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ABSTRACT

When deciding whether to grant a party summary judgment or a directed verdict, appellate courts ordinarily evaluate whether the plaintiff produced sufficient evidence to establish each element of his claim. In McDonnell Douglas Corp. v. Green,[1] *the Supreme Court deviated from this long-standing practice, and held that in Title VII cases courts must evaluate evidence of discrimination under a novel three-part burden-shifting framework. While the Supreme Court initially insisted this innovation was necessary to ensure that plaintiffs have their day in court, many scholars, practitioners, and judges now recognize that the* McDonnell Douglas *framework creates complication and confusion. In this article, I survey the competing methodologies and suggest the time might be right for a simpler, more direct method of evaluating the question of discrimination.*

INTRODUCTION

Under the now familiar *McDonnell Douglas* framework, a court must proceed through three phases to determine liability in an employment discrimination case.[2] First, the employee has the burden of establishing a prima facie case of discrimination by the preponderance of the evidence.[3] The prima facie case of discrimination[4] must consist of evi-

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1. 411 U.S. 792 (1973).

2. Although initially developed for cases arising under Title VII, the *McDonnell Douglas* framework was subsequently expanded to cases arising under the Age Discrimination in Employment Act (ADEA). Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Americans with Disabilities Act (ADA), Berry v. T-Mobile USA, Inc., 490 F.3d 1211, 1220 (10th Cir. 2007); and Family and Medical Leave Act, Metzler v. Federal Home Loan Bank of Topeka, 464 F.3d 1164, 1170 (10th Cir. 2006).

3. *See, e.g.*, Timmerman v. U.S. Bank, N.A., 483 F.3d 1106, 1113 (10th Cir. 2007).

4. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); *McDonnell Douglas*, 411 U.S. at 802. The prima facie case differs depending on the plaintiff's protected status. In every case, however, the plaintiff must present some evidence of the employer's intent to discriminate because of the protected status. To establish a prima facie case of *age discrimination*, a plaintiff must show: (1) membership within a protected age group; (2) evidence of satisfactory work; (3) an adverse employment action; and (4) some evidence the employer discriminated based on age. *E.g.*, Pippin v. Burlington Res. Oil and Gas Co., 440 F.3d 1186, 1192-93 (10th Cir. 2006). To establish a prima facie case of *disability discrimination*, a plaintiff must show: (1) a disability under the ADA; (2) qualification to perform the job; and (3) some evidence the employer discriminated because of the disability. *E.g.*, MacKenzie v. City & County of Denver, 414 F.3d 1266, 1274 (10th Cir. 2005). To establish a prima facie case of *retaliation*, a plaintiff must show: (1) protected opposition to discrimination; (2) an adverse employment action; and (3) a causal connection between the opposition and the employment action. *E.g.*, Somoza v. Univ. of Denver, No. 06-1488, 2007 WL 4465244, at

dence that (1) the victim belongs to a protected class; (2) the victim suffered an adverse employment action; and (3) the challenged action took place under circumstances giving rise to an inference of discrimination.[5]

If the employee succeeds in establishing a prima facie case, the burden of production shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action.[6] The court need not believe the employer's reason, so long as it is plausible. Once the employer supplies its reason, the presumption of discrimination attendant to the plaintiff's prima facie case is rebutted.[7]

The third—and most important—step in the tripartite scheme then arises: the pretext inquiry. In this final step, the employee must carry the burden of proof in showing that the employer's action stemmed from the discriminatory basis alleged.[8] That is, the plaintiff must prove the employer's proffered legitimate nondiscriminatory reason was pretextual.

To prove pretext, the plaintiff must produce evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons."[9] "The relevant inquiry as to a proffered reason's falsity 'is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs.'"[10] Because this pretext inquiry is necessarily a motive inquiry, a great deal of subjectivity inevitably attaches.

If the plaintiff succeeds in showing evidence of pretext, summary judgment[11] in favor of the employer is inappropriate and the case should go to the factfinder.[12] Likewise, summary judgment at this stage in favor

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*3 (10th Cir. Dec. 21, 2007); Haynes v. Level 3 Commc'ns, LLC, 456 F.3d 1215, 1228 (10th Cir. 2006).

5. *E.g.*, Sorbo v. United Parcel Serv., 432 F.3d 1169, 1173 (10th Cir. 2005).

6. *St. Mary's Honor Ctr.*, 509 U.S. at 506-07.

7. *Id.* at 507.

8. *Id.* at 507-08.

9. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 951-52 (3d Cir. 1996)); *see also* Argo v. Blue Cross and Blue Shield of Kan., Inc., 452 F.3d 1193, 1203 (10th Cir. 2006); Bryant v. Farmers Ins. Exchange, 432 F.3d 1114, 1125 (10th Cir. 2005).

10. Nguyen v. Gambro BCT, Inc., 242 F. App'x 483, 489 (10th Cir. June 20, 2007) (quoting Rivera v. City and County of Denver, 365 F.3d 912, 924-25 (10th Cir. 2004)).

11. It is important to emphasize that the *McDonnell Douglas* framework was not initially developed as a tool for evaluating summary judgment motions. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1227 (10th Cir. 2003) (Hartz, J., concurring). The opinion makes no reference to summary judgment. The Supreme Court did not apply the framework to a summary judgment motion until twenty-three years later in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). As I will explain below, *McDonnell Douglas* has its greatest impact at the summary judgment stage of a case.

12. Ingels v. Thiokol Corp., 42 F.3d 616, 622 (10th Cir. 1994).

of the *employee* is also inappropriate.[13] Thus, "if a plaintiff advances evidence establishing a prima facie case and evidence upon which a factfinder could conclude that the defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the factfinder."[14]

As I will show, this focus on pretext has shifted the emphasis of an employment discrimination case away from the ultimate issue of whether the employer discriminated against the complaining employee. By adopting this unique burden-shifting framework in lieu of the more customary sufficiency of the evidence standard, the Supreme Court has left the entire area of law confused.

I. THE *MCDONNELL DOUGLAS* FRAMEWORK

A. Supreme Court Case Law

When deciding whether to grant a party summary judgment or a directed verdict, appellate courts ordinarily determine whether the plaintiff produced enough evidence to establish each element of the claim.[15] In *McDonnell Douglas v. Green* the Supreme Court announced that courts should deviate from this long-standing practice in Title VII cases, and instead evaluate the evidence under a three-part burden-shifting framework.[16]

Although the Court imposed a framework that substantially deviated from past practices, it failed to explain or justify its decision. Scholars and judges initially concluded *McDonnell Douglas* was a "plaintiff-friendly opinion,"[17] designed to "ease the evidentiary burdens

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13. *See, e.g.*, *Ingels*, 42 F.3d at 621-22 ("[A] factfinder may, but is not required to, find discrimination when a plaintiff presents evidence that the defendant's proffered reasons are unworthy of credence."); Whittington v. Nordam Group Inc., 429 F.3d 986, 993 (10th Cir. 2005) ("A showing that the employer's justifications for its behavior are pretextual permits a finding of intentional discrimination.") (quoting Exum v. U.S. Olympic Comm'n, 389 F.3d 1130, 1135 (10th Cir. 2004)).

14. *Ingels*, 42 F.3d at 622; *Bryant*, 432 F.3d at 1125; *see also Morgan*, 108 F.3d at 1323.

15. *Wells*, 325 F.3d at 1221 (Hartz, J., concurring).

16. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (describing the three-part burden-shifting framework); *see also Wells*, 325 F.3d at 1221 ("The *McDonnell Douglas* framework is a departure from the approach appellate courts customarily use in evaluating the sufficiency of the evidence to sustain a plaintiff's case, whether reviewing judgments after trial or summary judgments."); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 215 (1993) (explaining in *McDonnell Douglas* "the Court departed from the traditional order of proof in a civil case"); Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *is not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 753 (2006) ("The three-part burden-shifting framework was a significant change from the tests that other lower courts previously had used in disparate treatment discrimination cases."); Jeffrey A. Van Detta, *'Le Roi Est Mort; Vive Le Roi!': An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a 'Mixed Motives' Case*, 52 DRAKE L. REV. 71, 84-92 (2003) (explaining how the *McDonnell Douglas* framework departed from "common-law pleading and practice").

17. *Wells*, 325 F.3d at 1224 (Hartz, J., concurring) (explaining that *McDonnell Douglas* was "viewed at the time as a plaintiff-friendly opinion").

on employment discrimination plaintiffs, who rarely are fortunate enough to have access to direct evidence of intentional discrimination."[18] In subsequent opinions, the Court concurred with this assessment.[19]

The Court's groundbreaking opinion also created substantial confusion in the lower courts. Most notably, a circuit split developed over the question of what constituted the defendant's burden at the second stage of the *McDonnell Douglas* analysis—the employer's explanation of the adverse action. Some courts,[20] including the Tenth Circuit,[21] concluded the defendant had the burden of persuasion: In order to rebut the presumption of discrimination, the defendant had to prove by a preponderance of the evidence the existence of a non-discriminatory reason for the adverse action. Other courts interpreted *McDonnell Douglas* as merely requiring the defendant to produce some evidence of a legitimate reason for the action.[22]

The Supreme Court settled this debate eight years later in *Texas Department of Community Affairs v. Burdine*.[23] In order to rebut the presumption of discrimination, the defendant must only satisfy a burden of production. The burden, furthermore, is relatively easy to overcome. The "defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[24]

The *Burdine* opinion implies that once a plaintiff satisfies an initial burden of establishing a prima facie case of discrimination, little difference exists between a case evaluated under the *McDonnell Douglas* framework and a case evaluated under a traditional sufficiency of the evidence standard.[25] Because a defendant almost always satisfies its burden of production,[26] the third stage of the *McDonnell Douglas*

18. Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987); *see also* McGinley, *supra* note 16, at 215 ("Because a plaintiff alleging discrimination under the disparate treatment theory must prove that the defendant *intended* to discriminate, and intent is generally difficult to prove absent a smoking gun, the Court departed from the traditional order of proof in a civil case.").

19. *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.") (internal quotation marks omitted).

20. *See* Burdine v. Tex. Dep't of Cmty. Affairs, 608 F.2d 563, 567 (5th Cir. 1979); Williams v. Bell, 587 F.2d 1240, 1246 (D.C. Cir. 1978).

21. *See* Higgins v. Gates Rubber Co., 578 F.2d 281, 284 (10th Cir. 1978).

22. Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980); Jackson v. U.S. Steel Corp., 624 F.2d 436, 443 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1025 (1st Cir. 1979) (Bownes, J., concurring and dissenting).

23. 450 U.S. 248 (1981).

24. *Id.* at 254.

25. *See* Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J., concurring) ("*Burdine* did not, however, dispel all confusion. Indeed, by clarifying that the prima facie case did not shift the burden of persuasion, it raised the question whether the *McDonnell Douglas* framework accomplished much of anything.").

26. Van Detta, *supra* note 16, at 101 ("This 'burden' to 'articulate' a legitimate nondiscriminatory reason . . . is really no burden at all.").

framework—the pretext stage—becomes the most critical. *Burdine*'s description of this step, furthermore, is similar to a description of the analysis a court would undertake in evaluating the sufficiency of the evidence in a non-Title VII case: The plaintiff "may succeed in [proving discrimination] 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."[27]

Thus, starting with *Burdine*, the Supreme Court began to move in the direction of returning to a traditional sufficiency of the evidence standard. The cases that followed *Burdine* reinforced the new approach in two main ways. First, the Court clarified that when considering evidence of pretext, courts should analyze the adequacy of the plaintiff's evidence in the same manner they would evaluate it under a traditional sufficiency of the evidence standard. Second, the Court limited the relevancy and applicability of the *McDonnell Douglas* framework.

1. Pretext Analysis and the Traditional Sufficiency of the Evidence Standard

In two opinions following *Burdine*, the Court clarified that the pretext stage of the *McDonnell Douglas* test is no different than an ordinary sufficiency of the evidence analysis.

a. *St. Mary's Honor Center v. Hicks*[28]

In the first case, *St. Mary's Honor Center v. Hicks*, the plaintiff alleged that he was demoted and discharged because of his race. After a bench trial, the district court entered judgment in favor of the employer.[29] The court explained that although the defendant's proffered reason for firing the plaintiff was not credible, the plaintiff failed to carry his ultimate burden of proving race was the reason he was terminated.[30] The Eighth Circuit reversed, holding that as soon as the employee proved all of the employer's proffered reasons for the adverse action were pretextual, the employee was entitled to judgment as a matter of law.[31] The Supreme Court, however, disagreed with the Eighth Circuit's conclusion, explaining "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."[32] At the pretext stage, therefore, a court should analyze the evidence under an ordinary suffi-

27. *Burdine*, 450 U.S. at 256.
28. 509 U.S. 502 (1993).
29. *Id.* at 505.
30. *Id.* at 508.
31. *Id.* at 508-09.
32. *Id.* at 514-15.

ciency of the evidence standard and determine whether the plaintiff satisfied his burden of showing evidence of intentional discrimination.

b. *Reeves v. Sanderson Plumbing Products, Inc.*[33]

The Court reinforced this view several years later in *Reeves v. Sanderson Plumbing Products, Inc.* In *Reeves*, the jury concluded the defendant violated the Age Discrimination in Employment Act (ADEA) when it fired the plaintiff.[34] The district court denied the defendant's motion for a directed verdict, and the defendant appealed.[35] The Fifth Circuit reversed, holding that evidence satisfying the plaintiff's prima facie case plus evidence that the defendant's proffered reason was not credible was not sufficient to prove intentional discrimination.[36]

The Supreme Court rejected the Fifth Circuit's conclusion, holding that "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."[37] In reaching this decision, the Court once again strongly implied that at the pretext stage of the *McDonnell Douglas* analysis, a court should evaluate the plaintiff's evidence of intentional discrimination no differently than it would evaluate evidence under a traditional sufficiency of the evidence standard.[38] The Court explained, for example:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is *consistent with the general principle of evidence law* that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.[39]

2. Limiting the Relevancy and Applicability of the *McDonnell Douglas* Framework

In a series of four cases, the Court substantially limited the relevancy and applicability of the *McDonnell Douglas* framework.

a. *United States Postal Service Board v. Aikens*[40]

In *United States Postal Service Board v. Aikens*, the plaintiff filed suit under Title VII, alleging his employer discriminated against him on account of his race by refusing to promote him.[41] After a bench trial, the

33. 530 U.S. 133 (2000).
34. *Id.* at 138-39.
35. *Id.* at 139.
36. *Id.*
37. *Id.* at 148.
38. *Id.*
39. *Id.* at 147 (emphasis added) (internal quotation marks omitted).
40. 460 U.S. 711 (1983).
41. *Id.* at 712-13.

district court entered judgment in favor of the employer, holding the plaintiff failed to prove a prima facie case of discrimination.[42] The Supreme Court concluded the court erred in granting the defendant judgment on this basis. It explained, "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."[43]

Aikens implies that as long as the defendant satisfied its burden of producing evidence of a non-discriminatory reason for its employment action, the court should evaluate the plaintiff's evidence under a traditional sufficiency of the evidence standard.[44] In essence, *Aikens* makes the *McDonnell Douglas* framework irrelevant at the directed verdict stage of a trial because "the employer will present evidence of a proper motive in almost every case."[45] To the extent that *McDonnell Douglas* still matters, it only affects how judges evaluate motions for summary judgment.[46]

b. *Trans World Airlines, Inc. v. Thurston*[47]

The Supreme Court further limited the applicability of the *McDonnell Douglas* framework in *Trans World Airlines, Inc. v. Thurston.* The Court held the burden-shifting framework "is inapplicable where the plaintiff presents direct evidence of discrimination."[48] In *Thurston*, the plaintiffs alleged the employer violated the ADEA by implementing a system that forced airline pilots to either retire by age sixty or obtain employment as a flight engineer through a bidding procedure.[49] Because the retirement system itself constituted direct evidence of age discrimination, the Court concluded the district court erred in evaluating the evidence under the *McDonnell Douglas* test.[50] The tripartite scheme was designed for claims based on indirect evidence alone.

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42. *Id.* at 713.
43. *Id.* at 715.
44. *Id.* at 715-16 ("On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation."); *see also id.* at 716 ("[N]one of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and order of presentation of proof . . . ." (internal quotation marks omitted)).
45. Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1226 (10th Cir. 2003) (Hartz, J., concurring).
46. *Id.* at 1226-27.
47. 469 U.S. 111 (1985).
48. *Id.* at 121.
49. *Id.* at 116-18.
50. *Id.* at 118, 121.

c. *Price Waterhouse v. Hopkins*[51]

In *Price Waterhouse v. Hopkins,* the Supreme Court further limited the applicability of the *McDonnell Douglas* framework by concluding it does not apply in mixed motive Title VII cases.[52] A mixed motive case involves evidence showing that an employment decision was made based on both legitimate and illegitimate considerations.[53] In contrast, in a pretext case, the plaintiff alleges a prohibited consideration was the *sole* cause of the employment action, and the employer's proffered reasons were merely pretextual.[54]

In *Price Waterhouse,* partners in a professional accounting firm proposed a female candidate for partnership.[55] After deliberation and a vote, the partners ultimately decided to hold her candidacy for reconsideration.[56] When the partners refused to repropose her for partnership, she sued the firm, alleging sexual discrimination in violation of Title VII. The district court concluded the partners had legitimate concerns about the candidate's interpersonal skills, and these concerns did not serve as a pretext for discrimination.[57] At the same time, the court decided the firm still violated Title VII because certain sexist remarks made by the partners indicated discrimination played a role in the decision.[58] The D.C. Circuit affirmed, and the Supreme Court granted certiorari.[59]

Title VII of the Civil Rights Act of 1964 made it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[60] In interpreting this language, Justice Brennan's plurality opinion,[61] Justice White's concurring opinion, and Justice O'Connor's concurring opinion all agreed the statute permitted courts to hold employers liable for employment decisions based on both permitted and prohibited considerations.[62] They also agreed courts should not apply the *McDonnell Douglas* framework when evaluating such cases.[63] A new framework was needed. Within the scope of that new framework, if the employee met the initial burden of proof, an employer could still avoid

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51. 490 U.S. 228 (1989).
52. *Id.* at 245-47 (Brennan, J., plurality); *id.* at 260 (White, J., concurring); *id.* at 270 (O'Connor, J., concurring).
53. *Id.* at 246-47 (Brennan, J., plurality); *id.* at 260 (White, J., concurring).
54. *Id.* at 260 (White, J., concurring).
55. *Id.* at 233 (Brennan, J., plurality).
56. *See id.* at 232-33.
57. *Id.* at 231-32, 236.
58. *Id.* at 236-37.
59. *Id.* at 232.
60. 42 U.S.C. § 2000e-2(a)(1) (2006).
61. Justice Brennan's plurality opinion was joined by Justices Marshall, Blackmun and Stevens.
62. *Hopkins*, 490 U.S. at 240 (Brennan, J., plurality); *id.* at 259-60 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring).
63. *Id.* at 246-47 (Brennan, J., plurality); *id.* at 260 (White, J., concurring).

liability if it proved by a preponderance of evidence that it would have made the same decision even if it had not taken the prohibited consideration into account.[64]

Justices Brennan, White, and O'Connor disagreed, however, about what constituted the plaintiff's initial burden of proof. Justice Brennan explained the plaintiff must prove by a preponderance of the evidence that a prohibited characteristic played a *motivating part* in the employment decision.[65] Justice White required the plaintiff to show that the unlawful motive was a *substantial factor* in the adverse employment.[66] Finally, Justice O'Connor argued the plaintiff must prove by "*direct evidence* . . . an illegitimate criterion was a *substantial factor* in the decision."[67] In subsequent cases, several circuits,[68] including the Tenth Circuit,[69] followed Justice O'Connor's approach and required plaintiffs to produce direct evidence of discrimination in order to establish liability under a mixed motive theory.

d. *Desert Palace, Inc. v. Costa*[70]

After *Price Waterhouse*, few plaintiffs pursued claims under the mixed motive framework because most circuits concluded direct evidence was necessary to prove liability under that theory. Because most employment discrimination cases involve only circumstantial evidence, the *McDonnell Douglas* framework continued to be the dominant framework courts used to determine whether the plaintiff's Title VII claims survived summary judgment.[71] Partly in response to the *Price Waterhouse* decision,[72] Congress amended Title VII when it enacted the Civil Rights Act of 1991. The new statutory language clarified that "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.*"[73]

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64. *Id.* at 244-45 (Brennan, J., plurality); *id.* at 261 (White, J., concurring); *id.* at 270 (O'Connor, J., concurring).

65. *Id.* at 244-45 (Brennan, J., plurality).

66. *Id.* at 259 (White, J., concurring).

67. *Id.* at 276 (O'Connor, J., concurring).

68. *See, e.g.*, Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Trotter v. Bd. of Trs. of Univ. of Ala., 91 F.3d 1449, 1453-54 (11th Cir. 1996); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995).

69. *See, e.g.*, EEOC v. Witel, Inc., 81 F.3d 1508, 1514 (10th Cir. 1996); Heim v. Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993).

70. 539 U.S. 90 (2003).

71. *See* Carey v. FedEx Ground Package Sys., 321 F. Supp. 2d 902, 915 (S.D. Ohio 2004).

72. *Desert Palace*, 539 U.S. at 94.

73. 42 U.S.C. § 2000e-2(m) (2006) (emphasis added). The 1991 Act also altered the employer's affirmative defense. Under the *Price Waterhouse* framework, an employer does not violate Title VII if the employer can satisfy its burden of persuasion. Under the 1991 Act, however the employer still violates Title VII if the employer proves it would have made the same decision in the absence of the protected characteristic. Under such circumstances, the plaintiff could obtain declara-

In *Desert Palace, Inc. v. Costa*,[74] the Supreme Court interpreted the meaning of this new language in an opinion that could dramatically increase the number of cases that are analyzed under the mixed motive framework and decrease the number of cases examined under the *McDonnell Douglas* framework. The potential implications of this case will be further explored below.[75]

B. Tenth Circuit Case Law on Pretext

To prove pretext in the Tenth Circuit, a plaintiff must produce evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons."[76] Because this pretextual inquiry is necessarily a motive inquiry, the court is expected to probe the mental status of the decision maker involved. Thus, "[t]he relevant inquiry as to a proffered reason's falsity 'is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs.'"[77]

Tenth Circuit cases also address the typical situation where the employer has proffered multiple nondiscriminatory reasons for its employment decision. The general rule in these cases is an employee "must proffer evidence that shows each of the employer's justifications is pretextual."[78] But this general rule is subject to numerous qualifications. If the plaintiff "casts substantial doubt on many of the employer's multiple reasons," for example, then summary judgment is not appropriate and the case should go to the fact finder.[79] Moreover, if one of the employer's stated reasons for its action predominates over the others, "demonstrating that reason to be pretextual is enough to avoid summary judgment."[80]

1. Evidence Generally Used to Prove Pretext

As the case law surrounding pretext has developed, the Tenth Circuit determined certain types of evidence were sufficient to show pretext in individual cases. Subsequent plaintiffs often try to shoe-horn the evi-

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tory relief, injunctive relief, and attorney's fees. The plaintiff, however, could not obtain damages. *See id.* § 2000e-5(g)(2)(B).

74. *Desert Palace*, 539 U.S. 90.

75. *See infra* Part II.C.

76. Argo v. Blue Cross & Blue Shield of Kan., 452 F.3d 1193, 1203 (10th Cir. 2006); Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1125 (10th Cir. 2005); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

77. Nguyen v. Gambro BCT, Inc., 242 F. App'x 483, 489 (10th Cir. 2007) (quoting Rivera v. City and County of Denver, 365 F.3d 912, 924-25 (10th Cir. 2004)).

78. Tyler v. RE/MAX Mountain States, Inc., 232 F.3d 808, 814 (10th Cir. 2000).

79. *Id.*

80. *Bryant*, 432 F.3d at 1127; *accord* Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1310 (10th Cir. 2005).

dence they have of pretext into these talismanic categories. Although these categories are found neither in Congress's statutory language nor in the Supreme Court's relevant case law, plaintiffs continue to invoke them to make their required showing of pretext. The most common categories of evidence are the following:

General Bias. Evidence in this category tends to show various supervisors of the employer harbored discriminatory animus toward individuals in the plaintiff's protected class. For example, there may be a "pattern and practice" of failing to promote employees of a certain status,[81] a "long history" of discriminatory conduct,[82] or a "culture of racial hostility."[83] Because it is so generalized, this type of evidence, standing alone, rarely suffices to show pretext.[84] The plaintiff must show "the alleged general discriminatory animus on the part of the employer played a direct role in the adverse employment decision in the plaintiff's case."[85] "'[S]ome nexus between the circumstantial evidence of general bias and the decision to terminate is required.'"[86]

Disparate Treatment / Prior Treatment of Plaintiff. Adverse employment actions or generally bad treatment of the plaintiff may, in some cases, lead to an inference of discrimination.[87] For example, being disciplined for reading on the job—while other similarly-situated employees not in a protected class were not—may point toward discrimination in a later adverse employment decision.[88] "A plaintiff seeking to show pretext often does so by providing evidence that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness."[89] "Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline."[90] This "same-supervisor

81. *See generally* Ortiz v. Norton, 254 F.3d 889, 896 (10th Cir. 2001) (explaining the type of evidence a plaintiff should produce to show that the defendant's reason for its actions is "merely pretext").

82. *See generally* Pippin v. Burlington Res. Oil and Gas Co., 440 F.3d 1186, 1197 (10th Cir. 2006) (explaining that the court can infer discrimination from a plaintiff's showing of such regular conduct on the part of the defendant).

83. *See generally* English v. Colo. Dep't of Corr., 248 F.3d 1002, 1010 (10th Cir. 2001) (explaining that in order to show a "culture of racial hostility" the plaintiff must show some connection between the culture of hostility evidence and the defendant's decision to terminate the plaintiff).

84. *See* Bullington v. United Air Lines, 186 F.3d 1301, 1319 (10th Cir. 1999).

85. Timmerman v. U.S. Bank, N.A., 483 F.3d 1106, 1118 (10th Cir. 2007).

86. *Id.* at 1117-18 (quoting *English*, 248 F.3d at 1010).

87. *See* Mohammed v. Callaway, 698 F.2d 395, 399 (10th Cir. 1983) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (noting that the employer's treatment of the employee during his term of employment is relevant to the employee's showing of pretext)).

88. *Cf.* Simms v. Oklahoma *ex rel.* Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1331 (10th Cir. 1999) (noting this type of behavior may demonstrate pretext in some cases, but not where the incident occurs "years before" the employment decision challenged).

89. *Timmerman*, 483 F.3d at 1120 (quoting Kendrick v. Penske Transp. Serv. Inc., 220 F.3d 1220, 1230 (10th Cir. 2000)).

90. *Id.* (quoting Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997)).

rule" does not apply when the plaintiff alleges a company-wide discriminatory reduction in force ("RIF").[91]

Statistical Evidence. "It is uniformly recognized that statistical data showing an employer's pattern of conduct toward a protected class can create an inference that an employer discriminated against individual members of the class."[92] At the same time, "[s]tatistics taken in isolation are generally not probative of . . . discrimination."[93] The usefulness of statistics depends on their relevance to the individual plaintiff's case. "[A] plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between *comparable* individuals."[94]

Disturbing Procedural Irregularities / Company Policy. Evidence of pretext can be shown if the defendant acted contrary to a written company policy or an unwritten policy or practice.[95] The alleged irregularity must have disadvantaged members of the protected class alone, rather than all employees.[96] "[D]isturbing procedural irregularities surrounding an adverse employment action may demonstrate that an employer's proffered nondiscriminatory business reason is pretextual."[97] Courts may infer pretext from procedural irregularities for the simple reason that the employer may have concocted different policies for the sole purpose of discriminating against the plaintiff.

Use of Subjective Criteria. The Tenth Circuit has held, "the presence of subjective decision-making can create a strong inference of discrimination . . . ."[98] "The use of such subjective criteria as 'dedication' and 'enthusiasm' also 'may offer a convenient pretext for giving force and effect to . . . prejudice.'"[99] Because the court evaluates whether subjective criteria were used in the employment decision in an objective,

91. Mendelsohn v. Sprint/United Mgmt. Co., 466 F.3d 1223, 1228 (10th Cir. 2006); *see also* Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1175 (10th Cir. 2006); EEOC v. PVNF, L.L.C., 487 F.3d 790, 805 (10th Cir. 2007).

92. Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991).

93. Jones v. Unisys Corp., 54 F.3d 624, 632 (10th Cir. 1995); *see also* Ortiz v. Norton, 254 F.3d 889, 896-97 (10th Cir. 2001).

94. *Fallis*, 944 F.2d at 746.

95. Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10th Cir. 2000); *see also Fallis*, 944 F.2d at 747.

96. *Kendrick*, 220 F.3d at 1230 n.9 (quoting Randle v. City of Aurora, 69 F.3d 441, 454 n.20 (10th Cir. 1995)).

97. Timmerman v. U.S. Bank, N.A., 483 F.3d 1106, 1122 (2007); *see also* Simms v. Oklahoma *ex rel.* Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1329 (finding no procedural irregularities because defendant-employer's hiring actions were consistent with its published policies); Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1138 n.11 (10th Cir. 2003).

98. Bauer v. Bailar, 647 F.2d 1037, 1045 (10th Cir. 1981).

99. Mohammed v. Callaway, 698 F.2d 395, 401 (10th Cir. 1983) (quoting Thornton v. Coffey, 618 F.2d 686, 691 (10th Cir. 1980)).

reasonable light, an employee's allegation of pretext based on a self-assessment of his abilities is insufficient.[100]

2. Evidence Used to Show Pretext in Reduction in Force Cases

The Tenth Circuit has treated allegations of pretext somewhat differently in RIF cases. In a RIF case, a plaintiff can demonstrate pretext in three main ways: (1) plaintiff's termination does not accord with the RIF criteria; (2) defendant's RIF criteria were deliberately falsified or manipulated in order to terminate plaintiff; or (3) the RIF was generally pretextual.[101]

The third category generates the most heated disagreements because it is the most open-ended. A RIF can be deemed generally pretextual in various ways. First, the RIF is likely pretextual if the employer actively sought to replace RIF-terminated employees with new hires during the RIF general time frame.[102] Although "leaving out new employees from RIF decisions does not establish pretext," hiring new ones does.[103]

Second, the RIF is likely pretextual if the employer evaluates and ranks employees using "wholly subjective" criteria.[104] As with evidence of subjective criteria more generally, however, "[t]he subjective nature of the evaluations may be a factor to consider in pretext but it ordinarily is not by itself sufficient to establish pretext."[105]

Third, an employee may establish pretext by showing his or her job was not in fact eliminated in the RIF.[106] "Where an employee is selected for RIF termination solely on the basis of position elimination, qualifications become irrelevant and one way that employee can show pretext is to present evidence that his job was not in fact eliminated but instead remained a single, distinct position."[107]

3. Evidence of Pretext Must be Linked to the Decision Maker

Despite the various pretext categories crafted by the Tenth Circuit, there must be some evidence the decision maker had a discriminatory intent. To make out a claim of employment discrimination, there must

100. *See Simms*, 165 F.3d at 1329 ("[A]n employee's own opinions about his qualifications do not give rise to a material factual dispute.") (quoting Rabinovitz v. Pena, 89 F.3d 482, 487 (7th Cir. 1996)).

101. *See, e.g.*, Beaird v. Seagate Tech., 145 F.3d 1159, 1168 (10th Cir. 1998).

102. *Id.*; Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1193 (10th Cir. 2006).

103. *Pippin*, 440 F.3d at 1194; Fallis v. Kerr-McGee Corp., 944 F.2d 743, 745 (10th Cir. 1991).

104. *Pippin*, 440 F.3d at 1195 (citing Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1218 (10th Cir. 2002)).

105. *Id.; see also* Furr v. Seagate Tech., Inc., 82 F.3d 980, 987 (1996); *Simms*, 165 F.3d at 1328.

106. *Pippin*, 440 F.3d at 1194 (internal quotation marks omitted).

107. *Id.*

be some nexus between the decision maker's unlawful discrimination and the employment decision.[108]

In *Belcher v. Boeing*,[109] for example, the plaintiff failed to establish a case of race discrimination where the defendant responsible for plaintiff's termination did not know plaintiff was African-American.[110] The court held, "the inference of discrimination does not make sense when the decision maker is unaware of the employe[e]'s membership in a protected class."[111] In two alleged retaliation cases, the plaintiffs could not make out a case because the decision maker never knew of the protected conduct.[112] In *Henderson v. Echostar*,[113] the court held plaintiff had failed in his case of disability discrimination, because it was undisputed the employer "was not made aware of any such impairments until after [plaintiff] was fired."[114] In *Rakity v. Dillon Cos.*,[115] the court held that whether one supervisor may have considered plaintiff disabled was immaterial in light of the undisputed fact that a different supervisor was responsible for the adverse employment action.[116] Thus, despite the categorical label placed on a plaintiff's evidence of pretext, the plaintiff must link up the evidence with an intent to discriminate on behalf of the decision maker.[117]

C. Other Circuits' Case Law on Pretext

1. Evidence Generally Used to Show Pretext

Other courts of appeals have adopted categories of pretext evidence similar to those used by the Tenth Circuit. Sometimes the formulation of the category is slightly different, but often the exact phrases are used. Thus, it is obvious the courts of appeals are looking to each other to fig-

108. *Cf.* Mendelsohn v. Sprint/United Mgmt. Co., 466 F.3d 1223, 1233 (10th Cir. 2006) (Tymkovich, J., dissenting) ("Even taking as true [plaintiff's] assertion that these witnesses would provide credible evidence that managers other than [the decision maker in this case] were motivated by discriminatory animus, this does not in and of itself support the conclusion that [decision maker] was so motivated."). The Supreme Court recently heard oral argument in *Mendelsohn* on the issue of whether a district court must admit testimony by nonparties alleging discrimination by company managers not involved in the adverse employment action at issue (i.e., "me too" evidence).

109. 105 F. App'x 222 (10th Cir. 2004).

110. *Id.* at 227.

111. *Id.* at 226.

112. Jones v. Barnhart, 349 F.3d 1260, 1269-70 (10th Cir. 2003) (holding that where decision maker was unaware of plaintiff's outspokenness, plaintiff failed to establish causation requirement for retaliation claim); Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993) (noting "the supervisor who made the decision to remove Plaintiff[] was not aware that Plaintiff had filed any EEO complaints").

113. 172 F. App'x 892 (10th Cir. 2006).

114. *Id.* at 895.

115. 302 F.3d 1152 (10th Cir. 2002).

116. *Id.* at 1163.

117. The only possible exception to this rule is referred to as a "cat's paw" or "rubber stamp" decision making process. In those situations, a biased subordinate lacking decision-making power uses the formal decision maker to trigger a discriminatory employment action. *See, e.g.*, E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 484-89 (10th Cir. 2006) (describing the theory behind liability in "cat's paw" situations).

ure out how to conduct the pretext analysis as set forth in *McDonnell Douglas*. Although this helps ensure some level of consistency across the country, the focus is misplaced: The courts should instead focus on the issue of the employer's discriminatory motives. Tenth Circuit categories used in other circuits include:

> *General Bias.* Many circuits also cognize a category of general bias, including the Fifth, Seventh, Eighth, and Ninth Circuits.[118]
>
> *Disparate Treatment / Prior Treatment of Plaintiff.* Every court of appeals recognizes that disparate treatment or prior bad treatment of plaintiff may give rise to an inference of pretext on the part of the defendant-employer.[119]
>
> *Statistical Evidence.* At least the Second, Fifth, Seventh, Ninth, and D.C. Circuits recognize statistical evidence may be used by a plaintiff to prove pretext.[120]
>
> *Disturbing Procedural Irregularities / Failure to Follow Company Policy.* Most circuits, including the Second, Eighth, and D.C. Circuits, have held a plaintiff may demonstrate pretext by showing the employer's employment decision was filled with disturbing procedural irregularities or the employer failed to follow company policies.[121]
>
> *Use of Subjective Criteria.* The Fifth Circuit agrees with the Tenth that use of subjective criteria in making an employment decision can lead to an inference of discrimination.[122]

In addition to the categories used by the Tenth Circuit, other circuits have fashioned additional categories of evidence that plaintiffs can use to show pretext. These categories include:

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118. Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1295 (5th Cir. 1994); Hernandez v. HCH Miller Park Joint Venture, 418 F.3d 732, 736 (7th Cir. 2005); Vaughn v. Roadway Express, Inc., 164 F.3d 1087, 1091 (8th Cir. 1998); Diaz v. AT&T, 752 F.2d 1356, 1364 (9th Cir. 1985).

119. Nasti v. CIBA Specialty Chems. Corp., 492 F.3d 589, 593 (5th Cir. 2007); Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 790-92 (7th Cir. 2007); McClain v. NorthWest Comm. Corrections Ctr. Judicial Corr. Bd., 440 F.3d 320, 334 (6th Cir. 2006); 2922 Sherman Ave. Tenants' Assoc. v. Dist. of Columbia, 444 F.3d 673, 684 (D.C. Cir. 2006); Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 853 (8th Cir. 2005); Raad v. Fairbanks North Star Borough Sch. Dist., 323 F.3d 1185, 1192-95 (9th Cir. 2003) (prior treatment of plaintiff); Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 39 (1st Cir. 2003); Graham v. Long Island R.R., 230 F.3d 34, 43 (2d Cir. 2000); Hughes v. Bedsole, 48 F.3d 1376, 1384-85 (4th Cir. 1995); Richardson v. Leeds Police Dept., 71 F.3d 801, 805-07 (11th Cir. 1995); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 538 (3d Cir. 1992).

120. Fisher v. Vassar College, 70 F.3d 1420, 1442 (2d Cir. 1995); *Anderson*, 26 F.3d at 1290; Mister v. Illinois Cent. Gulf R.R., 832 F.2d 1427, 1435 (7th Cir. 1987); Noyes v. Kelly Servs., 488 F.3d 1163, 1172 (9th Cir. 2007); Krodel v. Young, 748 F.2d 701, 710 (D.C. Cir. 1984).

121. Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 51 (2d Cir. 1998); Ledbetter v. Alltel Corporate Servs., Inc., 437 F.3d 717, 722 (8th Cir. 2006); *Krodel*, 748 F.2d at 711.

122. Payne v. Travenol Labs, Inc., 673 F.2d 798, 827 (5th Cir. 1982).

Anecdotes or Anecdotal Evidence. The Second, Fifth, and D.C. Circuits have a category called anecdotal evidence that can be used to show pretext.[123]

Qualifications Jump off the Page and Slap You in the Face. The Fifth and Eleventh Circuits have adopted a standard whereby an employee may make out a case of pretext by showing an individual who was hired instead of the aggrieved plaintiff was obviously not as qualified.[124]

Substantial Changes in Proffered Reason. The Fourth and Eighth Circuits allow an inference of pretext where the employer has made substantial changes over time in its proffered reason for an employment decision.[125]

2. Evidence Must be Linked to the Decision Maker

Most circuits agree with the Tenth Circuit that the decision maker must know about the employee's protected status for the employee to make out a case of employment discrimination.[126] This accords with Supreme Court precedent.[127] In *Raytheon Co. v. Hernandez*,[128] for example, the Court ruled in favor of the defendant as a matter of law where the decision maker did not know of the plaintiff-employee's protected status. The Court held, "If [the decision maker] were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on [plaintiff's] disability."[129]

In sum, the courts of appeals have adopted various categories of evidence into which prospective plaintiffs try to fit their claims of pretext. This accords with the practice in the Tenth Circuit. The problem

123. *Fisher*, 70 F.3d at 1438-39; *Anderson*, 26 F.3d at 1289-90, 1294; *Krodel*, 748 F.2d at 710-11.

124. Lee v. GTE Florida, Inc., 226 F.3d 1249, 1254 (11th Cir. 2000); Deines v. Tex. Dept. of Protective and Regulatory Servs., 164 F.3d 277, 280 (5th Cir. 1999). *But see Raad*, 323 F.3d at 1194 ("We have *never* followed the Fifth Circuit in holding that the disparity in candidates' qualifications must be so apparent as to jump off the page and slap us in the face to support a finding of pretext.") (internal marks omitted). The Ninth Circuit has adopted a formulation where the aggrieved plaintiff's qualifications need only be "clearly superior." *Id.*

125. E.E.O.C. v. Sears Roebuck & Co., 243 F.3d 846, 852-53 (4th Cir. 2001); Kobrin v. Univ. of Minn., 34 F.3d 698, 703 (8th Cir. 1994).

126. *See, e.g.*, Schreiner v. Caterpillar, Inc., 250 F.3d 1096, 1099 (7th Cir. 2001) (holding sexist comments "are relevant only when attributable to the person who made the adverse employment decision"); Holland v. Washington Homes, Inc., 487 F.3d 208, 217 (4th Cir. 2007) ("[U]ltimately, it is the perception of the decisionmaker which is relevant."); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 10 (1st Cir. 1990) ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.").

127. As noted *supra* note 108, the Supreme Court recently heard oral arguments in *Sprint/United Management Co. v. Mendelsohn*, which also concerns the relevance of evidence of discriminatory animus harbored by non-decision makers. *See* Transcript of Oral Argument, 128 S. Ct. 435 (2007).

128. 540 U.S. 44 (2003).

129. *Id.* at 55 n.7.

with this approach is that the categories of pretextual evidence divert the attention of judges and juries away from the ultimate issue in every case: whether the adverse employment decision resulted from the employer's unlawful discrimination.

II. PROBLEMS WITH *MCDONNELL DOUGLAS*

Several problems arise out of the *McDonnell Douglas* framework. A thoughtful concurrence in *Wells v. Colorado Department of Transportation* highlights some of them.[130] First, the compartmentalization of evidence causes courts to put on blinders, looking at categories of evidence narrowly while the totality of the evidence may point to discrimination.[131] Second, the framework creates an artificial distinction between direct and circumstantial evidence.[132] Third, the three-part test emptied the field of other equally plausible ways of examining evidence, ways that might not fit in the formalistic categories established by the Supreme Court.[133] Finally, the courts are confused about what *McDonnell Douglas* means for cases that go to the jury. In this Part, I will further describe these problems, as well as other conundrums.

A. Over-Compartmentalization of Evidence

The tripartite scheme leads factfinders (or more precisely courts considering motions for summary judgment) to (unwittingly) over-compartmentalize evidence. In *Reeves*, the Supreme Court suggested that the Fifth Circuit erred by "ignor[ing] the evidence supporting petitioner's prima facie case" in reviewing whether there was discrimination during the pretext stage of analysis.[134] *Reeves* rebuked over-compartmentalization of the evidence in the *McDonnell Douglas* framework when it noted "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual."[135]

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130. Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1221-28 (10th Cir. 2003) (Hartz, J., concurring); *see also* Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1167 (10th Cir. 2007) (Hartz, J., concurring, joined by Tymkovich, J.) ("I continue to believe that we should not apply the framework of *McDonnell Douglas* . . . to review a summary judgment when the existence of a prima facie case is not disputed. . . . Applying that framework is inconsistent with Supreme Court authority, adds unnecessary complexity to the analysis, and is too likely to cause us to reach a result contrary to what we would decide if we focused on the ultimate question of discrimination *vel non*.") (internal quotation marks omitted).

131. *Wells*, 325 F.3d at 1221-28.

132. *Id.* at 1225.

133. *Id.* at 1224.

134. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 146 (2000).

135. *Id.* at 143 (internal citations and quotations omitted); *see also* Vasquez v. County of Los Angeles, 349 F.3d 634, 649 (9th Cir. 2003) (Ferguson, J., dissenting) ("The trier of fact may consider the same evidence that the plaintiff has introduced to establish a *prima facie* case in determining whether the defendant's explanation for the employment decision is pretextual.") (quoting Lowe v. Monrovia, 775 F.2d 998, 1008 (9th Cir. 1985)).

In *Reeves*, the Supreme Court chastised the Fifth Circuit for failing to consider all the evidence of discrimination. In reversing the jury's verdict in favor of the employee, the court of appeals "ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision."[136] The Fifth Circuit thought the plaintiff's prima facie case, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, was nevertheless insufficient as a matter of law to sustain a jury's verdict in favor of plaintiff.[137] The Supreme Court thought otherwise. It held, "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[138]

In *Hicks*, decided seven years earlier, the Supreme Court had already warned against over-compartmentalization of evidence. The Court made clear the factfinder's rejection of the defendant's proffered reasons *permits* the trier of fact to infer the employer discriminated, but does not *require* such an inference.[139] The Court held, "the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of [persuasion].'"[140]

Despite the Court's repeated warnings against over-compartmentalization of evidence, there is widespread evidence it still plagues the lower courts today. A case from the Northern District of Illinois typifies the problem. In *Jarosz v. Seko Air Freight, Inc.*, the plaintiff alleged discrimination on the basis of her gender.[141] The employer's defense was that it fired plaintiff because she was improperly maintaining relationships with defendant's competitors in violation of company policy. In applying the *McDonnell Douglas* framework, the court decided some of the employer's evidence could not be introduced to rebut plaintiff's showing of a prima facie case, but instead had to wait until the employer was obliged to offer a legitimate, non-discriminatory reason for the employment action. The court ruled, "Defendant's allegation that Plaintiff defied Defendant's orders . . . is more appropriately introduced as a legitimate reason for terminating Plaintiff rather than as

136. *Reeves*, 530 U.S. at 146 (citing Reeves v. Sanderson Plumbing Prods., 197 F.3d 688, 693-94 (5th Cir. 1999)).

137. *Reeves*, 197 F.3d at 693.

138. *Reeves*, 530 U.S. at 147.

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

140. *Id.* (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)); *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2282-90 (1995).

141. Jarosz v. Seko Air Freight, Inc., No. 92-7246, 1994 WL 11649 (N.D. Ill. Jan. 6, 1994).

evidence that Plaintiff was not meeting Defendant's reasonable performance expectations."[142]

By dividing the presentation of the evidence into three stages, the ultimate fact of discrimination can easily become lost. Courts are overly concerned with fitting the evidence available in a particular case into artificial categories of "prima facie case," "legitimate, nondiscriminatory reason," and "pretext." Instead, they should be focused on gathering all evidence tending to show the defendant-employer discriminated.

B. Direct Versus Circumstantial Evidence

Another fundamental problem with the *McDonnell Douglas* framework is the artificial distinction it creates between direct and circumstantial evidence. Under existing doctrine, courts need to classify evidence as either direct or indirect because the type of evidence produced by the plaintiff determines whether the courts should apply the *McDonnell Douglas* framework. In *Trans World Airlines, Inc. v. Thurston*,[143] the Supreme Court held courts do not need to apply the *McDonnell Douglas* framework in an ADEA case if the plaintiff produces direct evidence. At least prior to the *Desert Palace* decision, a plaintiff also needed to produce direct evidence in order to pursue a case under a mixed motive theory.[144]

Frequently it is difficult to classify evidence as direct or circumstantial. Judge Hartz in a concurring opinion in *Wells v. Colorado Department of Transportation*[145] thoughtfully addresses this conundrum. The appeal involved a claim of retaliation arising from complaints of gender discrimination. In evaluating the evidence produced at the summary judgment stage, the concurrence observed:

> In this case, for example, would testimony that Mr. Moston called Plaintiff's lawsuit a "frivolous . . . pain in the ass" be direct evidence of discrimination? If the evidence is "direct evidence," must we then abandon the *McDonnell Douglas* framework in our review of the case? If it is not "direct evidence," how does it fit within the *McDonnell Douglas* framework?[146]

Another problem with the direct and indirect evidence dichotomy is that it is based on the assumption that direct evidence is inherently more reliable than circumstantial evidence. But "[t]he authorities are legion that circumstantial evidence can be every bit as compelling as direct evi-

142. *Id.* at *4.
143. 469 U.S. 111, 121 (1985).
144. Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring).
145. 325 F.3d 1205 (10th Cir. 2003).
146. *Id.* at 1225 (Hartz, J., concurring).

dence."[147] Often the direct evidence of a positive eyewitness can be quite undone by contradictory circumstantial evidence.

Finally, this inquiry distracts the court from what it should be focusing its attention on: determining whether the plaintiff produced sufficient evidence of discrimination. As Judge Hartz observed in *Wells*:

> I would have thought that by now the distinction between direct and circumstantial evidence would have been disregarded in considering the sufficiency of the evidence to support a claim. [This demonstrates] how the use of the *McDonnell Douglas* framework so readily lends itself to consideration of formalities instead of the essence of the issue at hand.[148]

C. *Mixed-Motive Cases*

Another problem is the artificial distinction between mixed motive and single motive Title VII cases. As explained above, this distinction was created by the Supreme Court in *Price Waterhouse*.[149] Under a single motive theory (i.e., *McDonnell Douglas* framework), a plaintiff ultimately must prove that discrimination was the sole factor influencing the employment decision, while under a mixed motive theory, a plaintiff must merely show that discrimination was a motivating factor. Nothing in the text of the Civil Rights Act of 1991, however, indicates that Congress intended courts to maintain this dichotomy. The statute plainly states, "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*."[150] In this Part, I will explain why the Supreme Court's decision in *Desert Palace* creates additional confusion about when courts should evaluate Title VII cases under the mixed motive framework rather than the *McDonnell Douglas* formula.[151]

1. Potential Implications of *Desert Palace*

In *Desert Palace, Inc. v. Costa*,[152] an employee sued her employer under Title VII, alleging gender discrimination. The district court proposed to give the jury the following mixed motive instruction:

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147. Whittington v. Nordam Group Inc., 429 F.3d 986, 996 (10th Cir. 2005) (citing Rogers v. Mo. Pac. R.R., 352 U.S. 500, 508 n.17 (1957)); The Robert Edwards, 19 U.S. (6 Wheat) 187, 190 (1821); United States v. Becker, 62 F.2d 1007, 1010 (2d Cir. 1933); 1A John Henry Wigmore, EVIDENCE § 26 (Peter Tillers rev. 1983).

148. *Wells*, 325 F.3d at 1225 (Hartz, J., concurring).

149. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

150. 42 U.S.C. § 2000e-2(m) (2006).

151. At least one circuit has concluded *Desert Palace* also affects mixed motive claims that are brought under statutes other than 42 U.S.C. § 2000e-2(m). *See, e.g.*, Rachid v. Jack in the Box, Inc., 376 F.3d 305, 311-12 (5th Cir. 2004) (holding the Court's analysis of mixed motive Title VII cases in *Desert Palace* is also applicable to ADEA claims).

152. 539 U.S. 90, 96 (2003).

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.[153]

The employer objected, arguing the plaintiff was not entitled to such an instruction because she had failed to produce any direct evidence of discrimination.[154] The district court rejected the objection, and the jury found for the plaintiff.[155] An en banc panel of the Ninth Circuit affirmed the district court's judgment, and the Supreme Court granted certiorari.[156]

In affirming the Ninth Circuit's judgment, the Supreme Court explained that the Civil Rights Act of 1991 clarified that a plaintiff pursuing judgment under a mixed motive theory does not need to prove his case using direct evidence.[157] Therefore, in order to obtain a mixed motive jury instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [a prohibited characteristic] was a motivating factor for any employment practice."[158] This holding implies courts should apply an ordinary sufficiency of the evidence standard in determining whether the plaintiff has satisfied the burden.

Although *Desert Palace*'s opinion is about jury instructions, several judges,[159] practitioners,[160] and scholars[161] have suggested that the Supreme Court's elimination of the direct evidence requirement carries

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153. *Id.* at 96-97.
154. *Id.* at 97.
155. *Id.*
156. *Id.* at 97-98.
157. *Id.* at 101-02.
158. *Id.* at 101.
159. *See, e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 740 (8th Cir. 2004) (Magnuson, J., concurring).
160. *See, e.g.*, Bettina Plevan et al., *Summary Judgment in Employment Discrimination Cases After Desert Palace*, *in* 745 LITIGATION STRATEGY: PREPARING AND DEFENDING SUMMARY JUDGMENT MOTIONS 815 (2006).
161. *See generally* T.L. Nagy, *The Fall of the False Dichotomy: The Effect of* Desert Palace v. Costa *on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137 (2004); Van Detta, *supra* note 16.

over into the summary judgment context.[162] One judge went so far as to claim[163] the Court's reasoning in *Desert Palace* should be extended to the summary judgment context because the reasonable jury standard used to determine whether the court should issue mixed motive jury instructions is the same as the standard used to determine whether the plaintiff's claims survive summary judgment.[164]

If plaintiffs no longer need to produce direct evidence to survive summary judgment, potentially every Title VII case could be analyzed under both the mixed motive approach and the *McDonnell Douglas* single motive approach.[165] If both options are available to plaintiffs, most—if not all—plaintiffs would likely choose the mixed motive theory. As Judge Magnuson explains, "a plaintiff that prevails under either theory obtains the same relief . . . . There is no need for a plaintiff to prove the more onerous single-motive case, when all that Title VII requires a plaintiff to prove is that discrimination was a motivating factor in the employment decision."[166]

Based on this reasoning, Judge Magnuson and others have suggested *Desert Palace* makes the *McDonnell Douglas* framework essentially irrelevant at the summary judgment stage of a Title VII case. They suggest courts should instead simply apply a traditional sufficiency of the evidence standard to determine whether unlawful discrimination was a motivating factor in an employment decision, and whether the employer can establish an affirmative defense.[167]

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162. *See generally* Plevan et al., *supra* note 160 (summarizing cases); Nagy, *supra* note 161; Van Detta, *supra* note 16.

163. *Griffith*, 387 F.3d at 745 (Magnuson, J., concurring).

164. Judge Magnuson reasoned:

> Although the context of the decision applied to jury instructions, the practical effect of *Desert Palace* nonetheless affects the analysis used at summary judgment. The reasonable jury standard is the same as the summary judgment standard: whether the plaintiff has presented sufficient evidence from which a reasonable jury could logically infer that the adverse employment action resulted from an improper consideration of a protected characteristic. Moreover, there is no support for the proposition that the Civil Rights Act of 1991 compels different analyses at different procedural stages of a Title VII case. Applying the more onerous *McDonnell Douglas* paradigm at summary judgment and then applying the Civil Rights Act of 1991 at trial is inconsistent and impractical. This approach requires the plaintiff to prove at summary judgment that an invidious characteristic was the but-for cause of the employment action, but then at trial only requires the plaintiff to prove that this characteristic was a motivating factor in the employment decision. This inconsistency further interferes with the ultimate issue of whether there is any evidence that supports a finding that discrimination motivated the employment decision. It is absurd to require the plaintiff to satisfy a higher burden at summary judgment when the lesser burden is all that is required under the statute.

Id. at 745 n.9.

165. *Id.* at 744 (Magnuson, J., concurring) ("[P]rinciples of statutory interpretation compel the conclusion that Congress never envisioned a dichotomy between single and mixed-motive cases.").

166. *Id.* (Magnuson, J., concurring).

167. *Id.* at 747-48.

2. Confusion in the Tenth Circuit and Other Circuits

Nonetheless, courts throughout the country have struggled to interpret the meaning of the *Desert Palace* opinion. One cause of this confusion is the fact that the Supreme Court, in a footnote, explicitly declined to address the affect the case had on the *McDonnell Douglas* framework.[168] In a subsequent opinion—*Raytheon Co. v. Hernandez*[169]—the Supreme Court applied the traditional *McDonnell Douglas* framework and made absolutely no reference to the *Desert Palace* opinion. As Judge Magnuson commented, "Just as the Supreme Court ignored *McDonnell Douglas* in the *Desert Palace* opinion, the Supreme Court likewise ignored *Desert Palace* in the *Raytheon* opinion. These inconsistencies further demonstrate the confusion that *McDonnell Douglas* creates."[170]

This confusion clearly manifests itself in the Tenth Circuit's post-*Desert Palace* decisions. One unreported decision, analyzing the impact *Desert Palace* had on summary judgment motions, held that a court may apply the mixed motive framework even if the plaintiff only produced circumstantial evidence of discrimination.[171] A decision published the same year, however, did not mention *Desert Palace* and suggested the direct evidence requirement still existed.[172]

Assuming plaintiffs are permitted to pursue a Title VII claim under the mixed motive framework without direct evidence, it is unclear when courts should apply the framework. In one unreported case, the employee argued the district court erred in only applying the traditional *McDonnell Douglas* framework, and not the mixed motive analysis.[173] The panel declined to reach the issue because the plaintiff did not specifically raise the mixed motive theory before the district court.[174] In a different unreported case, the Tenth Circuit implied that the mere presentation of evidence of a mixed motive triggered the district court's obligation to evaluate the plaintiff's Title VII retaliation claim under a mixed motive analysis.[175]

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168. "This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context." Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 n.1 (2003).

169. 540 U.S. 44, 50 (2003).

170. *Griffith*, 387 F.3d at 747 n.11 (Magnuson, J., concurring).

171. Cuenca v. Univ. of Kansas, 101 F. App'x 782, 787-88 (10th Cir. 2004).

172. Stover v. Martinez, 382 F.3d 1064, 1075-76 (10th Cir. 2004).

173. Furaus v. Citadel Commc'ns Corp., 168 F. App'x 257, 260 (10th Cir. 2006).

174. *Id.*

175. McNulty v. Sandoval County, 222 F. App'x 770, 774 (10th Cir. 2007).

> Ms. McNulty first complains that defendants did not raise a mixed motive analysis until oral argument on their summary judgment motion. She argues that the district court erred in employing this untimely-raised affirmative defense in granting summary judgment to the defendants . . . . While Ms. McNulty is correct that the Supreme Court has described the mixed-motive approach as most appropriately deemed an affirmative defense . . . this court has indicated that a mixed-motive analysis should be employed whenever it is appropriate, not necessarily only when the defendant invokes it . . . . The district court in-

Finally, it is unclear whether *Desert Palace* requires the Tenth Circuit to modify the traditional *McDonnell Douglas* framework. In a recent unpublished opinion, the Tenth Circuit acknowledged that "some courts and commentators have viewed the *Desert Palace* holding as requiring a either a departure from or a modification of the *McDonnell Douglas* framework."[176] The panel, however, declined to reach the issue.

The Tenth Circuit is not the only circuit that has struggled with the meaning of *Desert Palace.* Other circuits have reached conflicting conclusions about its implications.[177] For example, the Fourth Circuit concluded *Desert Palace* did not alter or nullify the traditional *McDonnell Douglas* framework.[178] The Fifth Circuit, in contrast, extended the court's reasoning in *Price Waterhouse* and *Desert Palace* to an ADEA case, and adopted a "modified *McDonnell Douglas* approach" for analyzing summary judgment motions.[179] Under this standard:

> [T]he plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive[s] alternative).[180]

Finally, the Ninth Circuit permits plaintiffs to decide whether to proceed under the traditional *McDonnell Douglas* framework or a mixed motive analysis. As the court explained in *McGinest v. GTE Service Corp.*:[181]

> [A]lthough the *McDonnell Douglas* burden shifting framework is a useful tool to assist plaintiffs at the summary judgment stage so that they may reach trial, nothing compels the parties to invoke the *McDonnell Douglas* presumption. Rather, when responding to a summary judgment motion, the plaintiff is presented with a choice

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terpreted Ms. McNulty's arguments and the evidence presented before it as requiring a mixed-motive analysis. Given that defendants cited four reasons for terminating Ms. McNulty's employment, and that one of the reasons was arguably retaliatory while the others were unquestionably legitimate performance-based concerns, that interpretation was reasonable.

Id. at 773-74 (internal quotation marks omitted).

176. *Furaus*, 168 F. App'x at 260.

177. For an overview of cases addressing *Desert Palace*'s impact on the *McDonnell Douglas* framework, see Plevan et al., *supra* note 160.

178. *See, e.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 317-18 (4th Cir. 2005).

179. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

180. *Id.* (internal quotation marks omitted).

181. 360 F.3d 1103 (9th Cir. 2004).

> regarding how to establish his or her case. [The plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer].[182]

As these cases demonstrate, there continues to be substantial confusion in the Tenth Circuit and in other circuits about the implications of *Desert Palace*.

D. Jury Confusion

A circuit split exists over whether the *McDonnell Douglas* framework should be used when a case goes to the jury. Some courts permit the jury to hear a burden-shifting instruction; others find that instruction too confusing.

The Tenth Circuit has held that juries should not use the *McDonnell Douglas* framework.[183] "Because the employer will present evidence of a proper motive in almost every case, the ultimate question for the jury simply becomes 'which party's explanation of the employer's motivation it believes.'"[184] This stems from the Supreme Court's observation in *Aikens*: "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."[185] Thus, after a case goes to the jury, a reviewing court's only role is "to review the record for substantial evidence supporting the jury's verdict."[186]

The court has "disapproved jury instructions which delineate the intricacies of *McDonnell Douglas* because a jury is not well equipped to understand the shifting burdens of such a formulation."[187] "Our concern with a *McDonnell Douglas* instruction is not that it favors one party over another. It is that it unnecessarily complicates the jury's job, and unnecessary complexity increases the opportunity for error."[188]

A majority of circuits agree with the Tenth Circuit that the *McDonnell Douglas* burden-shifting scheme should not be introduced to the jury through the jury instructions. Most conclude the only question that

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182. *Id.* at 1122 (internal quotation marks and citations omitted).

183. Whittington v. Nordam Group, Inc., 429 F.3d 986, 993 (10th Cir. 2005); Abuan v. Level 3 Commc'ns, Inc., 353 F.3d 1158, 1169 (10th Cir. 2003).

184. *Whittington*, 429 F.3d at 993 (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

185. *Aikens*, 460 U.S. at 715.

186. *Whittington*, 429 F.3d at 993.

187. Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990); *Whittington*, 429 F.3d at 998. *But see* Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425, 1425 n.3 (10th Cir. 1993) (finding no error in a jury instruction that incorporated the entire *McDonnell Douglas* framework because the instructions set forth the proper allocation of proof and directed the jury that age must be the determinative factor in the failure to hire).

188. *Whittington*, 429 F.3d at 998.

should go to the jury is the ultimate question of discrimination.[189] The First, Second, and Seventh Circuits have taken a more ambiguous approach on the issue.[190] The Sixth Circuit alone has not disparaged the use of the *McDonnell Douglas* framework in jury instructions.[191]

III. REPLACING THE CURRENT FRAMEWORK

The current framework, stemming from the tripartite scheme first announced in *McDonnell Douglas*, should be reconsidered in favor of a simple sufficiency of the evidence approach. The plaintiff should maintain the burden of proof to convince the judge or jury that the adverse employment decision about which the plaintiff complains resulted from a discriminatory motive. In this way, the focus of the case is on whether or not the employee suffered from discrimination.

Furthermore, an ordinary sufficiency of the evidence approach is consistent with existing Supreme Court precedent. *Hicks*, *Reeves*, *Aikens*, and *Desert Palace* have essentially eliminated the need for lower courts to evaluate discrimination cases differently than other cases. No

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189. Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 221 (3d Cir. 2000) (holding that, although it is proper "to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown," it is error to instruct the jury on the *McDonnell Douglas* burden shifting scheme); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (noting that the "shifting burdens of production of *Burdine* . . . are beyond the function and expertise of the jury" and are "overly complex"); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age."); Ryther v. KARE 11, 108 F.3d 832, 849-50 (8th Cir. 1997) (en banc) (Loken, J., in Part II.A. of the dissent, which a majority of the court joined) (holding that "the jury need only decide the ultimate issue of intentional age discrimination," and usually need not make findings on the prima facie case or whether the defendant's explanation is pretextual); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003) ("[I]t is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case."); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) ("[I]t is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis.").

190. Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979) ("*McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to a jury, as was done here, will add little to the jury's understanding of the case . . . ."); Cabrera v. Jakabovitz, 24 F.3d 372, 381-82 (2d Cir. 1994) (holding that, although a jury instruction that included the phrase "prima facie case" and referred to "defendant's 'burden' of produc[tion]" "created a distinct risk of confusing the jury," in certain instances it would be appropriate to instruct the jury on the elements of a prima facie case); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) ("Once the judge finds that the plaintiff has made the minimum necessary demonstration (the 'prima facie case') and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question—the only question the jury need answer—is whether the plaintiff is a victim of intentional discrimination."). *But see* Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987) ("[T]he district court was correct in using the framework in the instructions to the jury" because "[i]t is a straightforward way of explaining how to consider whether there is intentional discrimination."), *abrogated on other grounds by* Iacobucci v. Boulter, 193 F.3d 14, 27 (1st Cir. 1999); Lynch v. Belden & Co., 882 F.2d 262, 269 (7th Cir. 1989) ("[I]t was proper for the district court to instruct the jury as to the *McDonnell Douglas/Burdine* formula for evaluating indirect evidence . . . . [Such an instruction] accurately informed the jury of the parties' burdens . . . ." (footnote omitted)).

191. Gafford v. Gen. Elec. Co., 997 F.2d 150, 167, 167 n.9 (6th Cir. 1993) (holding that it was not error to "guid[e] the jury through a three-stage order of proof as opposed to instructing solely on the ultimate issue of sex discrimination").

formal three-step framework is needed to allow a plaintiff to prove discriminatory intent through the use of circumstantial evidence.[192]

Moving to a sufficiency of the evidence approach would have the salutary effect of minimizing the need for the artificial categories of evidence currently used by the courts of appeals. Although these categories have become somewhat entrenched, they are too divorced from relevant statutory and case law to be sustained. These artificially created categories of evidence—including "disturbing procedural irregularities," "prior treatment of plaintiff," and "subjective criteria"—could be abandoned in favor of a simpler, more straightforward analysis. The federal courts should be focused on the ultimate question of whether the plaintiff has brought forth sufficient evidence for a factfinder to conclude the plaintiff suffered discrimination. The various categories of circumstantial evidence used by plaintiffs and courts today only tend to cloud the issues. A more direct analysis would keep all parties focused on the ultimate question of discrimination.

Ideally, courts could also eliminate the artificial distinction between mixed motive and single motive Title VII cases. As explained above, nothing in the text of the Civil Rights Act of 1991 supports this dichotomy. At the very least, courts could adopt the approach followed by the Ninth Circuit of permitting plaintiffs to choose whether they prefer to pursue their claim under a mixed motive or a single motive framework. Such an approach implicitly eliminates the relevancy of the *McDonnell Douglas* analysis in Title VII cases because most (if not all) plaintiffs would prefer to pursue their case under the less onerous and more statutorily anchored mixed motive framework. The mixed motive framework, furthermore, closely resembles an ordinary sufficiency of the evidence standard.

CONCLUSION

The *McDonnell Douglas* tripartite scheme has survived a long time. But that is not a sufficient justification for continuing to rigidly adhere to its precepts. Lower courts have struggled to implement the burden-shifting framework for over thirty years. It may now be time to replace the framework with a simpler, more direct method of determining the question of discrimination.

192. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1223 (10th Cir. 2003) (Hartz, J., concurring); *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (It is a "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.") (internal quotation marks omitted); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 130 (2007) ("This chain of permissive inferences—from error, to lie, to cover-up, to discrimination—is similar to inferences that are routinely used in other parts of the law.").