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THE EFFECT OF ELIMINATING DISTINCTIONS AMONG TITLE VII DISPARATE TREATMENT CASES

*Henry L. Chambers, Jr.**

INTRODUCTION

IN its last term, the Supreme Court issued *Desert Palace, Inc. v. Costa*,[1] a remarkably simple and unanimous opinion stating that circumstantial evidence alone could support giving a motivating-factor jury instruction[2] in a mixed-motives disparate treatment case based on Title VII of the Civil Rights Act of 1964.[3] Before *Desert Palace*, the motivating-factor instruction was considered by many to be available only when a plaintiff had presented direct evidence to support the claim that an illegitimate factor was a motivating factor in a job decision.[4] Though *Desert Palace* appears merely to reaffirm the pedestrian notion that direct and circumstantial evidence can be equally probative of intentional discrimination, it will have a significant effect on disparate treatment law. The decision essentially eliminates any relevant distinctions between vari-

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1. 123 S. Ct. 2148 (2003).

2. A motivating-factor instruction states that if an illegitimate factor, such as the plaintiff's gender or race, was a motivating factor in the subject job action, the employer has engaged in an unlawful employment practice. *See* 42 U.S.C. § 2000e-2(m) (2000) ("Except as otherwise provided in this subchapter, an 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."). However, if the employer can prove that its decision would have been the same in the absence of the consideration of the illegitimate factor, it may limit its liability to fees and non-monetary relief:

> On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. § 2000-e2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000(e)-2(m).

42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000).

3. 42 U.S.C. § 2000e.

4. *See Desert Palace*, 123 S. Ct. at 2151-52 (noting that a number of circuit courts had required that plaintiff prove that an illegitimate factor was a motivating factor through direct evidence).

ous types of disparate treatment cases and will likely increase the discretion afforded district courts in disposing of Title VII cases.

When Title VII was enacted, standard civil litigation rules applied to disparate treatment cases. However, in *McDonnell Douglas v. Green*,[5] the Court developed a pretext test that forced factfinders to evaluate circumstantial evidence in a particular way. Similarly, in *Price Waterhouse v. Hopkins*,[6] the Court created a motivating-factor test to be used when legitimate and illegitimate factors combined to cause a job action. The rules from these cases created three different types of disparate treatment cases (standard, *McDonnell Douglas* pretext, and *Price Waterhouse* mixed-motives) and provided roadmaps for judges and factfinders to decide them. Over the last decade, these rules and the distinctions they created have been jettisoned.

St. Mary's Honor Center v. Hicks[7] eliminated the effect of the pretext test and the distinction between standard and pretext cases. *Desert Palace* interpreted the motivating-factor test in a way that eliminates the distinction between mixed-motives and non-mixed-motives cases. The point is not that the Court has decided the cases incorrectly or with an inappropriate bias.[8] Rather, it is that eliminating the distinctions between the different types of cases suggests that all disparate treatment cases should be treated the same. The result of these decisions will likely be a reversion to an older litigation model in which trial judges are not given specific rules to use to resolve specific types of disparate treatment cases, but instead have substantial discretion to dispose of all types of disparate treatment cases as they see fit.

This article explores the Court's recent simplification and standardization of Title VII disparate treatment cases. Part I reviews the Court's pretext jurisprudence. Part II reviews the Court's mixed-motives jurisprudence. Part III explains how the Court's pretext and mixed-motives jurisprudence implicitly eliminate the distinctions among pretext, mixed-motives, and standard disparate treatment cases. Finally, Part IV explains why the likely result of this collapse will be a shift in discretion to trial judges.

I. THE SUPREME COURT'S PRETEXT JURISPRUDENCE

Pretext cases are circumstantial evidence cases in which the strength of plaintiff's evidence flows from the defendant's inability to provide an explanation for the subject employment action. Until the Supreme Court developed its pretext test in *McDonnell Douglas v. Green*,[9] courts could summarily dispose of circumstantial evidence, disparate treatment cases

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5. 411 U.S. 792 (1973).
6. 490 U.S. 228 (1989).
7. 509 U.S. 502 (1993).
8. The decisions have not been uniformly pro-plaintiff or pro-employer. *Hicks* favors employers; *Desert Palace* favors employees, at least in the short run.
9. 411 U.S. 792 (1973).

before the defendant-employer was required to present a case. However, the Court's pretext test both effectively required that the defendant present a defense and guided judges in evaluating circumstantial evidence of discrimination. Though pretext cases historically have been considered to be different from standard disparate treatment cases in which a plaintiff presents direct evidence to support its claim of intentional discrimination, the Court has effectively eliminated that distinction.[10] Now, pretext cases and standard cases are theoretically distinct, but virtually indistinguishable in practice.

A. *McDonnell Douglas* Test

The three-part *McDonnell Douglas* pretext test remains the cornerstone of pretext jurisprudence. The first part of the test is the prima facie case. The second part is the defendant's articulation of at least one legitimate nondiscriminatory reason (LNR) for the job action. The third part is the pretext stage.

A prima facie case consists of any set of facts that allows a factfinder to infer that intentional discrimination occurred.[11] In *McDonnell Douglas*, the prima facie case consisted entirely of circumstantial evidence that proved that instead of hiring plaintiff, an African American man, for a job for which he was clearly qualified, the employer continued to look for other workers possessing plaintiff's qualifications.[12] After a prima facie case is presented, the factfinder has reason to suspect, but not hard evidence to ensure, that discrimination occurred.[13] Following a proven

10. Nonetheless, the *McDonnell Douglas* test is primarily applied to circumstantial evidence cases and arguably should not be used in direct evidence cases. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (noting inapplicability of the *McDonnell Douglas* test in direct evidence cases).

11. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement . . . . [T]his court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination."); Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 528 (1993) (Souter, J., dissenting) (noting that under *McDonnell Douglas* and *Burdine*, a prima facie case raises an inference of discrimination); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) ("But *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'").

12. *McDonnell Douglas*, 411 U.S. at 802. ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (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.").

13. The prima facie case makes the inference of discrimination reasonable. *See Burdine*, 450 U.S. at 253-54 ("The prima facie case serves an important function in the litiga-

prima facie case, a judicially-installed presumption of discrimination shifts the burden of producing evidence—but not the burden of persuasion—that the subject job action was not caused by discrimination to the defendant-employer.[14] If the employer fails to produce such evidence, it loses.[15]

Because the employer loses unless it provides a defense, the presumption of discrimination forces the employer to articulate an LNR, leading to the second part of the test. The employer need only present admissible evidence of an LNR to rebut the presumption of discrimination.[16] If the employer rebuts the presumption, the case proceeds to the pretext stage. By the end of the second stage of the *McDonnell Douglas* test, the plaintiff has provided evidence supporting the prima facie case and an inference of discrimination, and the employer has provided evidence of an LNR and an inference of non-discrimination.[17]

In the pretext stage, the plaintiff may attempt to rebut the LNR and demonstrate that intentional discrimination more likely than not caused the job action. The plaintiff may do this directly by proving that discrimination best explains the job action or indirectly by proving that the employer's LNR is false.[18] This is where the major controversy regarding the *McDonnell Douglas* test existed. Before the Supreme Court resolved the issue, some courts believed that proof of the LNR's falsity was proof that discrimination caused the job action and required a verdict for the plaintiff. Other courts believed that proof of falsity was mere evidence that helped the factfinder determine if discrimination caused the job action.[19] The Supreme Court made clear in *St. Mary's Honor Center v. Hicks* that proof of falsity was merely evidence of, not necessarily proof of, intentional discrimination.[20]

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tion: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.").

14. *See Hicks*, 509 U.S. at 517-18 (noting that the burden of persuasion remains on the plaintiff); *Burdine*, 450 U.S. at 257 (noting that the burden of persuasion does not shift to the employer).

15. *Burdine*, 450 U.S. at 254. ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.").

16. *See McDonnell Douglas*, 411 U.S. at 802-03 (explaining how the articulation of a legitimate, non-discriminatory reason negates the presumption of discrimination).

17. *See Burdine*, 450 U.S. at 256 n.10 (noting that facts underlying prima facie case retain factual import even after the presumption of discrimination has been rebutted).

18. *See id.* at 256 (noting that plaintiff "may succeed . . . 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").

19. There was substantial scholarly commentary on this issue prior to the issuance of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). *See, e.g.*, Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 71-91 (1991).

20. *See Hicks*, 509 U.S. at 511.

B. Interpreting the *McDonnell Douglas* Test

The differing opinions of what proof of falsity establishes reflect differing visions of the *McDonnell Douglas* test's purpose. The first vision suggests that the test provides both a procedural structure to encourage the employer to present a defense and a substantive evaluation of circumstantial evidence of intentional discrimination. The second vision is that the test merely provides a structure to force the employer to provide a defense so a factfinder may decide the case in the same manner it would decide a standard disparate treatment case. Though it is clear that the Court has embraced the second vision, its rejection of the first vision is important.

Context suggests that viewing the *McDonnell Douglas* test as a roadmap to guide judges to a verdict is sensible.[21] The test appears unnecessary if its only goal was to force an employer to present a defense. The test was promulgated at a time when all Title VII trials were bench trials.[22] A judge who was inclined to require a defense from the employer could likely encourage the defendant to provide a defense without the formal procedure that the *McDonnell Douglas* test provides. That judge could encourage a defense by refusing to grant a motion for a directed verdict and suggesting that sufficient evidence existed to support a verdict for plaintiff. Thus, the first part of the *McDonnell Douglas* test—which automatically led to the second part—appears to have been designed for judges who would not encourage employers to present defenses, presumably because they believed that the quantum of evidence sufficient to support a prima facie case was insufficient to support an inference of discrimination or was insufficient to support a verdict for the plaintiff. Those judges could only be guided by a directive roadmap.

Further, if the test's focus was to be on judges who were skeptical of the strength of circumstantial evidence in disparate treatment cases, the pretext stage would appear necessary to guide those judges to a particular conclusion. Requiring that proof of falsity yield judgment for the plaintiff is sensible because the targeted judges might decline to find for plaintiffs even after the plaintiffs had proven all that they reasonably could—that the reason provided by the employer for the job action was clearly not the true one. Given that proof of falsity would require that the factfinder—the highly skeptical judge—be convinced the employer had provided no credible reason for the job action it took, telling the judge that a verdict for the plaintiff must follow as a result would seem sensi-

21. At the very least, *McDonnell Douglas* structured how judges were to handle cases. *See McDonnell Douglas*, 411 U.S. at 798 ("In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari. . . .").

22. The 1991 Civil Rights Act authorized jury trials for some Title VII cases. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A(c), 105 Stat. 1071, 1073 (codified at 42 U.S.C. § 1981a(c) (2000)).

ble.[23] Given that the plaintiff would appear to be in a stronger position after proving the falsity of the only explanation that the employer could provide than she was just after proving the prima facie case, requiring that the trial court grant a verdict to the plaintiff after proof of falsity seems reasonable.

However, any support for a roadmap vision of the *McDonnell Douglas* test was eliminated in *St. Mary's Honor Center v. Hicks*. The *Hicks* Court deemed the *McDonnell Douglas* test to be purely procedural. After *Hicks*, the *McDonnell Douglas* test's sole function is to force the employer to present evidence from which the factfinder can reach its own conclusion. According to the *Hicks* Court, the prima facie case is a minimal amount of evidence that merely triggers the presumption of discrimination.[24] The presumption forces the articulation of a LNR, but does not necessarily suggest that the evidence supporting the prima facie case is overwhelmingly strong.[25] Once the LNR is articulated and the factfinder has competing claims to assess, the *McDonnell Douglas* test becomes irrelevant. The third part of the test is necessary to provide the plaintiff a chance to rebut the LNR, but all evidentiary analysis—including the import of proof of falsity—is left to the factfinder.[26]

C. The Result of Eliminating the Effect of the *McDonnell Douglas* Test

Eliminating the roadmap vision of the *McDonnell Douglas* test eliminates the distinction between pretext and non-pretext cases and increases discretion for judges. The *McDonnell Douglas* test is now merely a procedural test designed to encourage the defendant to present evidence and drops from the case once that function is served. By the time the case is submitted to the factfinder, there is no relevant distinction between pretext and non-pretext cases.[27] A pretext case is merely a standard case supported by circumstantial evidence instead of direct evidence.

Judges now have increased discretion because they are the decisionmakers at the summary judgment and judgment as a matter of law stages, and have fewer substantive constraints on their ability to dispose of cases. Now that the *McDonnell Douglas* test merely has a procedural function and pretext and non-pretext cases are to be treated the same, judges may make the same sufficiency of evidence determination regard-

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23. Otherwise, judges could determine that the employer was lying, but determine that the plaintiff would still lose. *See, e.g.*, *Hicks*, 509 U.S. at 508 (noting that the trial judge found the employer's reasons not credible, but still found in employer's favor).

24. *See Hicks*, 509 U.S. at 506-07.

25. For a discussion of the relationship between the prima facie case and the presumption of discrimination, see Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 Alb. L. Rev. 1, 12-15 (1996).

26. After the 1991 Civil Rights Act, the factfinder may be a judge or a jury. *See supra* note 22.

27. If the judge determines that sufficient evidence has been presented for a case to be heard by a factfinder, there is no reason for the factfinder in the pretext case to be given instructions that are any different than those that would be given in a standard case.

ing summary adjudication in pretext cases as they would in standard cases. For example, in *Reeves v. Sanderson Plumbing Products, Inc.*,[28] the Supreme Court ruled that proof of LNR's falsity usually, but not always, supports a verdict for plaintiff. This presumably allows judgment as a matter of law for the employer in some cases where falsity has been proven.[29] *Reeves* reiterates that proof of falsity is mere evidence supporting intentional discrimination, not proof that such discrimination occurred, and should merely be considered part of a case for summary adjudication purposes.

The ability to summarily adjudicate a disparate treatment case in the face of proof of evidence or falsity suggests that judges may exercise substantially more discretion now than they could under a roadmap vision of the *McDonnell Douglas* test. However, it is not necessarily any more discretion than a judge would exercise in a standard disparate treatment case—the discretion to dismiss a case when the judge does not believe the plaintiff has sustained its evidentiary burden. A similar augmentation in judicial discretion may follow from the Court's recent decision in *Desert Palace*, though by a different route.

II. TITLE VII'S MIXED-MOTIVES JURISPRUDENCE

A. *Price Waterhouse v. Hopkins*

The Supreme Court first addressed mixed motivation in Title VII cases in *Price Waterhouse v. Hopkins*.[30] In *Price Waterhouse*, the employer illegitimately considered the plaintiff's sex by giving credence to sex-stereotyped and sex-based evaluations from partners of the firm,[31] but also legitimately considered the plaintiff's interpersonal skills in deciding to hold,[32] rather than grant, the plaintiff's bid for partnership.[33] The Court

28. 530 U.S. 133 (2000).

29. *Id.* at 148 ("Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory."). This analysis would have been nearly unthinkable in a world where proof of falsity arguably required a verdict for the plaintiff.

30. 490 U.S. 228 (1989) (plurality opinion). The Court already had experience with mixed motivations in constitutional law cases. *E.g.*, Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 270-71 (1977); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977).

31. *See Price Waterhouse*, 490 U.S. at 235 (plurality opinion) (noting that some of the partners based their comments about Hopkins on her sex).

32. *See id.* at 231 (plurality opinion) (noting that plaintiff "was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year").

33. *Id.* at 234-35 (plurality opinion) (noting that problematic interpersonal skills "eventually doomed her bid for partnership"). However, one must wonder if the firm's emphasis on interpersonal skills was related to plaintiff's sex. *But see id.* at 236 (plurality opinion) ("Moreover, [the trial judge] concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates

had to decide how to manage a disparate treatment employment discrimination case when legitimate and illegitimate factors combined to cause an employment action.[34] *Price Waterhouse* produced a fractured decision with four opinions—a four-justice plurality opinion, individual concurring opinions by Justices White and O'Connor, and a dissenting opinion by the remaining three justices. Though written only for herself, Justice O'Connor's opinion was considered by many to be the operative holding of *Price Waterhouse*.[35]

The four-justice plurality ruled that when an illegitimate factor was a motivating factor in the subject job decision, the employer must prove that it would have made the same decision absent the consideration of the illegitimate factor to avoid liability.[36] The plurality was clear that the employer's task was to prove an affirmative defense, not to carry a shifted burden of persuasion.[37] The distinction between a shifted burden of persuasion and an affirmative defense is important. A shifted burden of persuasion puts the risk of non-persuasion on the defendant. That is, even though the plaintiff arguably has not proven its case, plaintiff wins unless the defendant proves its defense.[38] Conversely, giving the defendant an

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who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.").

34. The Court had to determine whether the combined consideration of legitimate and illegitimate factors violated Title VII's prohibition on discrimination because of an employee's sex. *See* 42 U.S.C. § 2000e-2(a)(1). ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex . . . .").

35. Indeed, many circuits followed Justice O'Connor's opinion. *See* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2151-52 (2003) (noting courts that relied on Justice O'Connor's opinion); *see also* Bryan W. McKay, Note, *Mixed Motives Mix-up: the Ninth Circuit Evades the Direct Evidence Requirement in Disparate Treatment Cases*, 38 Tulsa L. Rev. 503, 513, 516-17 (2003) (discussing the narrowest grounds theory of Supreme Court holdings and suggesting that Justice O'Connor's decision in *Price Waterhouse* is the operative one). Ironically, this made Justice O'Connor's views authoritative even on points where there may not have been a majority of justices in agreement. *See* Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 Mich. L. Rev. 234, 239 (2001) ("Although only Justice O'Connor and the three dissenters agreed that plaintiffs must adduce direct evidence in order to establish a mixed-motive claim, most circuits have followed the minority in requiring direct evidence as a threshold for mixed-motive claims.").

36. *Price Waterhouse*, 490 U.S. at 244-45 (plurality opinion) ("We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.").

37. *Id.* at 246 (plurality opinion) (distinguishing an affirmative defense from a shift in the burden of persuasion). The plurality appeared to suggest that the affirmative defense in this setting was similar to a bona fide occupational qualification affirmative defense that is triggered after an illegitimate motive is proved. *See id.* at 248 (plurality opinion) (citing sex and pregnancy discrimination cases and noting "our assumption always has been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision").

38. However, a shifted burden of persuasion might have been appropriate as well. *See id.* at 250 (plurality opinion) (noting that employer created the risk of being viewed as a

affirmative defense suggests that the plaintiff has actually proven its case, though the defendant would retain an opportunity to justify its actions. Ultimately, the Court determined that no Title VII violation has occurred if an employer proves its affirmative defense.[39]

Justice O'Connor's approach was different, as she considered a mixed-motives case to be a particularly strong disparate treatment case.[40] Thus, she viewed the plurality's test as a largely justified shifting of the burden of persuasion, rather than as the creation of an affirmative defense.[41] However, rather than use the plurality's motivating factor test, she argued that the plaintiff needed to demonstrate through direct evidence that an illegitimate factor played a substantial role in the job decision before a shift in the burden of persuasion was justified.[42] Justice White likewise viewed the issue as one involving burden shifting rather than an affirmative defense.[43]

The dissenters argued that the *McDonnell Douglas v. Green*[44] pretext test was the appropriate test for mixed-motives cases.[45] To them, causation was the issue. They suggested that Title VII required the plaintiff to prove that the illegitimate factor was a but-for cause of the subject job decision. A burden shift never occurs because the plaintiff either carries its burden of persuasion and wins or fails to carry its burden and loses. For them, anything short of but-for causation is insufficient to demonstrate that the subject job decision was made because of sex as required

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discriminator by injecting improper motivation into the decisionmaking process and, thus, could not complain about the burden shift/affirmative defense).

39. *Id.* at 237 (plurality opinion) ("Under [the Circuit Court's] approach, an employer is not deemed to have violated Title VII if it proves that it would have made the same decision in the absence of an impermissible motive, whereas under the District Court's approach, the employer's proof in that respect only avoids equitable relief. We decide today that the Court of Appeals had the better approach . . . .").

40. *Id.* at 278-79 (O'Connor, J., concurring) ("Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination."). Justice O'Connor then focused on the strength of the evidence presented to explain when her test should be used. *See id.* at 272-75 (O'Connor, J., concurring) (focusing on the strength of plaintiff's evidence as the key to burden shift).

41. However, it is somewhat unclear that plaintiff would always need a shift in the burden of persuasion. *See id.* at 265-66 (O'Connor, J., concurring) (noting that the factfinder who knows that employer has used an illegitimate factor in a decision "could conclude that absent further explanation, the employer's discriminatory motivation 'caused' the employment decision").

42. *Id.* at 261, 276 (O'Connor, J., concurring) ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

43. *Id.* at 259-60 (White, J., concurring).

44. 411 U.S. 792 (1973).

45. *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting) (noting that "continued adherence" to *McDonnell Douglas* and *Burdine* "is a wiser course" than the plurality's).

by Title VII.[46]

Price Waterhouse's core principle, derived from the plurality and concurring opinions, is that an employer who uses illegitimate factors in making an employment decision has violated Title VII, unless the employer can prove that it would have made the same decision regardless.[47] However, two major, unresolved issues lingered after *Price Waterhouse.* The first was whether the plaintiff had to bear the heavier burden of proving that an illegitimate factor was a substantial factor or the lighter burden of proving that it was a motivating factor to trigger the burden shift/affirmative defense. The second was whether proof that the illegitimate factor played a role in the subject decision had to be supported by direct evidence or merely by circumstantial evidence.[48] The issues were unsettled because they appeared to be issues on which the plurality and concurring justices differed.[49] However, one issue appeared clear: mixed-motives cases were to be treated differently than other disparate treatment cases.

B. The Motivating Factor Test and the Civil Rights Act of 1991

In the wake of *Price Waterhouse*, Congress passed the Civil Rights Act of 1991, which included changes to Title VII. The Act clarified the *Price Waterhouse* plurality's motivating factor test and made it a formal part of Title VII.[50] Consequently, an unlawful employment practice may be

46. *See id.* at 295 (Kennedy, J., dissenting) (stating that plaintiff should lose because she could not prove that she would have been admitted to the partnership if only legitimate factors had been considered by partnership). The focus was to be on harm, not motives. *See id.* at 282 (Kennedy, J., dissenting) ("Our decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives.").

47. *Id.* at. 244-45 (plurality opinion) ("[O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.").

48. This distinction is arguably theoretical, as it can be very difficult to differentiate direct evidence and circumstantial evidence of discrimination. *See id.* at 291 (Kennedy, J., dissenting) (noting the difficulty of distinguishing between direct and circumstantial evidence); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 Mercer L. Rev. 651, 662-63 (2000) (noting the inability of easily distinguishing direct and circumstantial evidence in the employment discrimination context); Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 Colum. Hum. Rts. L. Rev. 657, 667 n.40 (2003) ("The distinction between direct and circumstantial evidence is often a difficult one to make, and in recent years courts have narrowed the range of behavior that is defined as 'direct evidence.'"); *see also* Mizer, *supra* note 35, at 239-41 (noting the different ways in which circuit courts have defined direct evidence after adopting the direct evidence standard). In addition, direct evidence cases may contain circumstantial evidence and circumstantial evidence cases may also utilize direct evidence.

49. *See Price Waterhouse*, 490 U.S. at 271-75 (O'Connor, J., concurring); *id.* at 259 (White, J., concurring) (stating that the illegitimate factor had to be a substantial factor in the decision to affect the burden of persuasion).

50. To be clear, Congress adopted the plaintiff's motivating factor test rather than Justice O'Connor's substantial factor test. However, the Act actually adopts the general vision of the District Court opinion in *Price Waterhouse*, which suggests that Title VII is breached as soon as illegitimate factors are considered in making a job decision regardless

proven merely by demonstrating that an illegitimate factor was a motivating factor in a job decision.[51] However, if the employer can prove that its decision would have been the same regardless of the use of the illegitimate factor, the plaintiff's monetary recovery is limited to attorney's fees and costs.[52]

Whether the motivating factor test applies to all Title VII disparate treatment cases or only to mixed-motives cases is unclear from its text. The Civil Rights Act of 1991 does not limit the motivating factor test to mixed-motives cases, and the test only states that an unlawful employment practice is proven when an illegitimate factor is a motivating factor in the subject decision.[53] Conversely, the context of the passage of the 1991 Act suggests that the motivating factor test might apply only to mixed-motives cases. The motivating factor test was passed to address *Price Waterhouse*, a mixed-motives case. In addition, the motivating factor test appears to complement the normal but-for causation test rather than supplant it.[54] This suggests that the motivating factor test applies to mixed-motives cases and that but-for causation applies to non-mixed-motives cases. Similarly, a continued distinction between mixed-motives and pretext cases might be appropriate because of the starkly different ways in which pretext and mixed-motives cases were treated when the Civil Rights Act of 1991 was passed. For example, at that time, the notion of an affirmative defense for a defendant or a shift in the burden of persuasion in a pretext case was anathema.[55] Because there was no indication from Congress that the rule was to change how pretext cases were handled, that might suggest Congress thought the distinction between mixed-motives and pretext cases was sound.

Of course, the argument that the motivating factor test applies to mixed-motives cases and a but-for test applies to non-mixed-motives cases suggests that there is a way to distinguish such cases. Though some Justices see virtually no difference between mixed-motives and non-

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of its actual effect on the decision. *Id.* at 237 (plurality opinion) ("[The trial judge] held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping.").

51. *See* 42 U.S.C. § 2000e-2(m) (2000).

52. The plaintiff may also be granted declaratory and injunctive relief. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000).

53. The *Price Waterhouse* plurality suggests that mere use of an illegitimate factor violates Title VII's spirit, *see* 490 U.S. at 240-41, but eliminated recovery if the employer could prove it would have made the same decision, *id.* at 244-45.

54. The language of the Act suggests that the motivating factor test may be an alternative way—other than through but-for causation—to prove an unlawful employment practice. *See supra* note 2. Clearly, either method may be used to prove the existence of an unlawful employment practice.

55. *See* Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 259-60 (1981) ("In summary, the Court of Appeals erred by requiring the defendant to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating the respondent . . . . When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.").

mixed-motives cases,[56] two possible distinctions have been forwarded. First, some have suggested that mixed-motives cases presume multiple causes of a job action, whereas non-mixed-motives cases presume a single cause.[57] Second, Justice O'Connor's direct evidence requirement for mixed-motives cases differentiated mixed-motives cases from pretext cases, though arguably not from standard direct evidence cases. Though Justice O'Connor did not suggest a qualitative distinction between the types of cases, her direct evidence requirement suggested a functional distinction that many courts embraced.[58] It may seem odd that some courts embraced the distinction given that Justice O'Connor's opinion was seemingly repudiated by the Civil Rights Act of 1991, but they did.[59] However, *Desert Palace Inc. v. Costa*[60] eliminates the distinction between mixed-motives and pretext cases that was based on the existence of direct evidence.

C. *Desert Palace, Inc. v. Costa*

In *Desert Palace*, the Court ruled that a plaintiff could prove an illegitimate factor was a motivating factor for a job decision through either circumstantial or direct evidence.[61] In that case, the plaintiff complained of disparate treatment sex discrimination.[62] At trial, the plaintiff presented evidence suggesting that she had been treated differently than her male colleagues at work, including being disciplined more harshly than male

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56. The dissenters in *Price Waterhouse* suggested that there is no fundamental distinction between mixed-motives and non-mixed-motives cases. *See Price Waterhouse*, 490 U.S. at 279-80 (Kennedy, J., dissenting) (indicating that the pretext test should apply to mixed-motives cases).

57. *See, e.g., id.* at 247; *see also* Belton, *supra* note 48, at 652-53 ("In a mixed-motive case, the evidence is sufficient to allow the factfinder to conclude, as a matter of fact, that an employer's employment decision was motivated by both lawful and unlawful reasons. The mixed-motive case is often contrasted with a single-motive pretext case, which is illustrated in *McDonnell Douglas.*").

58. The legislative history of the Civil Rights Act of 1991 did not provide guidance on the direct evidence issue.

> However, it is clear that Congress did not affirmatively embrace the direct evidence standard. Congress's failure to address some of these crucial issues has resulted in a great deal of confusion and conflict in the lower courts. In fact, the legislative history is singularly uninstructive on the substantive standard to be applied in mixed-motive employment discrimination cases.

Belton, *supra* note 48, at 661.

59. *See* McKay, *supra* note 35, at 504 ("A product of Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, the direct evidence requirement has found its way into Title VII jurisprudence in almost every circuit."); Mizer, *supra* note 35, at 262 ("By now the irony should be clear: the lower federal courts gleaned a direct evidence requirement from a single concurring opinion in a case that Congress expressly rejected, and they subsequently grafted that requirement onto the very statutory provision that overturned the decision.").

60. 123 S. Ct. 2148 (2003).

61. *See id.* at 2150 ("The question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (1991 Act). We hold that direct evidence is not required.").

62. Plaintiff also claimed sexual harassment. That claim was dismissed. *See id.* at 2152.

employees.[63] Based on the circumstantial evidence presented, the district court gave a motivating-factor jury instruction. The Ninth Circuit Court of Appeals, sitting en banc, affirmed the district court's ruling.[64]

The Supreme Court's decision, affirming the Ninth Circuit, was unanimous and straightforward. The Court ruled that because the text of Title VII did not limit how a motivating factor could be proven, any competent evidence could be used to prove that an illegitimate factor was a motivating factor.[65] Thus, a mixed-motive instruction appears to be appropriate whenever evidence is presented from which a factfinder can conclude that an illegitimate factor was a motivating factor.[66] However, *Desert Palace* raises serious issues for the disparate treatment enterprise. The possibility of a circumstantial evidence, mixed-motives case means that direct evidence cannot differentiate a mixed-motives case from a non-mixed-motives case.[67] The Court must rest the distinction between mixed-motives cases and non-mixed-motives cases (and the argument that the motivating factor test can be limited to mixed-motives cases) on the notion that mixed-motives cases assume multiple causes for the subject job action and non-mixed-motives cases assume a single cause. The next section of this article suggests that this distinction cannot be sustained and that *Desert Palace* implicitly eliminates any logical distinction among mixed-motives, pretext, and standard cases.

III. THE POST-*DESERT PALACE* DISPARATE TREATMENT LANDSCAPE

Before *St. Mary's Honor Center v. Hicks*[68] and *Desert Palace Inc. v. Costa*,[69] three types of disparate treatment cases existed: standard cases, pretext cases, and mixed-motives cases. A standard case is a direct evidence, single-factor case to which standard litigation rules apply. A pretext case is a circumstantial evidence, single-factor case to which the *McDonnell Douglas* test still ostensibly applies. A mixed-motives case

63. *See id.* ("At trial, respondent presented evidence that (1) she was singled out for 'intense stalking' by one of her supervisors, (2) she received harsher discipline than men for the same conduct, (3) she was treated less favorably than men for the assignment of overtime, and (4) supervisors repeatedly 'stack[ed]' her disciplinary record and 'frequently used or tolerated' sex-based slurs against her." (alteration in original)).

64. *See id.* at 2153.

65. Clearly, circumstantial evidence is competent evidence. *See id.* at 2154 (noting the import of circumstantial evidence in employment discrimination cases); *see also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.").

66. *See Desert Palace*, 123 S. Ct. at 2155 ("In order to obtain [a mixed-motive instruction] . . . a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'").

67. *See* McKay, *supra* note 35, at 504 ("The key to differentiating between pretext cases and mixed motives cases has been the direct evidence requirement.").

68. 509 U.S. 502 (1993).

69. 123 S. Ct. 2148 (2003).

was a direct evidence, multiple-factor case, but now is merely a multiple-factor case to which the motivating-factor test applies.

Though the descriptive distinctions exist, the practical distinctions no longer do.[70] Because of *Hicks*, the *McDonnell Douglas* test has virtually no effect on a pretext case by the time the evidence closes. Because both standard and pretext cases require that a factfinder specifically determine that intentional discrimination was more likely than not the cause of the subject job action, pretext and standard cases are practically indistinguishable. Similarly, *Desert Palace* appears to have leveled the distinctions between mixed-motives cases and pretext cases. Indeed, pretext and mixed-motives cases can morph into one another so easily that it makes little sense to treat them differently.

A. The Sameness of Pretext and Mixed-Motives Cases

The evidence presented in mixed-motives and pretext cases does not differentiate them, only the questions asked of the factfinders in those cases distinguish them.[71] Because pretext cases presume a single cause of the job action, pretext case factfinders are asked directly to determine whether discrimination caused the job action. Because mixed-motives cases assume multiple causes of the job action, mixed-motives case factfinders are asked, in bifurcated fashion, to determine what role discrimination played in the job action. First, they determine if an illegitimate factor was a motivating factor. Then, they determine if the employer has proven that the illegitimate factor was not a but-for cause of the job action.

Though the instructions given in the cases are different, a pretext case is in precisely the same posture as a circumstantial evidence, mixed-motives case by the close of evidence. In a pretext case, the parties present a prima facie case, the employer's LNR, evidence of the falsity of the LNR, and possibly evidence directly rebutting the prima facie case. In a mixed-motives case, the parties present all evidence that may prove that intentional discrimination motivated the job action and all evidence that may

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70. A number of commentators have suggested an eventual leveling of distinctions among different types of disparate treatment cases. *See, e.g.*, Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga. L. Rev. 563, 583 (1996) ("A new, uniform structure for analysis of disparate treatment cases has emerged. This model, which may replace the separate models established in *McDonnell Douglas/Burdine* and *Price Waterhouse*, began its emergence with Congress's reaction to *Price Waterhouse* through its enactment of the Civil Rights Act of 1991.").

71. However, both the plurality and Justice White argued in *Price Waterhouse* that there is a real distinction between pretext and mixed-motives cases. *See Price Waterhouse*, 490 U.S. at 247 (plurality opinion) (noting that "the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision"); *id.* at 260 (White, J., concurring) ("The Court has made clear that 'mixed-motives' cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision.' NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 400 n.5 (1983). In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.").

prove that intentional discrimination did not motivate the job action. Not surprisingly, with a little juggling, the evidence in a pretext case looks very similar to that in a circumstantial-evidence, mixed-motives case and vice-versa.

St. Mary's Honor Center v. Hicks[72] is an example of how easily a pretext case can morph into a mixed-motives case. In *Hicks*, the plaintiff was fired ostensibly for the number and severity of his disciplinary violations.[73] At trial, the plaintiff provided a prima facie case and evidence of the falsity of the claim that disciplinary reasons explained his termination. Indeed, the trial judge, sitting as factfinder, found that plaintiff had proven that the proffered reasons were not credible.[74] Simply, the plaintiff in *Hicks* appeared to have been treated differently than similarly situated white employees.[75] However, the judge determined that the plaintiff had only proven that his supervisor had a vendetta against him and fired him because he did not like plaintiff, not that the plaintiff was fired because of his race. Thus, the judge found for the employer.[76]

At the close of evidence in *Hicks*, at least two theories could have supported the existence of mixed motives. The first theory is that the plaintiff was fired both because of his race and his disciplinary violations, as neither alone would have caused his termination.[77] The second theory incorporates the trial judge's ultimate conclusion—the plaintiff's firing was attributable to a personal vendetta. If the personal vendetta was fueled in part by the plaintiff's race, the case could be a mixed-motives case. Circumstantial evidence of the racial nature of the vendetta could have included how the supervisor interacted with others in the workplace and the supervisor's harsh disciplining of the African American plaintiff compared to lighter disciplining of white employees.

Similarly, *Desert Palace* could easily be a pretext case. In *Desert Palace*, the plaintiff could have presented evidence of her qualifications plus evidence that her employer had treated her differently and more harshly than her male co-workers.[78] The differential treatment could lead a

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72. 509 U.S. 502 (1993).

73. *Id.* at 507 (noting that the employer's LNRs were "the severity and the accumulation of rules violations committed by" plaintiff).

74. *Id.* at 508 ("The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge.").

75. The plaintiff was the only shift commander reprimanded for his subordinates' violations. Other white shift commanders were not so reprimanded. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1246, 1250 (E.D. Mo. 1991).

76. *Hicks*, 509 U.S. at 508.

77. Because the number of African American employees at St. Mary's Honor Center appeared to remain constant over the relevant time period, one could argue that race alone did not cause plaintiff's termination. *See Hicks*, 509 U.S. at 508 n.2.

78. Interestingly, some courts require proof of differential treatment as part of a plaintiff's prima facie pretext case.

> Under the *McDonnell Douglas* burden shifting approach, in order to establish a prima facie case for gender discrimination, the plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she was performing her job to her employer's legitimate expectations; (3) that in spite of her

factfinder to infer that her firing was caused by her sex. This would be sufficient to support a prima facie case. The employer presented evidence suggesting that plaintiff's disciplinary problems justified her termination.[79] This would be a sufficient articulation of a LNR. Evidence that she was disciplined more harshly than male employees would allow a factfinder to infer the LNR's falsity. At the close of evidence, both sides would have presented evidence sufficient to support their cases and the inferences that illegitimate factors did or did not cause the subject job action.[80]

After *Desert Palace*, the pretext case and the circumstantial evidence, mixed-motives case are the same. In both cases, there is circumstantial evidence from which a jury could determine that discrimination was or was not the reason for the job action, that legitimate and illegitimate factors combined to cause the job action or that the cause of the job action was unclear.[81] At the close of evidence, a factfinder would not distinguish a mixed-motives case from a pretext case. In both pretext and mixed-motives cases, each party will argue that their claimed motivation was the only motivation for the job action.[82] In a mixed-motives case, the factfinder may conclude that mixed motives existed only after the plaintiff presents evidence that discrimination alone and the employer presents evidence that nondiscriminatory reasons alone explain the result. Were it otherwise, a mixed-motives case would exist only when a plaintiff conceded that the employer's case had some merit—that the em-

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> meeting the legitimate expectations of her employer, she suffered an adverse employment action; and (4) that she was treated less favorably than similarly situated male employees.

Markel v. Bd. of Regents of Univ. of Wis., 276 F.3d 906, 911 (7th Cir. 2002); *see also* Hilt-Dyson v. City of Chi., 282 F.3d 456, 465 (7th Cir. 2002) (requiring differential treatment of similarly situated employee as part of prima facie case for retaliation); Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002) (suggesting that proving that similarly situated individuals were treated differently than plaintiff can be a part of plaintiff's prima facie case).

79. *See* Desert Palace Inc. v. Costa, 123 S. Ct. 2148, 2152 (2003) ("Respondent experienced a number of problems with management and her co-workers that led to an escalating series of disciplinary sanctions, including informal rebukes, a denial of privileges, and suspension. Petitioner finally terminated respondent after she was involved in a physical altercation in a warehouse elevator with fellow Teamsters member Herbert Gerber.").

80. In the absence of the possibility of both inferences, judgment as a matter of law would be appropriate.

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

FED. R. CIV. P. 50(a)(1); *see also* FED. R. CIV. P. 52(c) (relating to judgment as a matter of law in bench trials).

81. Of course, a trial judge may refuse to credit intentional discrimination or the LNR presented by the employer as the most likely explanation for the job action. *See Hicks*, 509 U.S. at 511 (deciding that a court can reject the employer's proffered reasons, but also reject intentional discrimination as the reason for the job action).

82. In *Price Waterhouse v. Hopkins*, a mixed-motives case, the employer insisted that plaintiff's interpersonal skills explained the job action. 490 U.S. 228, 236 (1989).

ployer's decision may have been based in part on a legitimate factor and in part on an illegitimate factor. The absence of suitable grounds on which to differentiate mixed-motives and pretext cases suggests that one cannot support providing a motivating-factor instruction in a mixed-motives case and refusing to provide one in a pretext case. However, one must still question what evidence will trigger a motivating-factor instruction in either case.

B. Giving a Motiving-Factor Jury Instruction

The fact that pretext and mixed-motives cases are interchangeable but can yield different jury instructions is troubling. Declining to give a motivating-factor instruction withholds a key statement of law from the factfinder. A motivating-factor instruction provides the substantive law of Title VII, explains how the jury is supposed to structure its deliberations, and provides a roadmap for its verdict. Without a motivating-factor instruction, a jury in a pretext case could determine that intentional discrimination and the LNR were motivating factors in the job action, but would find for the employer if it could not decide that the plaintiff had proven that intentional discrimination more likely than not caused the job action.[83] Conversely, if a jury with the same evidence and a motivating-factor instruction determined both that intentional discrimination was a motivating factor in the job action and that defendant had not proven that the LNR alone would have yielded the same result, it would award full recovery of damages for the plaintiff. To be clear, the point is not that different juries could reach different factual conclusions based on the same evidence. Rather, it is that different juries could reach the same factual conclusions, but reach different verdicts because of the jury instructions given to them.

When a mixed-motives case was presumed to require direct evidence of intentional discrimination, few plaintiffs could be expected to produce sufficient evidence to support a mixed-motives instruction.[84] However, now that the direct evidence requirement no longer exists,[85] proving pretext appears to be more difficult than proving mixed motives. The Supreme Court's pretext jurisprudence requires that a plaintiff prove but-

83. The *Price Waterhouse* dissenters would have argued before the passage of the 1991 Civil Rights Act that proof of a motivating factor is proof of but-for causation. *See id.* at 218 (Kennedy, J., dissenting) ("Much of the plurality's rhetoric is spent denouncing a 'but-for' standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard.").

84. Direct evidence can be difficult to find in employment discrimination cases. *See* Hopson v. DaimlerChrysler Corp., 306 F.3d 427, 436 (6th Cir. 2002) (noting the difficulty of producing direct evidence even when discrimination may seem clear); Teneyck v. Omni Shoreham Hotel, 254 F. Supp. 2d 17, 20 (D.D.C. 2003) ("Direct evidence in employment discrimination actions may be difficult to produce, however.").

85. *See* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2155 (2003) ("Because direct evidence of discrimination is not required in mixed-motive cases, the Court of Appeals correctly concluded that the District Court did not abuse its discretion in giving a mixed-motive instruction to the jury.").

for causation.[86] Though the plaintiff may use circumstantial evidence to do so, the plaintiff must convince a factfinder that intentional discrimination is a but-for cause of the subject job action. Conversely, a motivating-factor showing does not appear to require a showing of but-for causation. The motivating-factor regime Congress passed in the 1991 Civil Rights Act contemplates intentional discrimination being a motivating factor, but not a but-for cause of a job action.[87] Because allowing a motivating factor showing to be made purely through circumstantial evidence makes the showing easier to make than (or identical to) a pretext showing, a motivating factor instruction would appear to be appropriate in every pretext case that survives summary judgment.

C. Where We Are After *Desert Palace*

The Supreme Court has determined that circumstantial evidence may serve the same functions that direct evidence does. This results in almost no practical distinction among standard, pretext, and mixed-motives cases. Though the Court has not determined whether it will retain its weakly plausible distinction among the cases,[88] trial courts will have to implicitly address the issue very soon in the context of deciding whether sufficient evidence has been presented to trigger a motivating-factor jury instruction.[89] The courts will face the argument that if sufficient evidence has been presented to support a but-for causation finding (necessary for reaching the jury in standard and pretext cases), the evidence is necessarily sufficient to support a finding that discrimination was a motivating factor. If the argument is persuasive, a motivating-factor jury instruction would be appropriate in all standard, pretext, and mixed-motives cases.[90] The last part of this article discusses how courts and the Supreme Court may react to this issue.

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86. *See Hicks*, 509 U.S. at 523-24 ("Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race."). Of course, plaintiffs may prove but-for causation through circumstantial evidence. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

87. *See supra* note 2.

88. The Court may continue to treat mixed-motives and non-mixed-motives cases differently. *See Desert Palace*, 123 S. Ct. at 2151 n.1 ("This case does not require us to decide when, if ever, § 107 [the motivating-factor test] applies outside of the mixed-motive context.").

89. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003).

90. The argument has some support in the academic community. *See, e.g.*, Zimmer, *supra* note 70, at 625 (arguing for application of motivating factor test for all disparate treatment cases, whether supported by direct evidence or circumstantial evidence).

IV. STANDARDIZING THE TREATMENT OF DISPARATE TREATMENT CASES

The effective result of *Desert Palace* and *Hicks* has been to eliminate the important distinctions among standard, pretext, and mixed-motives disparate treatment cases. Though courts may maintain a distinction (based on the putative number of causes of the subject job action) between mixed-motives and non-mixed-motives cases until the Supreme Court or Congress resolves the issue, this appears to be a short-term solution given the weakness of the distinction. In the long term, the most likely solution will be to treat the three types of cases the same and apply the motivating-factor test to all of them. However, applying the motivating-factor test to all disparate treatment cases may yield varying results, as judges will determine on an ad hoc basis how much evidence is necessary or sufficient to sustain an inference that an illegitimate factor was a motivating factor, i.e., the amount of evidence will trigger a motivating-factor jury instruction and be sufficient for a plaintiff to avoid judgment as a matter of law. Judges could have at least three methods to determine the sufficiency of evidence.

The first possibility is that the amount of evidence sufficient to trigger a motivating-factor instruction would be substantially less than that currently required to reach a jury in a pretext case. In a pretext case, a plaintiff must have presented sufficient evidence for the jury to infer that discrimination was a but-for cause. Because an illegitimate factor can be a motivating factor without being a but-for cause, the amount of evidence necessary to infer that a factor was a motivating factor could be less than that necessary to infer that the factor was a but-for cause. The precise amount of evidence necessary to trigger a motivating factor instruction would be uncertain and subject to judicial discretion, but the quantum of evidence would be relatively small.

The second possibility is that the amount of evidence required to trigger a motivating factor instruction would be the same as that necessary to reach a jury in a pretext case. As suggested above, the evidence necessary to trigger a motivating factor instruction arguably should not be any greater than that necessary to avoid judgment as a matter of law in a pretext case. However, the difficulty in determining the distinction between the amount of evidence sufficient to allow a jury to infer that an illegitimate factor was a motivating factor and sufficient to allow a jury to infer that the illegitimate factor was a but-for cause may lead a judge to determine that the only practical solution is to choose the amount of evidence necessary for a jury to infer but-for causation as the trigger for a motivating-factor instruction. Though there is still some uncertainty regarding how much evidence is necessary to support a verdict in plaintiff's favor in a pretext case, proof equivalent to a prima facie case coupled with evidence or proof of the falsity of the employer's LNR should gener-

ally be sufficient to trigger a motivating-factor instruction.[91]

The third possibility is that the amount of evidence necessary to trigger a motivating-factor instruction would be the same as that required in any standard disparate treatment case. Simply, whenever a judge decided—based on all available evidence—that a reasonable jury could not find in plaintiff's favor, she could summarily adjudicate the case. Whether the evidence presented in any particular case would be deemed sufficient to avoid summary adjudication would depend solely on an ad hoc determination made by the trial judge. Though the judge's decision would be informed by the amount of evidence generally deemed sufficient to avoid judgment as a matter of law in a pretext case—a prima facie case plus strong evidence of the falsity of the employer's LNR—it would not be absolutely constrained by it.

All of the possibilities provide discretion to trial judges, though the discretion in the first two instances is limited, as a practical matter, more than in the third instance. However, the third resolution is the most likely long-term solution. First, as has been noted, the Supreme Court has made pretext cases look like standard cases by telling judges that the *McDonnell Douglas* structure is irrelevant by the time the case is submitted to the jury and that the only question is whether the evidence supports a finding that discrimination more likely than not caused the job action. It is not difficult to make mixed-motives cases look like standard cases and apply the same rules. Second, the thrust of the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*[92] was to allow trial courts to adjudicate disparate treatment cases summarily whenever they determined that insufficient evidence had been presented to support a verdict.[93] Third, having simplified the disparate treatment landscape somewhat in *Hicks* and *Desert Palace*, the Court is unlikely to develop a specific test to tell trial judges when sufficient evidence has been presented to trigger a motivating factor instruction. Rather, it will likely leave the evidentiary analysis (and the discretion that accompanies it) to trial judges.

CONCLUSION

Primarily as a result of *St. Mary's Honor Center v. Hicks* and *Desert Palace v. Costa*, standard, pretext, and mixed-motives cases are nearly interchangeable. Over time, the formal distinctions among them will likely fall with the result that the motivating-factor test will apply to all disparate treatment cases. However, judges will likely exercise broad discretion in determining whether evidence presented can support an inference

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91. *See supra* note 29.

92. 530 U.S. 133 (2000).

93. Though the Court reversed the district court's summary adjudication, it did so in the context of a case in which the plaintiff had presented strong circumstantial evidence of discrimination. As importantly, it suggested that in some cases, proof of a prima facie case coupled with credible evidence of the falsity of the employer's LNR still might not be sufficient evidence for a plaintiff to avoid summary adjudication. *See supra* note 29.

that discrimination was a motivating factor. Without specific evidentiary rules to guide or constrain judges, trial judges will exercise substantial judicial discretion to hear or summarily adjudicate disparate treatment cases. They will likely do so without additional guidance from the Supreme Court regarding what quantum of evidence should be sufficient to support the necessary inference and allow plaintiff to avoid summary adjudication.

As a result of the foregoing, everything old is new again. The standardization of disparate treatment cases will essentially return disparate treatment jurisprudence to 1972, before *McDonnell Douglas v. Green* was decided. Courts will have general statutory language to apply—now the motivating factor test—but only a general vision of how much evidence is supposed to suffice for the plaintiff to avoid summary adjudication. The time will be as appropriate for the Court to provide guidance as it was in 1972. However, unlike the Court in the early 1970s, the current Court is unlikely to provide any such guidance.