requires the plaintiff to "demonstrate" that an employer relied on illegitimate factors,[84] and "demonstrate" is defined only as "meet[ing] the burdens of production and persuasion."[85] The Court found that this definition "[left] little doubt that no special evidentiary showing is required."[86] Reasoning that if Congress had intended to require direct evidence it would have made that intent explicit, the Court found that "[i]ts failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances."[87]

The silence of the statute and legislative history with respect to the type of evidence required caused the Court to rely on conventional rules of civil litigation, and these rules allow plaintiffs to use direct *or* circumstantial evidence to prove their case.[88] "The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive

78. 539 U.S. 90 (2003).

79. *Id.* at 92.

80. *Id.* at 102 (O'Connor, J., concurring).

81. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

82. *Desert Palace*, 539 U.S. at 98.

83. *Id.* at 98–99.

84. *Id.* at 99.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 98–100.

than direct evidence.'"[89] The decision contains no "circumstantial-plus" language; it imposes no requirement that the circumstantial evidence be directly linked to a discriminatory attitude, and states only that "no heightened showing is required under § 2000e-2(m)."[90] Thus, a plaintiff is entitled to make use of the plaintiff-friendly mixed-motive framework if he or she presents circumstantial evidence of a discriminatory factor in a Title VII case.[91]

Although the Court in *Desert Palace* may have attempted to relieve the confusion that plagued the lower courts, the picture is still far from clear. Many commentators felt that *Desert Palace* sounded the death knell for *McDonnell Douglas* and *Price Waterhouse*.[92] Following *Price Waterhouse*, many courts had followed Justice O'Connor's logic that the difference between pretext and mixed-motive cases lied not in the number of motivating factors but in the type of evidence presented.[93] Prior to *Desert Palace*, if a plaintiff provided direct evidence (or circumstantial-plus evidence in many circuits)[94] the case proceeded under the mixed-motive framework. If a plaintiff failed to produce sufficiently strong evidence, the case still proceeded, but under the more defendant-favorable *McDonnell Douglas-Burdine* framework. Thus, when *Desert Palace* eliminated the direct evidence requirement, many saw this as also eliminating the distinction between pretext and mixed-motive cases.[95] Assuming that most plaintiffs will proceed under the mixed-motive framework, there is little work left to be done by *McDonnell Douglas-Burdine*.[96]

Despite all the commentary casting doubt on the usefulness of *McDonnell Douglas*, the United States Supreme Court continues to utilize it in non-Title VII contexts, such as in cases brought under the Americans with Disabilities Act (ADA)[97] and the Age

89. *Id.* at 100 (quoting Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)).

90. *Id.* at 101.

91. *Id.* 100–01.

92. *See, e.g.,* Acocella, *supra* note 27, at 140.

93. Abbott, *supra* note 49, at 578.

94. *See supra* notes 70–73 and accompanying text.

95. Abbott, *supra* note 49, at 586 ("Kelly Pierce posits that the elimination of the direct evidence requirement will result in a merger of single and mixed motive cases.").

96. *See* Zimmer, *supra* note 69, at 194.

97. Raytheon Co. v. Hernandez, 540 U.S. 44, 51–53 (2003).

Discrimination in Employment Act of 1967 (ADEA).[98] *Desert Palace* has also been read narrowly by some courts as a holding "specifically directed to *statutorily-based, post-trial jury instructions in a Title VII mixed-motive case*."[99] "[A] plain reading of Desert Palace indicates a very narrow and focused holding, not a broad, sweeping one with instructions that its holding should be applied generally to all employment cases."[100] Additionally, some states have even refused to follow *Desert Palace* on state law grounds.[101]

Those states and circuits that required direct evidence were naturally expected to feel the most substantial impact from the Court's decision in *Desert Palace*.[102] If the abolition of the direct evidence requirement was to result in an increase in frivolous litigation as some predicted,[103] the courts in direct evidence jurisdictions would experience the greatest surge. It is unlikely that those states and circuits that had already moved to circumstantial or circumstantial-plus evidence would experience the same increase, because mixed-motive cases were already being heard in the absence of direct evidence. Although *Desert Palace* made it clear that direct evidence was not required, it did not address the "circumstantial-plus" standard required by many circuits. The language of the decision, however, suggests that the circumstantial-plus standard imposes a higher evidentiary burden than is required by Title VII. The Court stated that "no heightened showing is required under § 2000e-2(m)."[104] In contrast, the circumstantial-plus jurisdictions required the evidence to be "tied directly to the

98. Helfrich v. Lehigh Valley Hosp., No. 03-cv-05793, 2005 U.S. Dist. LEXIS 14792, at *17–*18 (E.D. Pa. July 21, 2005).

99. *Id.* at *2 n.1.

100. *Id.* at *20.

101. *See* Millner v. DTE Energy Co., 285 F. Supp. 2d 950, 967 n.18 (E.D. Mich. 2003) ("Michigan courts continue to require that mixed motive cases under the Elliott-Larsen Civil Rights Act be established by direct evidence."); Rubel v. Century Bancshares, Inc., No. 02-482(MJD/JGL), 2004 WL 114942, at *8 (D. Minn. Jan. 8, 2004) ("The *Desert Palace* decision has not been adopted by the Minnesota Supreme Court, and does not alter the analysis under the [Minnesota Human Rights Act].").

102. *See* Brian M. Peterson, *Mixed-Motive Cases After* Desert Palace Inc. v. Costa, LAWMEMO, http://www.lawmemo.com/articles/costa.htm (last visited Oct. 29, 2007).

103. Abbott, *supra* note 49, at 585 ("[T]he abolition of the direct evidence requirement will 'shift the balance of Title VII litigation' and burden employers with frivolous litigation.").

104. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003).

alleged discriminatory animus."[105] How and if these circuits will reformulate their evidentiary standards is still unclear.

III. ALASKA'S MIXED-MOTIVE CASE LAW

Alaska mixed-motive cases arise in a number of different contexts: the Alaska Human Rights Act (AHRA),[106] Title VII,[107] and common law retaliation actions.[108] Due to the differences in the causes of action under which mixed-motive cases arise in Alaska state courts, it may not be surprising that the Alaska Supreme Court has not established a single consistent evidentiary standard for mixed-motive cases. At times, the court has required plaintiffs to offer direct evidence to establish a mixed-motive cause of action.[109] In other instances, the court has required circumstantial-plus evidence.[110] In still other cases, the court has fashioned its own requirement.[111]

What is surprising, however, is that the inconsistent evidentiary standards cannot be explained solely by the fact that the mixed-motive cases arise under different laws. The supreme court has not held that one evidentiary standard applies to Title VII cases, another applies to AHRA cases, and yet another applies to common law torts. To the contrary, the court has applied varying evidentiary standards even though it has tended to treat all mixed-motive employment discrimination claims as one body of law. For example, it has cited to and followed logic from AHRA cases in common law retaliation cases[112] and relied on federal Title VII law in deciding a mixed-motive suit brought under state law.[113]

This Part examines the chronological development of mixed-motive case law in the Alaska Supreme Court, points out the court's tendency to treat the mixed-motive case law as one body of

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105. Fields v. New York State Office of Mental Retardation, No. 96-7523, 1997 U.S. App. LEXIS 19794, at *28 (2d Cir. 1997) (quoting Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992)).

106. *See* Era Aviation, Inc. v. Lindfors, 17 P.3d 40 (Alaska 2001); VECO, Inc. v. Rosebrock, 970 P.2d 906, (Alaska 1999).

107. *See* Sengupta v. Univ. of Alaska, 21 P.3d 1240 (Alaska 2001).

108. *See* Reust v. Alaska Petroleum Contractors, Inc., 127 P.3d 807 (Alaska 2005); Kinzel v. Discovery Drilling, 93 P.3d 427 (Alaska 2004).

109. *E.g.*, *Era Aviation*, 17 P.3d at 43–44.

110. *E.g.*, *Sengupta*, 21 P.3d at 1258.

111. Mahan v. Arctic Catering, Inc., 133 P.3d 655, 662 (Alaska 2006) (requiring "either direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof").

112. *See Reust*, 127 P.3d 807; *see also Kinzel*, 93 P.3d 427.

113. *See Sengupta*, 21 P.3d 1240.

law, and highlights the court's vacillation between a direct evidence and circumstantial-plus standard within that body of law. The conclusion that follows from this summary is that Alaska should adopt an internally consistent standard in order to promote consistent outcomes in mixed-motive cases. The next Part suggests that the appropriate standard for Alaska to adopt is the rationale of *Desert Palace*.

A. In Support of Direct Evidence: *VECO, Inc. v. Rosebrock* and *Era Aviation, Inc. v. Lindfors*

The Alaska Supreme Court decided a handful of mixed-motive cases prior to the *Desert Palace* decision,[114] although all these cases were decided after the passage of the Civil Rights Act of 1991.[115] Two of the three pre-*Desert Palace* cases clearly required direct evidence in order to make use of the mixed-motive framework.[116] This is perhaps unremarkable given the fact that many state courts initially adopted a direct evidence requirement.[117] However, before the Alaska Supreme Court decided its first mixed-motive case, the Ninth Circuit had already moved to a more relaxed standard, akin to the circumstantial-plus requirement.[118] Nevertheless, the Alaska Supreme Court opted to require direct evidence in *VECO* and *Era Aviation*, the first two mixed-motive cases that the court heard.

In 1991, Rosebrock was laid off from her job at VECO after approximately seven months of employment.[119] Rosebrock claimed

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114. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

115. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

116. *See* Era Aviation, Inc. v. Lindfors, 17 P.3d 40 (Alaska 2001); *see also* VECO, Inc. v. Rosebrock, 970 P.2d 906 (Alaska 1999).

117. *See, e.g.*, Levy v. Comm'n on Human Rights & Opportunities, 646 A.2d 893, 896 n.6 (Conn. App. Ct. 1994) ("Our Supreme Court, in applying the *Price Waterhouse* analysis, has adopted the term 'direct evidence theory.' Accordingly, we use the term 'direct evidence theory' in the present case, in place of the term 'mixed motives' theory."); Chicago Hous. Auth. v. Human Rights Comm'n, 759 N.E.2d 37, 47–48 (Ill. App. Ct. 2001) (requiring plaintiff-employees to present direct evidence in order to proceed under the mixed motive framework); Appeal of Montplaisir, 787 A.2d 178, 181–82 (N.H. 2001) (using federal standards to evaluate a retaliation claim under state law and noting that the mixed motive framework applies only when there is direct evidence of retaliation).

118. *See* Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104 (9th Cir. 1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Dominguez-Curry v. Nevada Transp. Dept., 424 F.3d 1027, 1042 (9th Cir. 2005); Ward, *supra* note 48, at 656.

119. *VECO*, 970 P.2d at 908.

that during the course of her employment, she was sexually harassed and was sexually assaulted by one of her coworkers.[120] She also claimed that she was wrongfully terminated after reporting the assault to her supervisor.[121] A jury agreed that Rosebrock had been wrongfully terminated, and VECO appealed.[122]

One of the issues raised on appeal was whether the superior court had properly instructed the jury on mixed-motives in a wrongful termination case.[123] Wrongful termination cases are brought under a section of the AHRA which makes it "unlawful for . . . an employer . . . to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200–18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter."[124]

VECO claimed the mixed-motives framework did not apply to cases brought under this section of the AHRA, but the supreme court rejected that contention.[125] Relying on the logic of *Price Waterhouse*, the Alaska Supreme Court reasoned that the term "because of" in Alaska's wrongful termination statute did not mean "solely because of."[126] Thus, the court held that a wrongful termination claim could be based on mixed-motives because "[r]equiring plaintiffs . . . to prove that their termination was caused solely by their protected actions would unnecessarily restrict the term 'because,' and would hinder achieving the purpose of . . . eradicating discrimination."[127]

The court also relied on *Price Waterhouse* in holding that Rosebrock did not need to choose between a pretext and a mixed-motive claim.[128] In allowing Rosebrock to pursue both theories, the Alaska Supreme Court made it clear that the framework that would ultimately be applied depended on the type of evidence offered by the plaintiff. "If the jury finds there is direct evidence . . . it will apply the mixed-motive framework. However,

120. *Id.*
121. *Id.*
122. *Id.* at 909.
123. *Id.* at 920–21.
124. ALASKA STAT. § 18.80.220(a)(4) (2006); s*ee also VECO*, 970 P.2d at 920.
125. *VECO*, 970 P.2d at 920.
126. *Id.*
127. *Id.*
128. *Id.* at 920–21.

if the jury does not find direct evidence, the plaintiff can still prevail by using the pretextual framework."[129]

The next year, in *Era Aviation, Inc. v. Lindfors*,[130] the Alaska Supreme Court reiterated the direct evidence requirement. Lindfors claimed, and the jury agreed, that she had been discriminated against because she was a female and that Era Aviation had passed her over for sixteen promotions or upgrades because of her sex.[131] As in *VECO*, Lindfors' claim was brought under a provision of the AHRA; here, the relevant provision makes it "unlawful for . . . an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's . . . sex . . . ."[132]

Era Aviation appealed, claiming that the superior court had erred when it gave a jury instruction that stated, "Ms. Lindfors must prove that it is more likely than not true . . . [t]hat ERA intentionally relied upon her sex as a factor in [the employment decision] . . . [and] Ms. Lindfors may prove her claim . . . by direct or indirect evidence."[133] Although the supreme court ultimately found that the error in instructing the jury was harmless,[134] the court discussed the evidentiary requirements for pretext and mixed-motive cases. Relying on *VECO* and *Price Waterhouse*, the court stated that "[u]nder the mixed-motive framework, once the plaintiff has cleared the initial hurdle of presenting direct evidence of discriminatory intent, the plaintiff's ultimate burden of proof is somewhat relaxed . . . ."[135] After clearing this hurdle, the burden shifts to the employer to show that it would have made the same decision.[136] "[I]f the jury finds no direct evidence of discrimination, it must find the defendant liable, if at all, under a pretext framework."[137] The disputed jury instructions shed some light on what Alaska courts considered to be direct evidence: "Direct evidence would include oral or written statements showing a discriminatory motive for ERA's [employment decision]. Indirect evidence would include proof of a set of circumstances that would

129. *Id.* at 921.
130. 17 P.3d 40 (Alaska 2000).
131. *Id.* at 42–43.
132. ALASKA STAT. § 18.80.220(a)(1) (2006) (emphasis added).
133. *Era Aviation*, 17 P.3d at 43 n.5.
134. *Id.* at 43–45.
135. *Id.* at 44.
136. *Id.*
137. *Id.*

allow one to reasonably believe that sex was a motive in ERA's [decision]."[138]

Following *VECO* and *Era Aviation*, the mixed-motive and pretext frameworks existed side-by-side in Alaska, much as Justice O'Connor's concurrence in *Price Waterhouse* had envisioned.[139] Although the court relied on the *Price Waterhouse* decision in both cases, it failed to acknowledge the confusion that had arisen in the wake of that case.[140] Therefore, the court blindly accepted what it saw as the holding in *Price Waterhouse* without evaluating what evidentiary requirement should properly apply in a mixed motive case.

B. Relaxing the Standard: *Sengupta v. University of Alaska and Kinzel v. Discovery Drilling, Inc.*

VECO and *Era Aviation* both involved discrimination claims brought under the AHRA, which mirrors Title VII.[141] In *Sengupta v. University of Alaska*,[142] the Alaska Supreme Court considered a Title VII case and came to a different conclusion about the appropriate evidentiary standard for mixed-motive cases. This time, rather than requiring direct evidence, the court expressed a "circumstantial-plus" standard.[143]

Dr. Sengupta, a professor of Indian decent, was employed by the University of Alaska Fairbanks (UAF) between 1990 and 1995.[144] During this time, Sengupta brought several grievances because he felt his salary should be higher, and he believed he had been passed over for two positions.[145] At a hearing concerning these grievances, the presiding officer "found that Sengupta had demeaned, degraded, and abused his colleagues; intentionally misrepresented his academic degrees; repeatedly dealt with his colleagues and the University in a dishonest manner; testified falsely under oath multiple times during the hearing; created and introduced false documents; and committed plagiarism . . . ."[146] These findings later became the basis for Sengupta's termination,

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138. *Id.* at 43 n.5.

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

140. *See supra* Part II.B.

141. *See Era Aviation*, 17 P.3d at 43. For further analysis of the relation between the AHRA and Title VII, see *infra* text accompanying notes 205–09.

142. 21 P.3d 1240 (Alaska 2001).

143. *See id.* at 1258.

144. *Id.* at 1245.

145. *Id.* at 1245–46.

146. *Id.* at 1246.

and, in response, Sengupta alleged that he was wrongfully terminated.[147] He brought claims under 42 U.S.C. § 1981[148] and Title VII, claiming he had been discriminated against on the basis of his "race, national origin, or prior EEOC activity."[149] UAF prevailed on a motion for summary judgment, and Sengupta appealed.[150]

The Alaska Supreme Court recognized the confusion that had emerged over the evidentiary requirements in mixed-motive cases following *Price Waterhouse*,[151] but the opinion failed to cite to the court's own precedent in *VECO* and *Era Aviation*.[152] Although *VECO* and *Era Aviation* were based on Alaska law rather than Title VII, they could have been used as analogous support in the *Sengupta* analysis, since in the past the court had purported to follow "decisions under Title VII in interpreting Alaska's anti-discrimination laws, and [had], in large part, endorsed the federal approach to analyzing claims of disparate treatment."[153] In the alternative, the court could have distinguished *VECO* and *Era Aviation* as having been decided under state law instead of Title VII, but the opinion simply makes no mention of these two prior mixed-motive cases.[154]

Instead of relying on its mixed-motive precedent, the court turned to previous decisions arising out of the pretext framework. The court stated: "We have permitted the use of circumstantial evidence in pretext cases and we now hold that a plaintiff may sustain his threshold burden for a mixed-motive claim by presenting circumstantial evidence, as long as this evidence is directly linked to the alleged discriminatory attitude."[155] This analysis (drawing the evidentiary standard for mixed-motive cases from pretext cases)[156] is also perplexing, given that, in *VECO* and *Era Aviation*, the court seemed concerned with drawing a

147. *Id.* at 1246–47.

148. 42 U.S.C. § 1981 (2000).

149. *Sengupta*, 21 P.3d at 1257.

150. *Id.*

151. *Id.* at 1257–58.

152. *Id.* at 1240.

153. Era Aviation v. Lindfors, 17 P.3d 40, 43 (Alaska 2002).

154. *See Sengupta*, 21 P.3d 1240.

155. *Id.* at 1258. Interestingly, the pretext case the court cites to support this proposition was a case brought under Alaska's Civil Rights statute, not Title VII. This suggests that the court could have relied on *VECO* and *Era Aviation* in its analysis in this case.

156. *See supra* Part II.A.

distinction between the mixed-motive and pretext cases.[157] A slight distinction remained: the pretext cases permitted the use of circumstantial evidence, while the mixed-motive framework required circumstantial-plus evidence.[158] What constitutes evidence "directly linked to the alleged discriminatory attitude" was left largely undefined by the court, but "[a] plaintiff cannot meet the threshold burden for a prima facie case through circumstantial evidence connected to decision makers only through a series of inferences based on other inferences."[159] An example of permissible circumstantial-plus evidence given by the court is "evidence of racial or national origin animus such as derogatory remarks about employees from India."[160] This is a much more relaxed standard than the direct evidence requirements of *VECO* and *Era Aviation*.

In *Kinzel v. Discovery Drilling*,[161] where the claim was in common law tort, the court backtracked slightly. It recognized the direct evidence requirement but adopted a broader definition of direct evidence. Interestingly, the court made no reference to its earlier decision in *Sengupta*. However, the ultimate result is similar to that of *Sengupta* because the court aligned itself with the Second Circuit—a "circumstantial-plus" circuit.[162]

Kinzel's job involved digging trenches with a backhoe, but worksite conditions were very poor, and Kinzel filed a complaint with the Alaska Department of Labor, Division of Occupational Safety and Health (OSH).[163] Shortly thereafter, Kinzel was reassigned to a different job and injured his back.[164] Kinzel was subsequently terminated, and he filed suit against Discovery Drilling claiming that he was wrongfully terminated for filing an OSH complaint.[165] Discovery Drilling claimed that Kinzel was fired

157. *E.g.*, *Era Aviation*, 17 P.3d at 45 (noting the supreme court's inclination to adopt the distinction between mixed-motive and pretext cases utilized by federal courts).

158. Evidence that is directly linked to the alleged discriminatory attitude has been characterized as "circumstantial-plus" evidence. *See* Hook v. Ernst & Young, 28 F.3d 366, 374 (3d Cir. 1994).

159. *Sengupta*, 21 P.3d at 1258 (quoting the superior court).

160. *Id.* (quoting the superior court).

161. 93 P.3d 427 (Alaska 2004).

162. *Id.* at 434–35.

163. *Id.* at 430–31.

164. *Id.* at 431.

165. *Id.*

because he lied about his back injury.[166] The jury found for Discovery Drilling, and Kinzel appealed.[167]

In analyzing whether the superior court should have given a mixed-motive instruction, the supreme court began with the language of *Era Aviation*.[168] In contrast to *Sengupta*, the court reverted to its original position that "there must be 'direct evidence' that the employer's conduct was motivated, at least in part, by a prohibited reason."[169] The court then attempted to define "direct evidence."[170] Recognizing the difficulty of obtaining strictly direct evidence, the court decided to align itself with the Second Circuit, which had adopted a broader definition of direct evidence.[171] "The Second Circuit takes the position that a plaintiff may prove that a forbidden animus was a motivating factor through either direct or circumstantial evidence so long as the circumstantial evidence is sufficiently strong."[172] An example of the type of evidence allowed by the Second Circuit's approach is "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude."[173] This type of evidence is properly viewed as "circumstantial-plus" evidence, because it requires the evidence to be "sufficiently strong" and to be directly linked to the discriminatory animus.

C. Raising the Evidentiary Bar: *Reust v. Alaska Petroleum Contractors, Inc.* and *Mahan v. Arctic Catering, Inc.*

Taken together, *Sengupta* and *Kinzel* suggested that the Alaska Supreme Court was moving toward a more relaxed evidentiary standard for mixed-motive litigation. The year after *Kinzel* was decided, however, the court appeared to retreat from the broader interpretation of *Kinzel* and revert to the direct evidence requirement.[174] The court cited to *Kinzel* a number of

166. *Id.*

167. *Id.* at 432.

168. *Id.* at 434.

169. *Id.*

170. *Id.*

171. *Id.* ("The Second Circuit has observed that 'direct' should not be understood 'in its sense as an antonym of "circumstantial," for that type of "direct" evidence as to a mental state is usually impossible to obtain.'" (quoting Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 181 (2d Cir. 1992))).

172. *Id.*

173. *Id.* at 435 (quoting *Ostrowski*, 968 F.2d at 182).

174. *See* Reust v. Alaska Petroleum Contractors, Inc., 127 P.3d 807, 815–16 (Alaska 2005).

times throughout its *Reust* decision,[175] yet the term "circumstantial evidence" never appeared in the opinion. In *Mahan*, the court purported to apply *Kinzel's* relaxed definition of direct evidence while subtly edging the evidentiary requirement back toward a stricter standard.[176]

Reust testified that he was offered a job with Alaska Petroleum Contractors (APC), but before starting he was wrongfully terminated "due to his participation in previous litigation between APC and another former employee."[177] APC argued that Reust was never actually hired, but the jury ultimately sided with Reust.[178] On appeal, APC challenged the mixed-motive instruction given to the jury.[179]

The Alaska Supreme Court started its analysis by stating, "[u]nder Alaska law, retaliatory discharge claims can follow different analytical frameworks depending on the type of evidence presented. When there is *no* 'direct evidence' of retaliation, a pretext framework is used."[180] In contrast, when direct evidence is presented, the mixed-motive framework is applied.[181] The definition of direct evidence from *Kinzel* was relegated to a footnote, with specific reference to circumstantial evidence conspicuously absent.[182] The language included states that direct evidence must directly reflect discriminatory attitudes.[183] Although the opinion implicitly approves of *Kinzel*, it also cites to the earlier cases of *VECO* and *Era Aviation*, both of which imposed the stricter standard of direct evidence.[184] Requiring a plaintiff to clear

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175. *Reust* was a wrongful discharge tort case, in which the court established the public policy rationale of protecting witnesses from retaliation by citing to various Alaska statutes, "including the Alaska Occupations Safety and Health Act, the Alaska Human Rights Law, and the Alaska Assisted Living Homes Act." *Id.* at 812–13 (footnotes omitted).

176. *See* Mahan v. Arctic Catering, Inc., 133 P.3d 655, 662 (Alaska 2006) (stating that circumstantial evidence may be used, but it must be "strong enough to be functionally equivalent to direct proof").

177. *Reust*, 127 P.3d at 810.

178. *Id.*

179. *Id.* at 815.

180. *Id.*

181. *Id.*

182. *Id.* at 815 n.23. Absent from the footnote is *Kinzel*'s summary of the Second Circuit's position (with which *Kinzel* aligns) stating that "a plaintiff may prove . . . forbidden animus . . . through . . . circumstantial evidence so long as the circumstantial evidence is sufficiently strong." Kinzel v. Discovery Drilling, 93 P.3d 427, 434 (Alaska 2004).

183. *Reust*, 127 P.3d at 815 n.23.

184. *See supra* Part III.A.

the initial hurdle of producing direct evidence in order to access the mixed-motive framework is largely reminiscent of *Era Aviation*.

In *Mahan v. Arctic Catering, Inc.*,[185] the court was given yet another opportunity to resolve the subtle conflicts in the case law. Mahan claimed that she was wrongfully terminated in retaliation for complaining about her supervisor's sexual advances.[186] Arctic Catering maintained that Mahan was fired for poor performance.[187] The superior court dismissed Mahan's claim because Mahan failed to establish a prima facie case, and Mahan appealed.[188]

In its analysis, the supreme court reiterated that "mixed-motive cases require the plaintiff to 'clear the initial hurdle of presenting direct evidence of discriminatory intent.'"[189] The court characterized its holding in *Kinzel* as requiring "either direct evidence of prohibited motivation or circumstantial evidence strong enough to be *functionally equivalent* to direct proof."[190] The court failed to explain, however, how to distinguish direct evidence from circumstantial evidence that is the functional equivalent of direct proof. Indeed, "functional equivalent of direct proof" suggests that the two types of proof may actually merge. Requiring the evidence to be "akin to direct proof"[191] nudges the evidentiary requirement toward a strict definition of direct proof and away from the "circumstantial-plus" standard elucidated by the Second Circuit (and purportedly adopted by the Alaska Supreme Court in *Kinzel*). Although *Mahan* does not claim to depart from *Kinzel* in any way, its language is original and implicitly imparts a stricter standard.

D. Alaska's Mixed-Motive Case Law Is Internally Inconsistent

Admittedly, the inconsistencies between the above cases are subtle, but they are very real. The Alaska Supreme Court's failure to reconcile conflicting standards leaves plaintiffs in a precarious position, unaware of what type of evidence will allow them to make use of the plaintiff-friendly mixed-motive framework. *VECO* and *Era Aviation* represent the strictest standard, requiring direct evidence.[192] These cases have not been overruled and are still cited

185. 133 P.3d 655 (Alaska 2006).
186. *Id.* at 660.
187. *Id.* at 657, 661.
188. *Id.* at 658.
189. *Id.* at 662 (quoting Era Aviation v. Lindfors, 17 P.3d 40, 44 (Alaska 2000)).
190. *Id.* (emphasis added).
191. *Id.* at 663.
192. *See supra* Part III.A.

to with approval.[193] While *Sengupta* and *Kinzel* moved toward the "circumstantial-plus" standard,[194] the court subtly recast the requirements of *Kinzel* in *Reust* and *Mahan*, tightening the evidentiary requirement again.[195] Part IV will argue that the most appropriate solution to this ambiguity would be to follow *Desert Palace* and abandon all heightened evidentiary requirements. However, if Alaska courts wish to retain and reconcile the above cases, they should do so explicitly so that plaintiffs may know what is required of them.

Kinzel took steps towards reconciling the cases but was undermined by the subsequent cases of *Reust* and *Mahan*. The Alaska Supreme Court could reconcile the existing cases under the logic of *Kinzel*, because *Kinzel* retains the direct evidence requirement of *VECO* and *Era Aviation* while loosening the standard of what amounts to "direct evidence."[196] How to define direct evidence is not entirely clear, and the Alaska Supreme Court must decide whether it wants to adopt the looser circumstantial-plus standard or require something stronger—something "akin to direct proof."[197] Alaska courts would be wise to follow the circumstantial-plus standard, given the United States Supreme Court's decision in *Desert Palace*.[198] However, even this lowered evidentiary requirement is higher than that required by the *Desert Palace* decision.[199]

Regardless of how Alaska courts decide to reconcile the mixed-motive cases, they should clearly state the evidentiary requirement and, if necessary, distinguish the existing cases. The mixed-motive case law is problematic, because the court has failed to explicitly acknowledge when it has departed from precedent or established a new standard. In each mixed-motive case, the Alaska Supreme Court has acted as if it were following a well-worn path when it was really expanding the width of the road upon which it traveled.

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193. *See, e.g.*, *Mahan,* 133 P.3d at 662.

194. *See supra* Part III.B.

195. *See supra* Part III.C.

196. *See* Kinzel v. Discovery Drilling, 93 P.3d 427, 434–35 (Alaska 2004).

197. *Mahan*, 133 P.3d at 665.

198. *See generally supra* Part II.E.

199. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) ("[N]o heightened showing is required under § 2000e-2(m).").

IV. ALASKA CASE LAW IN RELATION TO FEDERAL LAW

The preceding Part suggested that the mixed-motive case law in Alaska is internally inconsistent. While the internal variations of Alaska case law are shades of gray, the difference between Alaska law and federal case law is black and white: *Desert Palace* abrogated the direct evidence requirement in mixed-motive cases,[200] yet the Alaska Supreme Court continues to insist on its use.[201] Alaska case law thus requires plaintiffs to meet a higher evidentiary standard than is required by federal case law. This Part suggests that Alaska should follow the changing federal tide and abandon its reliance on the direct evidence requirement.

A. Alaska's Mixed-Motive Case Law Was Initially Consistent with the Federal Case Law

In general, Alaska mixed-motive case law has followed federal precedent. Alaska courts initially adopted "the distinction between 'pretext' and 'mixed-motive' cases . . . from the federal courts."[202] The Alaska Supreme Court also aligned itself with federal case law in holding that a plaintiff may simultaneously pursue pretext and mixed-motive claims.[203] *Price Waterhouse* explicitly stated that "[n]othing in this opinion should be taken to suggest that a case must be correctly labeled as either a 'pretext' case or a 'mixed-motives' case from the beginning . . . [;] we expect that plaintiffs often will allege . . . that their cases are both."[204]

Much of the reason why state law has so closely followed federal law in the mixed-motive context is because the statute under which many state-law employment discrimination cases are brought, the AHRA,[205] "mirrors" Title VII.[206] The similarity between the two statutes is apparent, as they contain nearly identical language. Title VII makes it unlawful "for an employer . . . 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

200. *Id.* at 92.

201. *See supra* Part III.C.

202. Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 43–45 (Alaska 2000).

203. VECO, Inc. v. Rosebrock, 970 P.2d 906, 920–21 (Alaska 1999).

204. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989) (plurality opinion).

205. ALASKA STAT. § 18.80.220 (2006).

206. *Era Aviation*, 17 P.3d at 43.

origin."[207] The AHRA similarly makes it "unlawful for . . . an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin."[208] Given this striking similarity, it is not surprising that Alaska courts "look to decisions under Title VII in interpreting Alaska's anti-discrimination laws, and have, in large part, endorsed the federal approach to analyzing claims of disparate treatment."[209]

Accordingly, Alaska cases decided in the years before *Desert Palace* were basically in step with the generally accepted interpretation of the federal case law. Instead of classifying cases as either mixed-motive or pretext based on whether a discriminatory factor was *a* motive or *the* motive, many courts followed *Price Waterhouse* and looked at the type of evidence presented by the plaintiff to determine where to draw the line between mixed-motive and pretext cases.[210] Initially, at least half of the circuits required direct evidence to merit the application of the mixed-motive framework.[211] In requiring direct evidence, *VECO* and *Era Aviation* reflected this trend.[212] As federal circuit courts moved toward a circumstantial-plus standard, [213] the Alaska Supreme Court did so as well in *Sengupta*.[214]

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207. 42 U.S.C. § 2000e-2(a)(1) (2000).

208. ALASKA STAT. § 18.80.220(a). The Alaska Human Rights Act contains additional unlawful factors that are not included in Title VII. Many of the factors added to the Alaska statute are covered by other federal statutes. For example, the Alaska statute includes age and disabilities in its list of unlawful factors. *Id.* In the federal framework, these factors are not included in the language of Title VII because they are covered by the ADA and ADEA. *See* 42 U.S.C. § 2000e-2(a)(1).

209. *Era Aviation,* 17 P.3d at 43 (citations omitted).

210. O'Connor's concurrence suggested that the real difference between pretext and mixed-motive cases was the type of evidence required. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring); *see also supra* notes 40–44. O'Connor's concurrence was adopted as the rule of *Price Waterhouse* by many courts. Abbott, *supra* note 49, at 578.

211. *See supra* note 67 and accompanying text.

212. *See supra* note 67 and accompanying text*; see also supra* Part III.A.

213. *See supra* Part II.D.

214. Sengupta v. Univ. of Alaska, 21 P.3d 1240, 1258 (Alaska 2001).

B. Recent Alaska Case Law Has Failed to Follow the Federal Law

After *Desert Palace*, Alaska's mixed-motive case law diverged from the federal decisions in Title VII cases. *Kinzel*, *Reust*, and *Mahan* were all decided after *Desert Palace*, yet none of them even mentioned that case.[215] *Kinzel* (decided an entire year after *Desert Palace*) discusses how courts have struggled with the meaning of the term "direct evidence" in the wake of *Price Waterhouse*,[216] but fails to recognize that the outcome of that struggle was of little consequence since direct evidence was no longer required under Title VII. Even though *Kinzel* broadened the definition of direct evidence,[217] the court still imposed a higher evidentiary burden than was required under the federal case law.[218]

A failure to acknowledge the undoing of the direct evidence requirement continued in *Reust*, which called for different frameworks to be applied depending on whether the evidence was direct or circumstantial.[219] *Mahan* represents the supreme court's most blatant failure to recognize *Desert Palace*: "Under federal case law, mixed-motive cases require the plaintiff to 'clear the initial hurdle of presenting direct evidence of discriminatory intent.'"[220] While this statement may still be true in non-Title VII cases, it is clearly false in the Title VII context after *Desert Palace*.[221] The supreme court in *Mahan* goes on to reiterate this inaccurate assertion, stating, "In *Kinzel v. Discovery Drilling*, we declined to strictly apply the federal 'direct evidence' requirement."[222] Yet the direct evidence requirement in Title VII mixed-motive cases had already been abandoned prior to *Kinzel*.[223] The language of *Mahan* also covertly ratcheted up the evidentiary burden in a mixed-motive case, requiring direct evidence or its

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215. *See* Mahan v. Arctic Catering, Inc., 133 P.3d 655 (Alaska 2006); Reust v. Alaska Petroleum Contractors, Inc., 127 P.3d 807 (Alaska 2005); Kinzel v. Discovery Drilling, 93 P.3d 427 (Alaska 2004).

216. *Kinzel*, 93 P.3d at 434 ("The term 'direct evidence' in the context of the mixed-motive methodology comes from the decision of the United States Supreme Court in *Price Waterhouse v. Hopkins.* Courts subsequent to *Price Waterhouse* have struggled with the meaning of the term 'direct.'").

217. *Id.* at 434–35.

218. *Id.*

219. *Reust*, 127 P.3d at 815.

220. *Mahan*, 133 P.3d at 662 (quoting Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 44 (Alaska 2001)).

221. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).

222. *Mahan,* 133 P.3d at 662.

223. *See supra* note 82–87.

functional equivalent.[224] Thus, this decision moved Alaska case law even further from its federal counterpart.

C. Alaska Should Recognize the Change Heralded by *Desert Palace*

It is unclear why the Alaska Supreme Court has failed to recognize the change made by *Desert Palace*. One potential explanation is that the court has not encountered a Title VII case post-*Desert Palace*—*Kinzel*, *Reust*, and *Mahan* were all decided under state law, not Title VII. Because the *Desert Palace* holding is limited to Title VII cases, the Alaska Supreme Court was not obligated to follow it in any of the recent mixed-motive decisions.[225] This explanation is unsatisfactory, however, because Alaska's civil rights legislation was modeled after Title VII, and the supreme court has expressed its intent to follow Title VII cases in interpreting Alaska's anti-discrimination laws.[226] While Alaska could choose to decline to follow *Desert Palace* on state law grounds,[227] it has not yet decided to do so.

What is clear is that the Alaska Supreme Court should finally recognize *Desert Palace* and abandon the direct evidence requirement in its own mixed-motive jurisprudence. A number of legal and policy reasons justify such a move. First, the supreme court should adopt the *Desert Palace* standard to ensure that what the court says and what it does are consistent. Indeed, the supreme court continues to indicate that it is following the federal mixed-motive case law.[228] But it has patently ignored the most recent, and thus most important, federal case on point. If Alaska intends to follow the lead of federal courts, it should acknowledge the impact of *Desert Palace* and abandon its reliance on direct evidence.

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224. *See Mahan*, 133 P.3d at 663.

225. *See* Millner v. DTE Energy Co., 285 F. Supp. 2d 950, 967 n.18 (E.D. Mich. 2003) ("Michigan courts continue to require that mixed motive cases under the Elliott-Larsen Civil Rights Act be established by direct evidence."); Rubel v. Century Bancshares, Inc., No. 02-482(MJD/JGL), 2004 WL 114942, at *8 (D. Minn. Jan. 8, 2004) ("The *Desert Palace* decision has not been adopted by the Minnesota Supreme Court, and does not alter the analysis under the [Minnesota Human Rights Act].").

226. Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 43 (Alaska 2000); *Millner*, 285 F. Supp. 2d at 967 n.18.

227. *Cf. Rubel*, 2004 WL 114942, at *8; *see supra* 225 and accompanying text (listing other states that have declined to follow *Desert Palace* on state law grounds).

228. *See Mahan*, 133 P.3d at 662.

Second, it is contrary to the goals and purposes of the AHRA to continue to require that plaintiffs satisfy the more stringent direct evidence requirement or its functional equivalent,[229] while plaintiffs who bring similar mixed-motive claims under Title VII—upon which the AHRA was modeled—must only present circumstantial evidence.[230] Because the mixed-motive framework is more favorable to plaintiffs than the pretext framework,[231] Title VII plaintiffs are more likely to prevail than their state law counterparts. This makes no sense in light of the similarities between the two laws.[232]

Third, the policy considerations that originally prompted a reexamination of the direct evidence requirement counsel against retaining the higher evidentiary burden. As the *Price Waterhouse* fallout makes clear, defining direct evidence is not easy, and the existence of numerous possible interpretations has led to divergent results in similar cases.[233] The circuit split that followed *Price Waterhouse* suggests that the direct evidence requirement was not a workable standard, as similarly situated plaintiffs were being treated differently in each jurisdiction. The Seventh Circuit acknowledged the potential for confusion, stating that "because 'mind reading is not an accepted tool of judicial inquiry' the only true direct evidence of intent that will ever be available is 'acknowledgement of discriminatory intent by the defendant or its agents.'"[234] Although such direct evidence was not required in all circuits, the Seventh Circuit's statements show how stringently the requirement can be interpreted. Additionally, discrimination has become more covert as employers try to avoid Title VII liability.[235] Therefore, it is increasingly unlikely that an employer would acknowledge discriminatory intent—making "true" direct evidence a rarity.

Fourth, direct evidence—while harder to come by—is not necessarily better than circumstantial evidence and is not required

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229. *See id.*

230. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).

231. *See supra* notes 35–39 and accompanying text. This is especially true in light of the changes made by the Civil Rights Act of 1991. *See supra* Part II.C.

232. *See* Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 43 (Alaska 2000).

233. *See, e.g.*, Tindall*, supra* note 48, at 364–65.

234. *See* Elissa R. Hoffman, Note, *Smoking Guns, Stray Remarks, and Not Much in Between: A Critical Analysis of the Federal Circuits' Inconsistent Application of the Direct Evidence Requirement in Mixed-Motive Employment Discrimination Cases*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 181, 192 (2002) (quoting Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994)).

235. *Id.* at 188.

in other situations. One Justice made this point very clear at oral arguments in *Desert Palace*, stating:

> [Y]ou would be suggesting a rule that, as far as I know, is alien to our law, that is, to make a distinction between direct evidence and circumstantial evidence. You can have direct evidence by a liar and you can have highly convincing circumstantial evidence. So why would the law in this one area make a distinction that, as far as I know, is not made elsewhere?[236]

As the Court alluded to, circumstantial evidence is routinely relied upon in other contexts, including criminal prosecutions.[237] Courts generally focus on "the probative value of evidence, rather than its type . . . because '[s]trong circumstantial proof may be much more probative than weak direct evidence, as when fingerprint evidence places a defendant at the scene of the crime while 'direct' eyewitness evidence from a . . . near-sighted person does not.'"[238] This point was reiterated in the *Desert Palace* opinion itself.[239] Thus, it is not only a daunting task to draw a workable distinction between direct and indirect evidence, but such a distinction may have no relationship to the relative strength of the evidence.

Proponents of the direct evidence requirement argue that O'Connor's *Price Waterhouse* concurrence requires direct evidence in order to make use of the mixed-motive framework.[240] According to this argument, the plaintiff-friendly burden-shifting of the mixed-motive framework is only justified if plaintiffs present sufficiently powerful evidence.[241] However, this argument ignores the fact that direct evidence is not necessarily more powerful than circumstantial evidence.[242]

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236. Transcript of Oral Argument at 8, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (No. 02-679).

237. *See id.*; Brief for the Respondent at 42, *Desert Palace*, 539 U.S. 90 (No. 02-679).

238. Zubrensky, *supra* note 48, at 980 (citation omitted).

239. *Desert Palace*, 539 U.S. at 100 ("'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.'") (quoting Rogers v. Mo. Pac. R. Co., 352 U.S. 500, 508, n.17 (1957)).

240. *See* Brief for United States as Amicus Curiae Supporting Petitioner at 14–17, *Desert Palace*, 539 U.S. 90 (No. 02-679).

241. Daniel P. Johnson, Note, *Employment Law:* Desert Palace, Inc. v. Costa*: Returning to Title VII's Core Principles by Eliminating the Direct Evidence Requirement in Mixed-Motive Cases*, 57 OKLA. L. REV. 403, 416 (2004).

242. *See supra* notes 236–239 and accompanying text.

Proponents of the direct evidence requirement also argue that it survived the amendments to the Civil Rights Act of 1991.[243] Parts of the legislative history indicate that Congress may have intended to adopt a direct evidence requirement.[244] Prior to *Desert Palace*, this sentiment prevailed, because "all the circuit courts except the Ninth Circuit held that the direct evidence requirement survived the 1991 Act."[245] However, the Court in *Desert Palace* concluded that direct evidence did not survive the 1991 Act.[246] While the Court rooted much of its analysis in the language of the statute,[247] the policy behind Title VII and the Civil Rights Act of 1991 supports the Court's decision. The ultimate purpose of Title VII was to combat racism and end discrimination.[248] Part of achieving this ultimate goal involves promoting "'voluntary compliance with the nondiscriminatory prohibitions.'"[249] Allowing employees to pursue claims under the plaintiff-friendly mixed-motive framework without direct evidence encourages voluntary compliance and settlements.[250] In the wake of *Desert Palace*, doomsayers predicted that the courts would be flooded with employment discrimination claims.[251] However, the mere threat of this deluge of litigation could also have the more benign effect of encouraging employers to take affirmative steps towards eliminating discrimination and minimizing the potential for litigation.[252]

The elimination of the direct evidence requirement is similarly in step with the primary purposes of the Civil Rights Act of 1991. In passing the 1991 Act, Congress intended to "respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions . . . [and] to strengthen existing protections and remedies available under federal civil rights law to provide more effective deterrence and

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243. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 17–18, *Desert Palace*, 539 U.S. 90 (No. 02-679).

244. Johnson, *supra* note 241, at 420 ("The House Education and Labor Committee's reports reveal that Congress intended the 1991 Act to establish 'the rule applied by the majority of the circuits.'") (quoting H.R. REP. NO 102-40, pt. II, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 711).

245. *Id.* at 423.

246. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–101 (2003).

247. *Id.*

248. Johnson, *supra* note 241, at 423.

249. *Id.* at 425 (quoting S. REP. NO. 88-872, at 2378 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2378).

250. *Id.* at 427–28.

251. *See supra* Part II.E.

252. Johnson, *supra* note 241, at 427–28.

adequate compensation for victims of discrimination."[253] Therefore, even though the 1991 Act was passed in part as a reaction to *Price Waterhouse*, it was more broadly intended to protect employee rights. Restoring and strengthening the existing protections depends, in large part, on the ability of plaintiffs to make effective use of the protections available to them. Ultimately, if plaintiffs are not able to obtain remedies in the court simply because they lack direct evidence, the purposes underlying the 1991 Act would be frustrated.

Finally, abandoning the direct evidence requirement would do more than simply harmonize Alaska case law with the federal mixed-motive cases. It would resolve the internal confusion produced by the existing case law, because the earlier decisions requiring strict direct evidence[254] would be overruled with the adoption of the *Desert Palace* rationale. Moreover, Alaska courts would no longer have to struggle with the daunting question of how to define direct evidence. If Alaska chooses to retain a higher evidentiary requirement, it should fully endorse the less stringent circumstantial-plus standard because it represents a lesser departure from the federal standard. This Note has suggested that circumstantial-plus evidence still represents a higher standard than the one endorsed in *Desert Palace*.[255] Nevertheless, a circumstantial-plus standard would at least be closer than direct evidence to the evidentiary standard laid down in *Desert Palace*.

V. CONCLUSION

In the wake of *Price Waterhouse*, courts all over the country have struggled to determine what a plaintiff must prove in order to gain access to the favorable mixed-motive framework. Alaska courts have not been immune to this struggle, and the standards advanced have gradually mutated as courts grapple with the issue. The evidentiary standard that Alaska courts require has vacillated between a stricter direct evidence standard and the looser circumstantial-plus requirement. The courts, however, have turned a blind eye to their own flip-flopping. Perhaps even more problematic is the fact that, although the Alaska Supreme Court has steadfastly claimed to be following federal case law in

253. Brief of the Nat'l Employment Lawyers Assoc., as Amicus Curiae in Support of the Respondent, Desert Palace Inc. v. Costa, 539 U.S. 90 (2003) (No. 02-679), 2003 U.S. S.Ct. Briefs LEXIS 438, at **8 (quoting H.R. REP. NO 102-40, pt. II, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 549).

254. *See, e.g.*, VECO, Inc. v. Rosebrock, 970 P.2d 906 (Alaska 1999).

255. *See supra* note 102–105 and accompanying text.

interpreting Alaska's anti-discrimination law, it has completely ignored the landmark case of *Desert Palace*. The Alaska Supreme Court has clung to an archaic evidentiary standard despite the federal decision to abandon it. The Alaska Supreme Court has had three chances to recognize and adopt *Desert Palace*, but each time the court has, unfortunately, remained silent. It is time that the court addresses this issue head-on and realigns itself with the federal case law.