Price Waterhouse v. Hopkins: Attempting to Resolve the Mixed-Motive Dilemma

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Title VII of the Civil Rights Act of 1964 ("Title VII") \(^1\) was enacted "to achieve equality of employment opportunities and remove barriers that had operated in the past to favor an identifiable group of white employees over other employees." \(^2\) More simply, Title VII was designed to deter employers from discriminatory conduct \(^3\) and "to make persons whole for injuries suffered on ac-
count of unlawful employment discrimination.” To achieve this result, section 703(a) of Title VII prohibits an employer from discriminating against an employee with regard to hiring, firing, compensation, or terms, conditions, or privileges of employment, “because of” that employee’s race, color, religion, sex, or national origin. Section 706(g) of the Act deals with the remedies available for violations under section 703(a).

Title VII aims to eradicate two major types of employment discrimination: “disparate treatment” and “disparate impact.” Disparate treatment, the more obvious form, involves intentional...

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4 Albemarle Paper, 422 U.S. at 418; see Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (employee not awarded windfall unless discrimination controlled employer’s decision); Haskins v. United States Dep’t of the Army, 808 F.2d 1192, 1200 (6th Cir. 1987) (“Title VII does not require federal courts to grant plaintiff a windfall, but only requires an award of ‘make whole’ relief”), cert. denied, 484 U.S. 815 (1987); Bibbs, 778 F.2d at 1322 (“[u]nless the impermissible . . . motivation was a but-for cause[,] . . . to place [the employee] in the job would . . . award him a windfall”); see also 42 U.S.C. § 2000e-5(g) (1988) (provision for statutory relief).


It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(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.

It is important to note, however, that a statutory exception, known as the bona fide occupational qualification (“BFOQ”), exists for certain employment practices. 42 U.S.C. § 2000e-2(e) (1988). The BFOQ provision allows an employer to hire individuals on the basis of religion, sex or national origin if it is “reasonably necessary to the normal operation of that particular business or enterprise.” Id. It is self-evident that this exception does not include race or color. Id. Thus, no racially-motivated discrimination can be justified under this provision. Also, even when the BFOQ exception may apply, courts consistently have interpreted it narrowly. Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 387 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Mitchell v. Board of Trustees of Pickens County School Dist. “A”, 415 F. Supp. 512, 518 (D.S.C. 1976); see Dothard v. Rawlinson, 433 U.S. 321, 334-35 (1977).


8 See International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). “[D]isparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.” Id. Senator Humphrey, summarizing his view on Title VII, stated: “What the bill does [is] . . . to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications.” 110 Cong. Rec. 13,088 (1964).
discrimination against an individual because of one's race, color, religion, gender, or national origin. In such a case, proof of discriminatory intent is essential. In contrast, disparate impact deals with facially neutral employment practices, such as height and weight or education requirements, which have a disproportionate effect upon members of an identifiable class.

9 See Teamsters, 431 U.S. at 335 n.15. Senator Clark, in debates concerning Title VII, defined "to discriminate" as follows: [To make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by [Title VII] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title. 110 CONG. REC. 7,213 (1964).

10 Teamsters, 431 U.S. at 335 n.15. Disparate treatment cases are more difficult to prove than disparate impact cases because they require a showing of discriminatory motive. See Note, supra note 7. Disparate impact cases do not require such a showing. Teamsters, 431 U.S. at 336 n.15.


13 See Belton, supra note 2, at 542. The evidentiary model applied in disparate impact cases was developed in Griggs, 401 U.S. at 436, a case in which the Court first focused its attention on the consequences of an employer's practices, rather than merely the employer's intent. Id. at 432. Under this model, a disparate impact employee bears the initial burden of proving that, although the disputed employment policy is neutral on its face and applies equally to all persons, it has a discriminatory impact on members of the employee's protected class. See Belton, supra note 2, at 546-47. An employee need not prove actual discriminatory intent as a prerequisite to a finding of unlawful discrimination. International Bd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977); see Griggs, 401 U.S. at 432. Once discriminatory impact has been established, the burden shifts to the employer to show that the questioned employment practice is justified by "business necessity." Id. at 431-32. To meet this burden, the employer need only show a legitimate business purpose. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125-27 (1989); Comment, The Business Necessity Defense to Disparate-Impact Liability Under Title VII, 46 U. Chi. L. Rev. 911, 933 (1979) ("[t]he higher standard of business necessity . . . is fundamentally inconsistent with the equal-treatment rationale of [Title VII]"). Should the employer meet its burden, the employee is then given an opportunity to show that the employment practice is a pretext for discrimination and that alternative, non-discriminatory practices exist by which the employer's purported business needs could be met. Dothard, 433 U.S. at 329; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Recently, the disparate impact analysis has been applied to subjective employment practices. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1988) (plurality opinion) (disparate impact equally applicable to subjective and subjective employment practices). See generally Note, supra note 7, at 399-410 (discussing importance of subjective employment
Disparate treatment claims can be divided into two broad categories: "single-motive" and "mixed-motive." In the single-motive situation, the challenged employment decision is the result of exclusive reliance by the employer on either a legitimate factor (such as the employee's insubordination) or an illegitimate, discriminatory factor (such as the employee's race). Mixed-motive cases, on the other hand, are more complex and involve employment-related decisions which are motivated by both legitimate and illegitimate factors.

In McDonnell Douglas Corp. v. Green and its progeny, the United States Supreme Court established an evidentiary framework to allocate the burdens of proof and to determine the standard of proof in single-motive cases. Under this framework, the Court has determined that the burden of persuasion should remain at all times upon the employee. The lower courts have been uni-
form in applying this principle. In deciding mixed-motive cases, however, the lower courts were without the guidance of an evidentiary model because the Court had never addressed directly the issue in a Title VII context. Recently, in *Price Waterhouse v. Hopkins*, the United States Supreme Court examined a mixed-motive case and expressly rejected the applicability of the *McDonnell Douglas* framework. Instead, the Court determined that for mixed-motive cases the initial burden would rest on the employee to show the existence of discrimination in the decision-making process, but once established, the burden would shift to the employer to persuade the court that the same decision would have been reached regardless of any discriminatory factors.

This Note will discuss the Court’s decision in *Price Waterhouse*. Part I will examine the framework established by the Court for single-motive disparate treatment cases to provide a background for the analysis to follow. Part II will describe the various approaches taken by courts in deciding non-Title VII mixed-motive cases and address the lack of uniformity among the lower federal courts in the context of Title VII mixed-motive cases. Part III will provide a synopsis of the recent Supreme Court decision in *Price Waterhouse*. Finally, Part IV will analyze this decision and will suggest that the Court was correct in determining that the single-motive evidentiary model was inapplicable to the mixed-motive context.

I. SINGLE-MOTIVE DISPARATE TREATMENT

Since direct evidence of unlawful discriminatory intent is

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22 See *Bibbs v. Block*, 778 F.2d 1318, 1322 (8th Cir. 1985) (en banc) ("[t]he Supreme Court has not expressly addressed the mixed-motives problem in a Title VII case, but it has focused on it in other contexts"); Blalock v. Metals Trades, Inc., 775 F.2d 703, 709 (6th Cir. 1985) ("[t]he Court ... has not expressly explained causation requirements in a Title VII dual motive case"), cert. denied, 109 S. Ct. 2062 (1989); Brodin, *supra* note 3, at 299 ("lower courts have had a relatively free hand to fashion their own differing standards").


24 See *Price Waterhouse*, 109 S. Ct. at 1788.
rarely available, a plaintiff in a single-motive disparate treatment case is generally compelled to rely on indirect or circumstantial evidence to prove intentional discrimination. Thus, in an effort to help "capture all the instances of discrimination at which Congress took aim when it enacted Title VII," the Supreme Court, in McDonnell Douglas, developed a three-stage analytical framework to afford "single-motive" plaintiffs an opportunity to prove intentional discrimination using circumstantial evidence.

The first stage of this analysis requires the plaintiff-employee to prove, by a preponderance of the evidence, a prima facie case of employment discrimination. The employee may satisfy this burden by showing:

27 As a general matter, single-motive disparate treatment claims can be divided into three categories: (1) individual treatment claims, which are governed by the formula established in McDonnell Douglas Corp. v. Green, 411 U.S. 782 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); (2) private class action disparate treatment cases, such as Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); and (3) "pattern or practice" treatment claims brought by the government, which are governed by Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), and International Bd. of Teamsters v. United States, 431 U.S. 324 (1977). See Furnish, supra note 16, at 354 n.9.

The class action and pattern or practice cases are beyond the scope of this Note, which focuses exclusively on individual disparate treatment cases.

Circumstantial evidence has been defined as "direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which such other fact is therefore inferred." W. Wills, supra, at 16-17; see C. McCormick, McCormick on Evidence § 185, at 543 (3d ed. 1984) ("even if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed").
29 See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) (requirement of direct evidence rather than circumstantial evidence would put "insurmountable" burden on victims of discrimination); Furnish, supra note 16, at 356 (discussing lack of direct evidence of disparate treatment in employment setting); cf. Thornbrough v. Columbus & G.R. Co., 760 F.2d 633, 638 (5th Cir. 1985) ("ADEA" claim) ("unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree").
30 Note, supra note 19, at 1133; see supra note 5 (text of Title VII).
31 McDonnell Douglas was the first case in which the Supreme Court specifically addressed the "order and allocation of proof in a private, non-class action challenging employment discrimination." McDonnell Douglas, 411 U.S. at 800.
32 Id. at 802-05.
33 See id. at 802; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).
(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\(^ {34}\)

The employee may satisfy this first stage by establishing that her "rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought."\(^ {35}\)

This formula is not limited to cases alleging wrongful failure to hire, as was the situation in *McDonnell Douglas*; it has been adapted by the courts to analyze discriminatory employment decisions concerning "discharge, discipline, layoff, promotion, transfer, retaliation, denial of training, and compensation."\(^ {36}\) In addition, the Court did not preclude the use of other methods to establishing discriminatory intent.\(^ {37}\)

\(^{34}\) *McDonnell Douglas*, 411 U.S. at 802. The employee is not required to prove that the position at issue was filled by an individual other than a member of his protected class. See *Meiri v. Dacon*, 759 F.2d 989, 996 (2d Cir.), cert. denied, 474 U.S. 829 (1985); *Diaz v. American Tel. & Tel.*, 752 F.2d 1358, 1359 (9th Cir. 1985). Furthermore, the employee will not be prevented from establishing a *prima facie* case if, after she has instituted the action, the position is filled by a member of the same protected class. See id. at 1360-61. However, a different position was adopted by the Eleventh Circuit in *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982). The *Lee* court construed *McDonnell Douglas* as requiring the employee to prove that she "was discharged and replaced by a person outside of the protected class or was discharged while a person outside of the class with equal or lesser qualifications was retained." Id.

\(^{35}\) See *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). The *Teamsters* Court stated that "[e]limination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one." Id.

\(^{36}\) See United States Postal Serv. Bd. of Governors v. *Aikens*, 460 U.S. 711, 715 (1983). In *Aikens*, the Court stated: "The prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Id. (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1981)).

The non-exhaustive nature of the *McDonnell Douglas* framework is evident in pattern-or-practice claims in which employees typically introduce statistical evidence to establish a claim of disparate treatment against a class of persons protected under Title VII. Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v.*
In *Texas Department of Community Affairs v. Burdine*, the Court found that the “establishment of [a] prima facie case in effect creates a [rebuttable] presumption that the employer unlawfully discriminated against the employee.” The Court’s recognition of the difficulty in proving discrimination without direct evidence, the employer’s greater access to such evidence, and the fact that the employer’s actions, unless otherwise explained, “are more likely than not” the result of discriminatory considerations, support this presumption of discrimination.

The creation of the rebuttable presumption in a single-motive case, however, has only a limited effect upon the employer. Once established, the case proceeds to the second stage, in which the burden of production shifts “to the employer to articulate some

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Burdine, 55 Temp. L.Q. 372, 380 (1982). However, such evidence is admissible only if it is relevant and will “be deemed to constitute a prima facie case” only if it is “sufficiently rigorous.” Id. at 380-81.


Id. at 254. The *Burdine* Court noted that “the prima facie case ‘raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.’” Id. (quoting *Furnco*, 438 U.S. at 577). Although the *Burdine* Court described the McDonnell Douglas factors as “giv[ing] rise to an inference,” id. at 253, it later explained that by “[t]he phrase ‘prima facie case,’” it meant only “the establishment of a legally mandatory, rebuttable presumption,” not the “plaintiff’s burden of producing enough evidence to permit the [court] to infer the fact at issue.” Id. at 254 n.7.

46 Id. at 254 (quoting *Furnco*, 438 U.S. at 577); see C. *McCormick*, supra note 28, § 343, at 968-69 (“some presumptions are created to correct an imbalance resulting from one party's superior access to proof”); Note, supra note 19, at 1117 (presumption created to help “compensate[] for the [employer’s] greater access to evidence”).

47 *Burdine*, 450 U.S. at 254. It is not necessary for the employer to “persuade the court that it was actually motivated by the proffered reasons.” Id. The burden of persuasion remains at all times upon the employee. See C. McCormick, supra note 28, § 344, at 980 (prevailing view that presumption fixes burden of persuasion).

It has been suggested that courts look to Federal Rule of Evidence 301 for guidance regarding the effect of presumptions in disparate treatment cases. See *Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 Stan. L. Rev. 1129, 1157-62 (1980). Rule 301 states:

[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 (emphasis added).

However, there are exceptions to the general rule that a presumption shifts only the burden of production to the opposing party. See C. McCormick, supra note 28, § 344, at 981 (some presumptions viewed as shifting burden of persuasion). Also, the burden of persuasion may rest with the employer at the relief stage of the proceeding, as opposed to the liability stage, to show that intentional discrimination was not the “but for” cause of the employment decision. See *Smith, supra* note 37, at 379 n.45.
legitimate, nondiscriminatory reason for the employee’s rejection.’ As clarified by the Court in Burdine, it is only the burden of production, and not the burden of persuasion, which shifts to the employer. Therefore, the employer need not convince the court by a preponderance of the evidence that it did not discriminate against the plaintiff, but only need introduce sufficient evidence to rebut the presumption. If the employer fails to meet this burden, the employee will prevail.

Should the employer rebut the presumption with evidence of a legitimate, nondiscriminatory basis for its decision, the presumption will disappear. The case will then advance to the third stage,

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42 McDonnell Douglas, 411 U.S. at 802. The employer need only show that the adverse employment decision was based “on a legitimate consideration, and not an illegitimate one such as race.” Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

Because McDonnell Douglas failed to determine the extent of the employer’s burden, lower courts have disagreed on whether the employer’s burden, after the employee established a prima facie case, is simply to produce some credible evidence of a nondiscriminatory motive or to persuade the trier of fact. Compare Powell v. Syracuse Univ., 580 F.2d 1150, 1154-55 (2d Cir.) (employer must provide some legitimate nondiscriminatory reason for rejection) (quoting McDonnell Douglas, 411 U.S. at 802), cert. denied, 439 U.S. 984 (1978), with Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977) (employer bears burden of proving legitimate nondiscriminatory reasons for action by preponderance of evidence, therefore bearing risk of nonpersuasion) and East v. Romine, Inc., 518 F.2d 332, 340 (5th Cir. 1975) (employer must come forward with comparable factual data). See generally Friedman, The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique, 65 Cornell L. Rev. 1, 4-5 (1979) (discussing split in lower courts after McDonnell Douglas regarding nature of employer’s burden); Mendez, supra note 41, at 1135-38 (same).

43 See Burdine, 450 U.S. at 254-56.

44 See id. at 253.

45 See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983) (quoting Burdine, 450 U.S. at 254-55). The employer must articulate its legitimate, nondiscriminatory reason through the introduction of admissible evidence at trial which is clear and reasonably specific. See McDonnell Douglas, 411 U.S. at 802-03. For example, simply filing an answer to the employee’s complaint will not satisfy the employer’s burden. See Burdine, 450 U.S. at 255 n.9.

However, the employer’s reasons do not have to rise to the level of business necessity to be considered legitimate. See McDonnell Douglas, 411 U.S. at 803-04. An employer’s reason may be legitimate even in the absence of a close relationship with job performance. See id. (failure to rehire employee as result of illegal protest against employer found to be legitimate, nondiscriminatory reason).

46 See Burdine, 450 U.S. at 254. A presumption is mandatory and, until rebutted, compels a finding for the party aided by the presumption. See C. McCormick, supra note 28, § 346, at 988; 9 J. Wigmore, supra note 28, § 2483.

47 See Aikens, 460 U.S. at 715. After the employer presents “evidence of the reason for the plaintiff’s rejection . . . the McDonnell-Burdine presumption ‘drops from the case,’ . . . and ‘the factual inquiry proceeds to a new level of specificity.’” Id. (quoting Burdine, 450 U.S. at 255); see also C. McCormick, supra note 28, § 344, at 974 (if employer produces
at which the employee is given an opportunity to demonstrate that the employer’s stated reasons were mere pretext for intentional discrimination. It is at this stage that the employee’s burden of proving pretext “merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.” The employee may discredit the employer’s evidence of legitimate considerations either directly by “persuading the court that a discriminatory reason more likely motivated the employer,” or indirectly by proving that the employer’s alleged reasons are not credible. Typically, the employee will rely on some circumstantial evidence regardless of whether she is attempting to prove pretext “directly” or “indirectly.” The court must then decide whose explanation of motive is more credible.

sufficient evidence, “presumption is spent and disappears”); 9 J. Wigmore, supra note 28, §§ 2489-2490.

48 See Aikens, 460 U.S. at 716 n.5; McDonnell Douglas, 411 U.S. at 804; see also Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) (en banc) (“pretext” means “a reason for the employment decision that is not the true reason”). The Supreme Court has further determined that the employee must meet this burden by a preponderance of the evidence. See Burdine, 450 U.S. at 253.

49 Burdine, 450 U.S. at 256. It is relatively easy for an employee to establish a prima facie case and for the employer to explain its conduct; thus, “most disparate treatment cases hinge upon this third stage of the McDonnell Douglas inquiry.” Note, supra note 19, at 1118; see B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 1317 (2d ed. 1983) (“majority of disparate treatment cases . . . depend on the issue of pretext”); Furnish, supra note 16, at 357 (success or failure in disparate treatment cases is contingent upon pretext issue).


51 See Burdine, 450 U.S. at 256 (citing McDonnell Douglas, 411 U.S. at 804-05). An employee can prove falsity by showing that the employer’s reasons have no basis in fact, did not actually motivate the employer’s conduct, or were insufficient to have motivated it. See Note, supra note 19, at 1121. However, “if the [employer] lies in rebuttal to conceal a reason that is unseemly but legally permissible[,] . . . proof that the [employer’s] proffered explanation is false does not necessarily amount to proof of discriminatory intent.” Id. at 1115.

52 See Note, supra note 19, at 1118 n.34; see also Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.) (employee need not attack employer’s articulated reason by means of direct evidence), cert. dismissed, 483 U.S. 1052 (1987); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) (court “may not require direct evidence of intentional discrimination as opposed to indirect [or circumstantial] evidence”).

53 See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). The court must evaluate all of the evidence presented by the employee in establishing a prima facie case and in attempting to prove pretext in deciding whether the employer has violated Title VII. See Jones v. Western Geophysical Co., 761 F.2d 1158, 1161 (5th Cir. 1985) (all evidence examined by court below to ascertain racial motivation behind plaintiff’s discharge).
ployee successfully refutes the employer's articulated reasons, she will also establish the required causal connection between the employer's discriminatory motive and the resulting employment decision necessary for a Title VII violation.  

II. MIXED-MOTIVE DISPARATE TREATMENT

As distinguished from single-motive cases, mixed-motive disparate treatment arises when an employer is influenced by both lawful and unlawful factors. "[D]iscrimination need not be the sole reason for an adverse job decision," but some causal connection between the discriminatory motive and the adverse employment decision is required. The central issue in a mixed-motive case, therefore, turns on the degree to which the employer's discriminatory motivation caused the employment decision in dispute.

Because the Supreme Court had not directly addressed the allocation of burdens and standard of proof required in a Title VII

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54 See Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) (en banc) ("[t]he very showing that the [employer's] asserted reason was a pretext for race is also a demonstration that but for his race plaintiff would have gotten the job"); see also Note, supra note 19, at 1121 (disproving employer's stated reason entitles employee to win suit); Note, An Evaluation of the Proper Standard of Causation in the Dual Motive Title VII Context: A Rejection of the "Same Decision" Standard, 35 Drake L. Rev. 209, 213 (1985-86) (causal connection between discrimination and employer's conduct is sole explanation after proof of prima facie discrimination and refutation of employer's reasons) [hereinafter Proper Standard].


[A]n employment action based on several permissible motives or several impermissible ones — say, an employer discharging an employee because of absenteeism and poor performance, or because of race and religion — still acts with "single" motives. The key to the distinction between "single" and "mixed" motives lies in the combination of impermissible motive(s) with permissible one(s).

Id. at 864 n.8.

56 See Fields v. Clark Univ., 817 F.2d 931, 935 (1st Cir. 1987); see Price Waterhouse, 109 S. Ct. at 1785 n.7 ("Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of' in section 703(a)(1)) (citing 110 Cong. Rec. 2728, 13,837 (1964)); Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) ("forbidden taint" must be at least "significant factor").

57 See Fields, 817 F.2d at 935.

mixed-motive case until Price Waterhouse, it is asserted that questions regarding these issues will likely proliferate in the lower courts. However, the Court had previously developed a procedural framework for analyzing mixed-motive discrimination actions in a first amendment context.

In Mount Healthy City School District Board of Education v. Doyle, the Court formulated a test whereby the employee would bear the initial burden of proving that his constitutionally-protected conduct was a "substantial" or "motivating" factor in the employer's adverse employment decision. Once demonstrated, the burden of proof would shift to the employer to demonstrate "by a preponderance of the evidence that it would have reached the same decision . . . in the absence of the protected conduct." This "same decision" test has been extended by the Court to cases involving alleged violations of the equal protection clause and labor disputes under the National Labor Relations Act.

The Mount Healthy decision, however, did not effectively resolve the lower courts' confusion as to the proper allocation of burdens and the standard of proof required in a Title VII mixed-motive action. Disagreement persisted as to the standard of proof

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80 Proper Standard, supra note 54, at 210.
82 See id. at 287.
83 Id.
84 See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977). The Court in Arlington Heights stated that "[p]roof that the decision by the Village was motivated in part by a racially discriminatory purpose would . . . have shifted to the Village the burden of establishing that the same decision would have resulted" even in the absence of the discriminatory consideration. Id. at 270-71 n.21. Ultimately, the Court did not find the case to be one of mixed motives because the plaintiffs did not successfully prove that discrimination had motivated the employer. Id. at 270.
85 Likewise, in Hunter v. Underwood, 471 U.S. 222 (1985), where it was alleged that a state constitutional provision discriminated against blacks, the Court acknowledged the applicability of the framework established in Mount Healthy and Arlington Heights for analyzing mixed-motive discrimination cases. See Hunter, 471 U.S. at 232. However, the Court did not apply the mixed-motive analysis because it found the plaintiff's evidence of race discrimination so compelling as to make the "but-for" determination "beyond peradventure." Id.
86 See NLRB v. Transportation Mgmt. Corp., 462 U.S. 393, 403 (1983) (analogy to Mount Healthy is fair); see also NLRB v. Wright Line, 662 F.2d 899, 906 (1st Cir. 1981) ("critical difference" between Mount Healthy and labor cases does "not affect the substantive utility of the 'but for' analysis"), cert. denied, 455 U.S. 989 (1982).
87 See Note, Making the Punishment Fit the Crime: The Eighth Circuit's Treatment
required to establish a causal connection between the discriminatory factor and the resulting adverse employment decision.\textsuperscript{67} Some courts have required that the employee establish “but for” causation,\textsuperscript{68} wherein the burden of persuasion would remain upon the employee.\textsuperscript{69} Other courts, however, have adopted the standard set out in \textit{Mount Healthy}, which requires only that the employee show that the discriminatory factor was a “motivating” or “substantial” consideration.\textsuperscript{70} In addition, following the “same deci-
sion” test of Mount Healthy, these courts shifted the burden of persuasion to the employer\(^1\) to prove that, even had the discriminatory factor not been considered, the same decision would have been reached.\(^2\) Yet, even courts adhering to the “same decision” standard have disagreed about the standard of proof required for the employer to satisfy its burden.\(^3\) Some courts have held the employer to a preponderance standard,\(^4\) while others have applied the higher standard of clear and convincing evidence.\(^5\) The courts that followed Mount Healthy further disagreed as to the effect that the “same decision” analysis would have on the parties.\(^6\) Some determined that, upon a finding that the same decision would have been reached regardless of discrimination, the employer would be absolved of liability.\(^7\) However, other courts

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\(^279\) (6th Cir. 1971) (employee entitled to lost compensation when discrimination was “in part, a causal factor”) (emphasis added); \(\text{see also Proper Standard, supra note 54, at 220} (“more likely than not” requirement is “less onerous than the ‘substantial factor’ requirement, yet it retains respect for the employer’s interest”).

\(^2\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^3\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^4\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^5\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^6\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^7\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^27\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^71\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^72\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^73\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^74\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^75\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(^76\) \(\text{See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

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\(\text{279 (6th Cir. 1971) (employee entitled to lost compensation when discrimination was “in part, a causal factor”) (emphasis added); see also Proper Standard, supra note 54, at 220 (“more likely than not” requirement is “less onerous than the ‘substantial factor’ requirement, yet it retains respect for the employer’s interest”).}

\(\text{71 See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(\text{72 See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(\text{73 See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(\text{74 See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

\(\text{75 See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}

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\(\text{77 See Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (“the burden of production and persuasion shift[,] from the plaintiff to the [employer]”); Blalock, 775 F.2d at 712 (burden of proof that adverse employment action would have occurred without discrimination shifted to employer).}
have separated the issues of liability and relief\textsuperscript{78} to prevent the possibility that employers will escape liability despite intentional discrimination.\textsuperscript{79} Under this latter view, once the employee establishes some degree of discrimination, Title VII is deemed to have been violated and liability attaches.\textsuperscript{80} Thus, the employee immediately would be entitled to various forms of preliminary relief regardless of the causative force of the discriminatory factor.\textsuperscript{81} The case would then proceed to the remedial stage, during which the employer would be given an opportunity to limit its liability by showing that it would have reached the same decision absent discrimination.\textsuperscript{82}

The Supreme Court also rejected the \textit{McDonnell Douglas-Burdine} analytical framework when the employee introduced direct evidence\textsuperscript{83} of the employer's discriminatory motive.\textsuperscript{84} Many lower courts have adhered to this pronouncement\textsuperscript{85} and, in a

\textsuperscript{78} See Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) (en banc); see also Brodin, supra note 3, at 323 ("same decision" test should be applied at remedial stage).


\textsuperscript{80} See Walsdorf v. Board of Comm'r's, 857 F.2d 1047, 1053 (5th Cir. 1988) (proof that discriminatory motive was significant factor established Title VII violation); Bibbs, 778 F.2d at 1323 ("[a] defendant's showing that the plaintiff would not have gotten the job anyway... simply excludes the remedy of retroactive promotion or reinstatement"); Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984) ("proper for the district court to find initial liability for employment discrimination without reference to whether the [plaintiff] ultimately would have received employment"); see also Brodin, supra note 3, at 323-26 (discussing benefits of separating issues of relief and liability).

\textsuperscript{81} See Bibbs, 778 F.2d at 1323-24 (proof that discrimination "played some part" immediately entitles employee to declaratory judgment, partial attorney's fees, or injunction). Professor Brodin proposes that Title VII has been violated if the employee shows that discrimination was a motive, even if the employer satisfies the "same decision" test. See Brodin, supra note 3, at 323.

\textsuperscript{82} See Bibbs, 778 F.2d at 1324 (employer will avoid remedies of promotion, reinstatement, and backpay upon satisfaction of "same decision" test at remedial stage).

\textsuperscript{83} See C. McCormick, \textit{ supra} note 28, § 185, at 543 ("[d]irect evidence is evidence which, if believed, resolves a matter in issue"); W. Wills, \textit{ supra} note 28 (direct evidence is "evidence which applies directly to the fact which forms the subject of inquiry"); Edwards, \textit{ supra} note 26, at 13-17 (discussing direct versus indirect evidence).

\textsuperscript{84} See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). In \textit{Thurston}, an employment discrimination case brought under the Age Discrimination in Employment Act ("ADEA"), the Court stated that "the \textit{McDonnell Douglas} test is inapplicable where the plaintiff presents direct evidence of discrimination." \textit{Id.} But see Edwards, \textit{ supra} note 26, at 1-4, 32-35 (criticizing \textit{Thurston} and proposing that \textit{McDonnell Douglas} test be applied in direct evidence cases).

\textsuperscript{85} See Fields v. Clark Univ., 817 F.2d 931, 935 (1st Cir. 1987) (if employee "proved by direct evidence that sexual discrimination was a motivating factor in the decision... the court was correct in not following the \textit{McDonnell Douglas} test"); Blalock v. Metals Trades,
"Mount Healthy-type analysis," have held that "the ultimate issue of discrimination has been proved" upon the employee's showing that discrimination was a "significant" or "motivating" factor in the employer's decision. Therefore, any need for a presumption of discrimination would be unnecessary. In addition, these courts have determined that the employer bears the burden of persuading the court that it would have reached the same decision absent discrimination.

III. Price Waterhouse v. Hopkins

A. Factual Summary

In Price Waterhouse, Ann Hopkins, a female senior manager at Price Waterhouse, claimed she was denied a promotion to partner because of her employer's reliance on sexual stereotypes. When Ms. Hopkins' promotion was first proposed, she was the

Inc., 775 F.2d 703, 707 (6th Cir. 1985) ("[d]irect evidence and the McDonnell Douglas formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the employer's] discriminatory intent"); cert. denied, 109 S. Ct. 2062 (1989); Miles v. M.N.C. Corp., 750 F.2d 867, 875 (11th Cir. 1985) ("McDonnell Douglas method of proving an employment discrimination case . . . pertains to situations where direct evidence of discrimination is lacking") (citing Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1556 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984)); see also Note, supra note 55, at 885 n.116 (McDonnell Douglas does not apply in mixed-motive situation). It has been proposed that courts focus "on the type of evidence the plaintiff presents, rather than the number of motives" to avoid "the doctrinal clutter that the 'mixed motive' label creates." Id. at 889.

Miles, 750 F.2d at 875 n.9 (quoting Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982)); Bell, 715 F.2d at 1557. Furthermore, many of these courts have held that proof that an employer relied on a discriminatory factor is a violation of Title VII. See id. at 1558 n.9; Lee, 684 F.2d at 774 (citing Mount Healthy, 429 U.S. at 287).

See Bell, 715 F.2d at 1558 n.9; Lee, 684 F.2d at 774.

See Fields, 817 F.2d at 935, 937.

The court's use of "significant" or "motivating" language is not necessarily distinguishable. See Fields, 817 F.2d at 937; Bell, 715 F.2d at 1558; Lee, 684 F.2d at 774.

See Thompsons v. Morris Brown College, 752 F.2d 558, 563 (11th Cir. 1985) ("circumstantial evidence is used to create an inference of discrimination under McDonnell-Douglas, while no such inference is required in the case of direct evidence").

See Miles v. M.N.C. Corp., 750 F.2d 867, 875 (11th Cir. 1985) (when case of discrimination is proven by direct evidence, employer "bears a heavier burden"); Bell, 715 F.2d at 1558 ("under Mt. Healthy, and our cases applying Mt. Healthy in the Title VII context, [the employer] bears . . . [the] burden of persuasion").

See Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987); Blalock v. Metals Trades, Inc., 775 F.2d 703, 712 (6th Cir. 1985), cert. denied, 109 S. Ct. 2062 (1989); Miles v. M.N.C. Corp., 750 F.2d 867, 875-76 (11th Cir. 1985); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982).

Price Waterhouse, 109 S. Ct. at 1781.
only woman nominated out of a group of eighty-eight employees.\textsuperscript{94} Upon initial review, Price Waterhouse’s policy board did not make a decision regarding Ms. Hopkins’ candidacy and decided to reconsider her nomination the following year.\textsuperscript{95} Although viewed as a “highly competent project leader,”\textsuperscript{96} the partners shared considerable concern regarding Ms. Hopkins’ interpersonal skills.\textsuperscript{97} The admissions committee had received a number of negative comments concerning her aggressiveness, impatience, and insensitivity.\textsuperscript{98} However, many of these comments were based on Ms. Hopkins’ alleged failure to conform to certain sexual stereotypes.\textsuperscript{99} Upon reconsideration, the partners in Ms. Hopkins’ office ultimately refused to repropose her for partnership, prompting Ms. Hopkins to bring suit under Title VII.\textsuperscript{100}

B. Lower Court Decisions

After reviewing the facts, the District Court for the District of Columbia found that Price Waterhouse’s articulated reasons for refusing to make Ms. Hopkins a partner were legitimate considerations and not a pretext for intentional discrimination.\textsuperscript{101} However, the court also found that the partners had unlawfully discriminated against Ms. Hopkins because “the firm’s evaluation process gave substantial weight” to partners’ comments that stemmed from sexual stereotyping.\textsuperscript{102} The court determined that Ms. Hopkins’ proof that sexual discrimination played a role in the firm’s decision\textsuperscript{103} effectively shifted the burden of persuasion to Price

\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 1782 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112-13 (D.D.C. 1985), aff’d, 825 F.2d 458 (D.C. Cir. 1987), rev’d, 490 U.S. 228, 109 S. Ct. 1775 (1989)).
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 1778.
\textsuperscript{101} Price Waterhouse, 618 F. Supp. at 1114-15. The court determined that Price Waterhouse was justified in deferring the decision of Ms. Hopkins’ candidacy for partnership for another year based upon Ms. Hopkins’ conduct. Id. at 1114.
\textsuperscript{102} See id. at 1120. “One common form of stereotyping is that women engaged in assertive behavior are judged more critically because aggressive conduct is viewed as a masculine characteristic.” Id. at 1118 (footnote omitted). In the present case, such discriminatory stereotyping played a role in the evaluation process because comments tainted by sexual stereotypes were given substantial weight in evaluating Ms. Hopkins’ candidacy. Id. at 1120.
\textsuperscript{103} Id.
Waterhouse to show by clear and convincing evidence that she would have been denied partnership even in the absence of such discrimination. The court concluded that the firm failed to meet its burden and that, even if it had, the firm would not have avoided liability, but only equitable relief.

The United States Circuit Court of Appeals for the District of Columbia agreed that "the partnership selection process at Price Waterhouse was impermissibly infected by stereotypical attitudes towards female candidates," and affirmed the lower court's determination of the proper allocation of proof. The court, however, held that if Price Waterhouse had met its burden by clear and convincing evidence, it also would effectively have avoided all liability, rather than simply equitable relief.

C. The Supreme Court's Analysis

1. Plurality Opinion

In an opinion written by Justice Brennan, a plurality of the Supreme Court agreed that when an employee in a Title VII mixed-motive action proves that gender played a part in an employment decision, the burden of persuasion shifts to the employer to show that it would have made the same decision without consid-

104 Id. Once an employee shows that discrimination played a part in an employment decision, "the [employee] is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination." Id.
105 Id. Although the court did not make a determination as to whether the legitimate or the illegitimate consideration motivated the employer, it stated that as long as sexual discrimination was present, "uncertainties must be resolved against the employer so that the remedial purposes of Title VII will not be thwarted by saddling an individual subject to discrimination with an impossible burden of proof." Id.
106 See id. at 1121. The court held that Ms. Hopkins was not entitled to an order that she be made a partner or monetary relief subsequent to her resignation; however, she was entitled to backpay dating from the time of denial of partnership to her resignation and attorney fees. Id.
107 Price Waterhouse, 825 F.2d at 468.
108 Id. at 471. On appeal, Price Waterhouse contended that Ms. Hopkins had not demonstrated the exact impact that the stereotypical comments had on the firm's ultimate decision to defer her candidacy. Id. at 465. The court of appeals, however, stated that acceptance of such a contention would "place an enormous, perhaps insurmountable, burden on Title VII litigants who challenge the employment decisions of collegial bodies such as partnerships." Id. at 469.
109 See id. at 472. The court found that Ms. Hopkins had been constructively discharged and, consequently, ordered the district court to award appropriate relief. Id.
eration of gender. However, despite this finding, the Court reversed on the issue of the employer's requisite standard of proof, holding that the employer need not satisfy its burden by clear and convincing evidence, but rather by a preponderance of the evidence.

The Court further determined that Ms. Hopkins was required to satisfy her initial burden by showing that the firm's reliance on gender played a "motivating factor" in the disputed decision. In defining "motivating factor," the Court stated: "[I]f we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."

The Court did not view its "burden shifting" rule as a departure from earlier disparate treatment cases, such as Burdine and McDonnell Douglas, since the burden of persuasion on "whether gender played a part in the employment decision" was not improperly shifted to the employer. This is because it is only after the employee has satisfied her burden of persuasion that the burden would shift to the employer. The Court viewed its burden shifting as an affirmative defense that would be addressed only after the employee had established that gender played a sufficient role in the employment decision. The Court read Title VII as mandating that the employer's freedom of choice be preserved, so that the employer could avoid liability if it successfully satisfied the "same decision" test. The plurality rejected Ms. Hopkins' argument that, once she showed that gender played a motivating part in the employment decision, she should be entitled to relief, with the possibility that such relief could be mitigated by the em-

110 See Price Waterhouse, 109 S. Ct. at 1787-88.
111 Id. at 1795.
112 Id. at 1792, 1795.
113 Id. at 1787.
114 Id. at 1790.
115 Id. at 1788.
116 See id. The Court held that the plaintiff retains the burden of persuasion, so that the issue was not one of "shifting burdens" as the Court addressed in Burdine. Id.
117 See id.
118 See id. In characterizing the shifting of burdens as an affirmative defense, the Court was merely recognizing that the burden of persuasion would shift. See id. at 1809 (Kennedy, J., dissenting). As Justice Kennedy noted in a dissenting opinion, "describing the employer's showing as an 'affirmative defense'... is nothing more than a label." Id. (Kennedy, J., dissenting).
119 Id. at 1786.
ployer's proof that it would nonetheless have reached the "same decision" absent discrimination.\footnote{See id. 1787 n.10.}

The Court stated that Ms. Hopkins was not required to establish "the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges."\footnote{Id. at 1786.} The Court reasoned that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation'... is to misunderstand them."\footnote{Id. at 1785.} According to Justice Brennan, a decision is arrived at "because of" a discriminatory reason if the employer considered the discriminatory factor in addition to legitimate factors at the time the employer made the decision.\footnote{Id.} The Court believed this to be true even if the employer later satisfies the "same decision" test.\footnote{Id.}

2. Concurring Opinions

In a concurring opinion, Justice White relied on the Court's earlier decision in Mount Healthy. He stated that if the employee showed discrimination was a substantial factor in the employment decision,\footnote{See id. at 1795 (White, J., concurring).} the burden of persuasion would correctly shift to the employer to prove by a preponderance of the evidence that the same decision would have been made in the absence of discrimination.\footnote{Id. (White, J., concurring).} However, Justice White added that there should be no requirement the employer meet its burden through objective evidence.\footnote{Id. at 1796 (White, J., concurring).} He argued that in a mixed-motive case it should be sufficient to introduce credible testimony that the employer would have acted the same way based on the legitimate reasons.\footnote{Id. (White, J., concurring).}

In a separate concurrence, Justice O'Connor agreed with the plurality that once an employee meets her burden, the burden of persuasion should shift to the employer to satisfy the "same decision" test, where satisfaction would relieve the employer of liability.\footnote{See id. at 1797 (O'Connor, J., concurring) (Title VII violated "when consideration of an illegitimate criterion is the 'but for' cause of an adverse employment decision").} However, Justice O'Connor disagreed with the plurality's
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distinction between the terms “because of sex” and “but for” causation,\textsuperscript{130} believing that the plurality misread Title VII as “commanding” the burden shift to the employer if the decisional process was at all “tainted” by discrimination.\textsuperscript{131} Instead, Justice O'Connor asserted that, based on its legislative history, Title VII demands “but for” causation since Congress intended to eliminate discriminatory acts, not discriminatory thoughts.\textsuperscript{132} However, Justice O'Connor did not believe that the employee should bear the burden of proving “but for” causation.\textsuperscript{133} In her view, the burden should shift if the employee proves by direct evidence\textsuperscript{134} that the illegitimate factor was a “substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made ‘because of’ the plaintiff’s protected status.”\textsuperscript{135}

Unlike the plurality, Justice O'Connor viewed this “burden shifting” as a justified departure from 	extit{McDonnell Douglas} and 	extit{Burdine},\textsuperscript{136} because the employer created uncertainty as to causation by knowingly giving weight to an impermissible criterion; the employer, therefore, should suffer the consequences of its conduct.\textsuperscript{137}

3. Dissenting Opinion

Dissenting, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, argued that the evidentiary framework established in 	extit{McDonnell Douglas} and 	extit{Burdine}, whereby the plaintiff bears the burden of persuasion throughout the trial, should be applied in mixed-motive cases.\textsuperscript{138} The dissent contended that both the burden of production and the burden of persuasion should be allocated to the employee because of “Congress’ manifest concern with preventing the imposition of liability in cases where discrimi-

\textsuperscript{130} See id. at 1797, 1805 (O'Connor, J., concurring).
\textsuperscript{131} Id. at 1804 (O'Connor, J., concurring).
\textsuperscript{132} Id. at 1797 (O'Connor, J., concurring).
\textsuperscript{133} Id. at 1803 (O'Connor, J., concurring). In the context of subjective employment practices, “requiring the plaintiff to prove that any one factor was the definitive cause of the decisionmaker’s action may be tantamount to declaring Title VII inapplicable to such decisions.” Id. (O'Connor, J., concurring).
\textsuperscript{134} Id. at 1804 (O'Connor, J., concurring).
\textsuperscript{135} Id. at 1805 (O'Connor, J., concurring).
\textsuperscript{136} Id. at 1801 (O'Connor, J., concurring).
\textsuperscript{137} See id. at 1803 (O'Connor, J., concurring).
\textsuperscript{138} See id. at 1810 (Kennedy, J., dissenting).
natory animus did not actually cause an adverse action."\(^{139}\)

IV. Analysis

In recognizing that Price Waterhouse was not a "presumption-based" case, as were McDonnell Douglas and Burdine,\(^{140}\) it appears that the Court was correct in shifting the burden of persuasion to the defendant-employer, Price Waterhouse. In so doing, the Court seemingly has resolved the conflict among the lower federal courts\(^{143}\) as to the appropriate evidentiary scheme to be applied in Title VII mixed-motive cases.

In finding that a case is, in fact, a mixed-motive case, a court logically has inferred that the employer used a discriminatory criterion, at least in part, in reaching the challenged employment decision.\(^{142}\)

Once it is determined that a mixed-motive case exists, the employee must prove that discrimination was a "motivating" factor in the adverse employment decision.\(^{145}\) Once a "motivating factor" is established, intentional discrimination is thus proved, rendering the creation of a presumption unnecessary.\(^{144}\) In effect, this scheme relieves the employee of the lofty burden of establishing the precise causal role that discrimination played in the decision\(^{146}\) since requiring the employee to prove "but for" causation would be unduly burdensome and would make it virtually impossible for a mixed-motive employee to prevail.\(^{146}\) This is especially true in subjective employment decisions, such as existed in Price Waterhouse, where the employee is often unable to produce the necessary evidence.

However, since the Court failed to define precisely what it in-

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139 Id. at 1811 (Kennedy, J., dissenting).
140 See supra notes 33-54 and accompanying text (discussing evidentiary model in single-motive cases).
141 See supra notes 69-82 and accompanying text (discussing varying views by lower courts).
142 See Price Waterhouse, 109 S. Ct. at 1804 (O'Connor, J., concurring). As Justice O'Connor stated, once the employee proves intentional discrimination, she also affirmatively establishes conduct which Title VII seeks to deter. Id. (O'Connor, J., concurring).
143 See supra notes 113-14 and accompanying text (defining "motivating" factor).
144 Id.
145 See supra note 121 and accompanying text (plaintiff need not establish precise causation).
146 See supra note 133 and accompanying text (Justice O'Connor, in her concurring opinion argued that a plaintiff should not bear burden of proving "but for" causation).
tended by a "motivating factor," the lower courts likely will remain confused as to the standard of proof required from the employee before the burden of persuasion shifts to the employer. Since no clear-cut standard was established by the Court, the effectiveness of Title VII in addressing employment discrimination will depend largely upon the lower courts' interpretation of the employee's initial burden of proof.

Although Justices O'Connor and White advocate the use of "substantial," as opposed to "motivating" factor, it is asserted that the plurality and the two concurring opinions can be harmonized. Justice O'Connor believed that the plurality mandated an impermissibly low standard of causation. However, both the plurality and Justice O'Connor would require that some level of causation be established by the employee before the burden would shift. Further, it is suggested that the employee should not be required to establish her prima facie case by direct evidence; circumstantial evidence should be sufficient as long as the court logically can conclude that the employer intentionally discriminated.

It is both logical and fair that an employer who has been proven a "wrongdoer . . . bear the risk that the influence of legal and illegal motives cannot be separated." It is suggested that the burden shift should occur when doubt as to causation exists, as it does in a mixed-motive case. As a result, the employer's satisfaction of its burden should not dispel the employee's proof as it does in single-motive cases. It would appear that the Court in Price Waterhouse was correct, therefore, in concluding that the burden of persuasion shifts to the employer to prove that the impermissible factor was irrelevant in the ultimate result.

As suggested by the plurality, the employer should be required to produce specific, objective evidence to satisfy its burden, since the employer is in the best position to know what its job require-

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147 See Price Waterhouse, 109 S. Ct. at 1787-90.
148 See supra notes 125 & 135 and accompanying text ("substantial" factor standard).
149 Price Waterhouse, 109 S. Ct. at 1804 (O'Connor, J., concurring).
150 See id. at 1791. “Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision.” Id. “The plaintiff must show that the employer actually relied on her gender.” Id. (emphasis added).
151 See supra note 134 and accompanying text (direct evidence requirement).
153 See supra note 46 and accompanying text (employer rebutted presumption of unlawful discrimination in single-motive situation).
ments are. Otherwise, the "burden shifting" would only have a limited effect in eradicating employment discrimination. By placing such a burden on the employer, it is foreseeable that employers will reevaluate their decision-making processes to limit and hopefully extinguish the use of even subtle discriminatory considerations, such as sexual stereotyping. Thus, arguably, the Court's allocation of the burden of proof promotes, to a greater extent, Title VII's goal of eliminating discrimination in the workplace.

Noting that Title VII represents an effort on the part of Congress to balance the rights of employees against the preservation of employers' freedom of choice, the Court in Price Waterhouse determined that the employer's ability to show that the same decision would have resulted regardless of the consideration of an illegitimate factor, completely exculpates the employer from liability. Despite a clear violation of Title VII, the Price Waterhouse Court would allow the employer to escape all Title VII liability. This view can be criticized because without the imposition of liability, it appears that merely labeling the employer a violator serves no clear purpose. If the purpose of Title VII is to eliminate employment discrimination, tolerating the influence of discriminatory factors in employment decisions does little to achieve that goal. It would be more in the spirit of Title VII to apply the "same decision" test at the remedial, rather than liability, stage of the analysis, whereby a court would be able to find a violation of Title VII once the employee establishes that a discriminatory factor played a motivating or substantial role in the employer's decision. Such a framework would advance effectively the deterrent goals of Title VII and, at the same time, avoid placing an employee in a better position than if Title VII had never been violated; damages would be limited by the degree of the discriminatory infraction.

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154 See Price Waterhouse, 109 S. Ct. at 1791.
155 See supra note 119 and accompanying text (Title VII intended to protect employers' rights as well as employees').
156 See supra note 77 and accompanying text (some courts would completely absolve employer).
157 See supra notes 78-82 and accompanying text (discussing lower court decisions with bifurcated analysis).
158 See Comment, supra note 79, at 141. "The Court would have more faithfully served the purposes of Title VII had it adopted an approach that permitted a finding of liability upon proof of discrimination." Id.
CONCLUSION

The Supreme Court's recognition of the shifting of the burden of persuasion in mixed-motive cases is a very positive development in Title VII law. In retreating from the requirement that the burden of persuasion remain at all times upon the employee, the Court in Price Waterhouse has eased the burden on employees in combating discriminatory factors which have operated in the past to prevent the advancement of women and minorities at the workplace. It is hoped that this decision will incite employers to reexamine their existing personnel practices in order to abolish discriminatory considerations, such as sexual stereotyping, and to establish objective performance appraisal systems.

Despite such advances, however, the Price Waterhouse decision has left some unanswered questions. First, there is likely to be "confusion and complexity" among the lower courts due to the absence of a precise standard of proof which must be met by the employee. Furthermore, to effectively advance Title VII's goal of equal employment for all, regardless of race, color, religion, sex, or national origin, the Court should consider applying the "same decision" test at the remedial, not liability, stage of the analysis. Since these issues were not directly addressed by the Court, it is up to the lower courts to refine the standard set forth in Price Waterhouse.

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109 Price Waterhouse, 109 S. Ct. at 1810 (Kennedy, J., dissenting).