2003

A Fire without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in Costa V. Desert Palace, Inc.

Kelly Pierce

Comment

A Fire Without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in *Costa v. Desert Palace, Inc.*

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Catharina Costa did an excellent job working in a warehouse owned by Caesars Palace Hotel and Casino.[1] Nonetheless, she was subjected to a series of informal rebukes by supervisors, denied benefits that were afforded to her male colleagues, and received harsher discipline than did similarly offending men.[2] She was eventually terminated by the casino following an altercation with a male colleague who verbally and physically assaulted her.[3] Costa, the only woman working in the warehouse, alleged that the casino's decision to fire her was motivated by her sex, in violation of Title VII of the Civil Rights Act of 1964.[4] The casino responded that Costa was terminated for her disciplinary history and the physical altercation.[5] At trial, the jury found that Costa's termination did violate Title VII, and awarded her over $350,000 in back pay and damages.[6] On appeal, a three-member panel of the Ninth Circuit Court of Appeals reversed, holding that Costa's evidence was not

* J.D. Candidate 2004, University of Minnesota Law School; B.A. 1999, Carleton College. I would like to thank Professor Miranda McGowan, Rachel Clark Hughey, and Rebecca Bernhard for their guidance; the members of the *Minnesota Law Review* for their good humor and support; Kay, Jim, and Marissa Miller for their love and endless encouragement; and my husband, Benjamin Pierce, for bringing joy and laughter to my life.

1. Costa v. Desert Palace, Inc., 299 F.3d 838, 844 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003).
2. *Id.* at 844-46.
3. *Id.* at 846.
4. *Id.* at 844-46.
5. *Id.* at 846.
6. *Id.* at 846-47.

sufficiently "direct" to merit a "mixed-motive" jury instruction.[7] The panel held that such direct evidence was required under *Price Waterhouse v. Hopkins*[8] for a plaintiff to proceed under a mixed-motive theory.[9] Sitting en banc, the Ninth Circuit reversed the panel's opinion, holding that a mixed-motive plaintiff need not prove a Title VII violation through the use of direct evidence, but could succeed through the use of either direct or circumstantial evidence.[10]

In holding that direct evidence is not required for a plaintiff to proceed under a mixed-motive theory, the Ninth Circuit jumped into a fiery debate over the evidentiary standards required of a Title VII plaintiff who alleges that a challenged employment action was motivated both by discrimination and by other legitimate reasons. Although most federal circuits hold plaintiffs to a direct evidence standard, the circuits have been widely split on how they define the term.[11] By holding that direct evidence is not even required to trigger a mixed-motive case, *Costa* represents a major departure from settled law and puts the Ninth Circuit in direct conflict with the other federal circuits.[12] To address this conflict, the Supreme Court has granted the casino's petition for certiorari

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7. Costa v. Desert Palace, Inc., 268 F.3d 882, 889 (9th Cir. 2001), *rev'd en banc*, 299 F. 3d 838 (9th Cir. 2002). Cases governed by the "mixed-motive" theory of intentional employment discrimination arise when a plaintiff alleges that a challenged employment action was the result of both legitimate reasons and illegitimate discrimination. *See infra* notes 41-71 and accompanying text (discussing the development of the mixed-motive theory of discrimination and its codification in the 1991 amendments to Title VII).

8. 490 U.S. 228, 258 (1989).

9. *Costa*, 268 F.3d at 889-90.

10. Costa v. Desert Palace, Inc., 299 F.3d 838, 844 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003).

11. *See infra* notes 85-111 and accompanying text (discussing these different definitions of direct evidence). The federal courts are generally split into three groups: those that apply a "classic" definition of direct evidence, those that apply an "animus plus" definition, and those that simply require plaintiffs to submit evidence, either direct or circumstantial, of discrimination. *See Costa*, 299 F.3d at 852-53; Steven M. Tindall, Note, *Do As She Does, Not As She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332, 354-64 (1996); Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 970 (1994).

12. *See infra* notes 85-111, 135-46 and accompanying text (discussing the imposition of the direct evidence requirement by other federal circuits, and *Costa*'s elimination of the requirement).

and will hear the case during the 2002 term.[13]

Part I of this Comment examines the origins of Title VII, the development of the pretext and mixed-motive theories of disparate treatment, the 1991 amendments to Title VII, and the three definitions of direct evidence applied by the federal circuits. Part II describes the three-member panel's reversal of the jury award for Costa and the en banc reversal of that decision in *Costa v. Desert Palace, Inc.*[14] Part III discusses how the Ninth Circuit reached its decision and argues that the elimination of the direct evidence requirement is more consistent with both Title VII and *Price Waterhouse*. Part IV articulates that *Costa*'s refusal to require direct evidence will have an impact on the distinction between pretext and mixed-motive cases, on future interpretations and use of *McDonnell Douglas Corp. v. Green*,[15] and on the use of legal presumptions in employment discrimination cases. This Comment concludes that despite *Costa*'s weaknesses, the Supreme Court should affirm the Ninth Circuit and decline to require direct evidence from mixed-motive plaintiffs.

I. DEVELOPMENT OF THE PRETEXT AND MIXED-MOTIVE THEORIES OF INTENTIONAL DISCRIMINATION

Congress intended the Civil Rights Act of 1964 to prohibit discrimination in education, transportation, public accommodations and facilities, participation in federally assisted programs, and employment.[16] Title VII of the Civil Rights Act prohibits employment discrimination on the basis of any of five specifically enumerated characteristics: "race, color, religion, sex, or national origin."[17] After the passage of Title VII, it was clear that an employer could not fire, or refuse to hire or promote an applicant, on the basis of her membership in a protected group.[18] What was less clear was how a plaintiff

13. Desert Palace, Inc. v. Costa, 123 S. Ct. 816 (2003). The case is scheduled for argument on April 21, 2003. The Court's grant of the petition suggests its interest in procedural matters in the employment discrimination context, as it also recently addressed pleading standards in these cases in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-12 (2002).

14. 299 F.3d at 847-54.

15. 411 U.S. 792 (1973). *McDonnell Douglas* is one of the most significant employment discrimination decisions. *See infra* notes 21-29 and accompanying text.

16. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

17. The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(a) to -2(d).

18. JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF

could establish that her employer had illegally discriminated against her. In response, scholars and courts developed two theories of employment discrimination law: disparate treatment and disparate impact.[19] Within the class of disparate treatment cases, what a plaintiff must do to prove a prima facie case of discrimination has been particularly unclear, especially because employers tend not to indicate that their employment decisions were discriminatory or the product of bias.[20]

A. PRETEXTUAL INTENTIONAL DISCRIMINATION

The Supreme Court initially read Title VII as requiring plaintiffs to prove that prejudice or discrimination based on the

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EMPLOYMENT DISCRIMINATION 57 (5th ed. 2001).

19. *See, e.g.*, Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 446-47 (2000) (discussing the evolution of the two theories of discrimination law). For a plaintiff to prevail on a disparate treatment theory, she must prove that her employer had some sort of discriminatory "intent" in making a challenged employment decision. *Id.* Justice Stewart described disparate treatment as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In contrast, plaintiffs asserting a disparate impact theory do not have to make a showing of discriminatory intent. *See* McGinley, *supra*, at 447; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (holding that an employer's good intent or absence of discriminatory intent does not "redeem" employment procedures or testing mechanisms that operate to disproportionately impact one group of people). The disparate impact theory of employment discrimination law is irrelevant for purposes of this Comment.

20. At the inception of Title VII, employment discrimination tended to be more overt, formal, and structural. *See* Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 5-6 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995). For example, Robert Brookins notes that "[b]efore the mid-1960s, some job advertisements openly specified 'males preferred.'" Brookins, *supra*, at 11 n.30 (citing DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 168 (1989)). That discrimination was at one time so overt suggests that direct evidence was easier for plaintiffs who were the victim of discrimination to produce. In the modern context, however, "cases of blatant, deliberate discrimination [in which direct evidence is available] no doubt exist, but are likely to represent only a small fraction of all employment decisions in which intergroup bias has played a role." Krieger, *supra*, at 1223; *see also infra* note 237 and accompanying text (arguing that *McDonnell Douglas* should apply where discrimination is more overt—as the sole motivating factor behind a challenged employment action—or when discrimination is altogether absent).

plaintiff's membership in a protected class alone motivated an employer's allegedly discriminatory action.[21] This was known as the "pretext" theory of analysis, which proceeds under the three-step, burden-shifting approach first established in *McDonnell Douglas Corp. v. Green*,[22] and further articulated in *Texas Department of Community Affairs v. Burdine*.[23]

In *McDonnell Douglas*, the Court held that a plaintiff in a Title VII suit "must carry the initial burden . . . of establishing a prima facie case" of discrimination.[24] According to the Court, a plaintiff's prima facie case has four distinct elements.[25] First, the plaintiff must prove that she is a member of a group protected by Title VII.[26] Second, the plaintiff must prove that she "applied and was qualified for a job for which the employer was seeking applicants."[27] Next the plaintiff must prove that she was rejected for the position.[28] Finally, she must prove that the position remained open after she was rejected and the employer continued to solicit and receive applications from similarly situated candidates.[29] A plaintiff's satisfaction of her prima facie case is the first step of the Court's articulated three-step approach for proving intentional discrimination.[30] The Court has suggested that the function of the prima facie case is to eliminate as factors "the most common

21. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-07 (1973).

22. *Id.*

23. 450 U.S. 248, 252-56 (1981).

24. *McDonnell Douglas*, 411 U.S. at 802.

25. *Id.*

26. *See id.* Title VII only prohibits discrimination on the basis of five characteristics: "race, color, religion, national origin, and sex." 42 U.S.C. § 2000e-2(a) (2000).

27. *McDonnell Douglas*, 411 U.S. at 802.

28. *Id.*

29. *Id.* In articulating these four elements, the Court was careful to point out that they relate specifically to a situation where a plaintiff alleges that she was not selected for a position on the basis of her membership in a racial minority. *Id.* These elements are articulated differently in cases involving other sorts of challenged employment actions, such as a termination, a failure to promote, or unequal distribution of benefits. *Id.* For example, the four elements of a prima facie case alleging discriminatory termination would be: the plaintiff is a member of a protected class; the plaintiff was performing up to the standards set for the position; the plaintiff was terminated from the position; and similarly situated employees were not terminated. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

30. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-54 (1981).

nondiscriminatory reasons" for an employment action,[31] and that its establishment thus creates a presumption that the employer's action was the result of illegal discrimination.[32]

Once a plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to rebut the resulting presumption of discrimination by asserting legitimate, nondiscriminatory reasons for the employment action.[33] A defendant cannot rest on its pleadings; it must introduce a legitimate, nondiscriminatory reason into evidence in order to satisfy its burden.[34] All the evidence need do is raise a genuine issue of material fact as to whether the defendant actually discriminated against the plaintiff.[35] Once the defendant has satisfied this burden, the plaintiff's prima facie case is rebutted.[36]

The third and final step of the *McDonnell Douglas/Burdine* approach allows the plaintiff the opportunity to demonstrate that the reason offered by the defendant for the employment action is pretext for illegal discrimination.[37] Thus, the ultimate burden of persuading the fact-finder that employer discriminated against the plaintiff remains with the plaintiff.[38] The plaintiff may prove discrimination either by showing that a discriminatory reason was more likely to have motivated the employment decision, or that the reason offered by the defendant is false.[39]

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31. *Id.* at 253-54. The Court articulated the function of shifting burdens of proof in a Title VII case as "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n.8.

32. *Id.* at 254.

33. *Id.* at 254-56. Because the prima facie case establishes a presumption in favor of the plaintiff, the defendant cannot remain silent. As the Court explained, "[i]f 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." *Id.* at 254.

34. *Id.* at 255 n.9.

35. *Id.* at 255.

36. *Id.*

37. *Id.* at 256.

38. *See id.*

39. *Id.*; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973) (noting that evidence relevant to the showing of pretext included the plaintiff's treatment by McDonnell Douglas during his employment, McDonnell Douglas's policies as related to minority employment, and the company's reaction to the plaintiff's civil rights work). In *St. Mary's Honor Center v. Hicks*, the Court increased the plaintiff's burden of persuasion by holding that mere proof of pretext does not require the court to find in favor of

Although the three-step framework articulated in *McDonnell Douglas* and *Burdine* clearly established the procedure for proving intentional discrimination, the Court did not specify what type of evidence was required to fulfill any of the steps.[40]

B. MIXED-MOTIVE INTENTIONAL DISCRIMINATION

Prior to *Price Waterhouse v. Hopkins* and the development of a mixed-motive theory of intentional discrimination, Title VII claims proceeded under a theory of either disparate treatment or disparate impact, both of which presuppose that a single reason alone motivated the challenged employment decision.[41] In *Price Waterhouse*, the Court addressed the issue of whether an employer could be liable under Title VII for employment actions that were the result of both legitimate reasons and illegitimate discrimination.[42]

The facts of *Price Waterhouse* are common to instances of discrimination on the basis of sex stereotypes.[43] Plaintiff Ann Hopkins was a female senior manager at Price Waterhouse, who was "neither offered nor denied admission to the [firm's] partnership."[44] Rather, Hopkins was informed that she would not be reconsidered for partnership after two partners who had previously supported her withdrew their support.[45] The company had legitimate concerns about Hopkins's "interpersonal skills,"[46] but also considered illegitimate sex

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the plaintiff. 509 U.S. 502, 508-12 (1993). *Hicks* requires not only that a plaintiff prove pretext, but also that discrimination was the real reason for the challenged employment action. *Id.* at 508. Some have termed this the "pretext-plus" approach to proving a disparate treatment claim. *See* McGinley, *supra* note 19, at 455.

40. *See Burdine*, 450 U.S. at 252-56; *McDonnell Douglas*, 411 U.S. at 800-06.

41. Krieger, *supra* note 20, at 1179; Joseph J. Ward, Note, *A Call for* Price Waterhouse II: *The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 635 (1997).

42. Price Waterhouse v. Hopkins, 490 U.S. 228, 241-247 (1989) (plurality opinion). Such a combination of legitimate and illegitimate reasons would include firing an employee both because she performed poorly on her last performance review and because she is a woman.

43. For lengthy discussions of the facts of *Price Waterhouse*, see Tindall, *supra* note 11, at 339-41; Zubrensky, *supra* note 11, at 965-66.

44. *Price Waterhouse*, 490 U.S. at 231.

45. *Id.* at 233 n.1.

46. *Id.* at 234-35. For example, Hopkins's colleagues indicated that she was "sometimes overly aggressive, unduly harsh, difficult to work with and

stereotypes.[47] For example, one evaluator suggested that in order to improve her partnership chances, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[48]

The Court held that Hopkins's evidence proved that the decision not to reconsider her for partnership was motivated, at least in part, by sex stereotypes.[49] In so doing, the plurality articulated that a plaintiff's burden of initial proof is satisfied if she can prove that discriminatory animus or bias played a "motivating part" in the employment decision.[50] If the plaintiff makes this showing, the defendant can avoid liability only by proving by a preponderance of the evidence[51] that "its legitimate reason, standing alone, would have induced it to make the same decision."[52] This has come to be known as the "same decision" affirmative defense.[53] If the defendant is unable to make a "same decision" defense, it cannot avoid equitable damages.[54] Although Price Waterhouse did advance some legitimate reasons for its failure to reconsider Hopkins's partnership, the Court remanded for a determination of whether Price Waterhouse had proved that it "would have made the same decision even if it had not taken the plaintiff's gender into account."[55]

In a concurring opinion Justice O'Connor seemed to recognize, as one scholar has explained, that "because discrimination does not always fit neatly into the traditional

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impatient with staff." *Id.* at 235. Of these interpersonal problems, her brusqueness with staff members seemed the most damaging to her partnership prospects. *Id.* at 234.

47. *Id.* at 234-36.

48. *Id.* at 235.

49. *Id.* at 255.

50. *Id.* at 258. Although they concurred in the judgment, neither Justice White nor Justice O'Connor believed the plaintiff's burden should be this easy. Instead, each argued that a plaintiff must show that the illegitimate motive was a "substantial" factor behind the challenged action. *See id.* at 259 (White, J., concurring); *id.* at 274 (O'Connor, J., concurring). For more discussion of this point, see Charles A. Sullivan, *Accounting for* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1125-32 (1991).

51. *Price Waterhouse*, 490 U.S. at 258.

52. *Id.* at 246 n.11.

53. *See, e.g.*, HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 239 (1997).

54. *See Price Waterhouse*, 490 U.S. at 258.

55. *Id.*

disparate treatment or disparate impact frameworks, a plaintiff should be permitted to bring a claim of discrimination under a mixed-motive framework."[56] O'Connor argued, however, that a plaintiff must prove that an illegitimate reason played a "substantial factor"[57] in the employer's decision through "direct evidence"[58] of the employer's reliance on the illegitimate reason.[59] Justice O'Connor favored a direct evidence requirement because of the "significant differences" between shifting the burden of persuasion to the defendant in cases resting only on statistical evidence and shifting the burden in cases where an employee proved through direct evidence that an illegitimate reason partially motivated an employment decision.[60]

Justice O'Connor's opinion was arguably the "narrowest ground" for the decision,[61] and was thus taken by many lower courts to be the controlling opinion in the case.[62] As a result,

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56. Ward, *supra* note 41, at 643.

57. *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring).

58. Nowhere in her concurrence did Justice O'Connor define "direct evidence." Instead, she seemed to define the term by negative inference to "stray remarks," stating,

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Id. at 277 (citation omitted). From this statement alone, it seems that while mere "stray remarks" are not sufficient to constitute direct evidence, a statement by a decision maker related to the decisional process may be sufficient.

59. *Id.* at 276. O'Connor wrote that "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." *Id.*

60. *Id.* at 275.

61. As the First Circuit noted in *Fernandes v. Costa Bros. Masonry, Inc.*, "when the Supreme Court rules by means of a plurality opinion (as was true in *Price Waterhouse*), inferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree." 199 F.3d 572, 580 (1st Cir. 1999) (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

62. *See, e.g.*, *id.* (holding O'Connor's concurrence to be the dominant opinion in *Price Waterhouse*). *But see* Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 203 (D.C. Cir. 1997) (noting that "Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . , so that it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent").

many of the federal circuits began to hold plaintiffs to a direct evidence requirement prior to shifting the burden of proof to the defendant,[63] despite the fact that O'Connor's opinion failed to provide a clear definition of direct evidence.[64]

C. THE 1991 AMENDMENTS TO THE CIVIL RIGHTS ACT

The Civil Rights Act of 1991 (the Act) has been viewed as a congressional response to several 1989 Supreme Court cases that many saw as being hostile to employment discrimination plaintiffs.[65] The amended Civil Rights Act changed Title VII in two major ways with regard to *Price Waterhouse* and the direct evidence problem. First, Congress codified the plurality's motivating factor test by amending section 703 of the 1964 Act by adding a new subsection (m), which allows a plaintiff to prove a defendant committed an unlawful employment practice when the plaintiff "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."[66]

Second, the Act changed the remedies available to a plaintiff when a defendant is able to prove that it would have made the same employment decision in the absence of its illegitimate consideration of a plaintiff's membership in a

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63. *See, e.g.*, Zubrensky, *supra* note 11, at 969.

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

65. Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 238 (2001). In addition to *Price Waterhouse*, 490 U.S. at 275, the decisions that many thought prompted the 1991 amendments include *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which held that section 1981 does not protect against discrimination in the performance of contracts; *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which held that a Title VII claim is triggered at the time the employer engages in the alleged discriminatory act, not when the employee felt its effect; *Martin v. Wilks*, 490 U.S. 755 (1989), which held res judicata did not bar the claims of white employees attempting to challenge employment decisions made pursuant to a consent decree when they failed to intervene in prior employment discrimination proceedings between the employer and minority employees; and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which held that the burden of persuasion in a disparate treatment claim remains with the plaintiff.

66. 42 U.S.C. § 2000e-2(m) (2000). From a practical standpoint, this means that liability attaches to a defendant employer as soon as an employee is able to prove that consideration of her membership in a protected class was a motivating factor behind the challenged employment action. *Id.* § 2000e-2(a), -2(m).

protected class.[67] If the defendant is able to make this showing, the court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[68] The plaintiff is still entitled to attorney's fees, declaratory relief, and injunctive relief, but is precluded from remedies such as back pay and reinstatement if the defendant is able to make a same-decision showing.[69] The remedies section makes it clear that defendants are not allowed to "escape entirely from liability by explaining that they would have made the same decision absent the impermissible consideration."[70] Thus, while the Act codified *Price Waterhouse*'s motivating factor test, it also overruled the decision to some extent by modifying the available remedies.[71]

While the amendments clarified the way in which a mixed-motive case was to proceed, they did little to distinguish what separated a mixed-motive case from a pretext case in terms of procedure.[72] The Act was initially proposed as a response "to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions."[73] This purpose is echoed elsewhere in the legislative history and the 1991 amendments themselves,[74] suggesting that the impetus behind the Act was congressional disagreement with the Court's employment discrimination

67. Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 585 (1996). Under *Price Waterhouse*, a defendant may escape from liability entirely if it successfully makes the "same decision" defense. *Price Waterhouse*, 490 U.S. at 246 n.11.

68. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

69. *See id.*; HENRY H. PERRITT, JR., CIVIL RIGHTS IN THE WORKPLACE 343 (3d ed. 2001); Ward, *supra* note 41, at 646.

70. Mizer, *supra* note 65, at 250.

71. *See* Ward, *supra* note 41, at 646. Ward suggests that the 1991 Act benefits plaintiffs because the "use of direct evidence will now almost certainly result in employer liability where an illegitimate factor is proven by a plaintiff. In addition, nothing in the statute suggests that a plaintiff may not use circumstantial evidence to show that the defendant was motivated by discriminatory reasons." *Id.*

72. *See, e.g.*, Zimmer, *supra* note 67, at 585-86.

73. H.R. CONF. REP. NO. 101-856, at 1 (1990); *see supra* note 65 and accompanying text.

74. Section 3 of the Civil Rights Act of 1991 states that one of the Act's purposes was to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071.

decisions. The legislative history surrounding mixed-motive cases, however, does not reveal congressional approval (or disapproval) of Justice O'Connor's direct evidence requirement.[75] The only mention of direct evidence in the debate surrounding the amendments appears in the comments of a Georgetown University law professor during Senate hearings.[76] Yet it is difficult to infer that Congress intended to hold plaintiffs to a direct evidence standard solely from the comments of a non-legislator.[77] Thus, as one commentator has noted, "combing the legislative history to discern Congress's intent regarding direct evidence becomes largely a task of inference from silence."[78]

Yet some evidence in the legislative history relates to the concept of "stray remarks," the language Justice O'Connor used to define direct evidence in the negative.[79] In a section of the Conference Report dealing with the committee's decision to partially overturn *Price Waterhouse*, the conferees stated,

> In providing liability for discrimination that is a "'contributing factor,'" the Committee intends to restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability. Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue. For example, isolated or stray remarks . . . are not alone sufficient.[80]

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75. Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 661 (2000); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 750-51 (1995); Mizer, *supra* note 65, at 256. Robert Belton notes that Congress did not address whether "a plaintiff must introduce direct evidence to shift the burden of persuasion on the same-decision defense to the employer." Belton, *supra*, at 661.

76. *See Civil Rights Act of 1990: Hearings on S. 2104 Before the Senate Comm. on Labor and Human Res.*, 101st Cong. 171 (1990) (statement of Prof. Eleanor Holmes Norton) (arguing that mere thoughts were not sufficient to prove that discrimination was the motivating factor behind an employment action, and that "[t]here has to be direct evidence of a motivating factor"); Mizer, *supra* note 65, at 258.

77. Mizer, *supra* note 65, at 258.

78. *Id.* at 257.

79. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); *see supra* note 58 and accompanying text (discussing Justice O'Connor's use of the term "stray remarks").

80. H.R. REP. 102-40(II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

Many commentators have suggested that "[t]his 'stray remarks' language seems to mirror Justice O'Connor's negative definition of direct evidence, indicating that Congress may have intended to codify such a requirement in the motivating factor provision."[81] Others have suggested that this language, along with other language like it, does not demonstrate that Congress "embrace[d]" Justice O'Connor's direct evidence requirement for mixed-motive discrimination cases.[82] Because there was neither clear endorsement nor rejection, and because Congress's attention in amending Title VII was primarily focused elsewhere,[83] commentators have suggested that the text of Title VII alone should guide judicial resolution of the direct evidence problem.[84]

D. DIFFERING INTERPRETATIONS OF DIRECT EVIDENCE

While the Act initially may seem straightforward, the federal circuits have long been split on the issue of proof in mixed-motive discrimination cases.[85] Most courts determine whether a plaintiff proceeds along a mixed-motive path or a pretext path depending on the type of evidence the plaintiff presents.[86] In essence, a plaintiff will proceed along the mixed-motive path if she presents direct evidence of discrimination.[87]

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81. Mizer, *supra* note 65, at 257.

82. Belton, *supra* note 75, at 661 (suggesting that the House Report is not clear as to whether the Committee agreed with O'Connor's direct evidence requirement, but noting that "it is clear that Congress did not affirmatively embrace the direct evidence standard").

83. *See supra* notes 65, 73 and accompanying text (discussing the impetus behind the 1991 amendments to the Civil Rights Act).

84. Mizer, *supra* note 65, at 257, 260-62. Benjamin C. Mizer suggests that it is ironic that "the lower federal courts gleaned a direct evidence requirement from a single concurring opinion that Congress expressly rejected, and they subsequently grafted that requirement onto the very statutory provision that overturned the decision." *Id.* at 262. He concludes that as a result, "courts should turn to the text of the statute as their touchstone in resolving the considerable confusion surrounding individual employment discrimination claims." *Id.*; *see also infra* notes 171-73 and accompanying text.

85. Costa v. Desert Palace, Inc., 299 F.3d 838, 852-53 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003); Krieger, *supra* note 20, at 1221; Tindall, *supra* note 11, at 354-64; Zubrensky, *supra* note 11, at 970.

86. *See* Krieger, *supra* note 20, at 1220-21 (discussing the general forms of direct evidence required by the federal circuits with reference to a cognitive process approach to discrimination and equal employment opportunity).

87. *See, e.g.*, *Costa*, 299 F.3d at 848-50; *see also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (remarking that "the *McDonnell Douglas*

A plaintiff unable to proffer direct evidence must proceed under a pretext theory.[88] In defining direct evidence, the federal courts of appeal are split into three groups: those that apply or attempt to apply the classic definition of direct evidence (evidence proving that discrimination motivated a challenged employment action without need for an inference);[89] those that apply an animus plus definition (evidence proving a particularly strong case of discrimination through an inference);[90] and those that apply an animus definition (evidence simply proving animus towards a plaintiff's class to prove discrimination).[91]

Courts applying the classic definition of direct evidence require that plaintiffs actually produce evidence that proves the defendant's discriminatory animus without requiring an inference or presumption.[92] The Sixth Circuit applied this standard in *Laderach v. U-Haul of Northwestern Ohio*, holding that the plaintiff's evidence—her direct supervisor told the

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test is inapplicable where the plaintiff presents direct evidence of discrimination").

88. *See Costa*, 299 F.3d at 848-50.

89. The circuits applying a classic definition are the First, Fifth, Sixth, and Tenth Circuits. *See* Ward, *supra* note 41, at 649; Tindall, *supra* note 11, at 356. For examples of the classic definition of direct evidence, see *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999), *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 733 (5th Cir. 1999), and *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1217 (5th Cir. 1995).

90. Courts applying the animus plus definition are the Second, Third, Seventh, Eighth, Eleventh, and D.C. circuits. *See* Tindall, *supra* note 11, at 359. Although Steven M. Tindall did not place the D.C. Circuit in this group, he noted that the Circuit had "not ruled squarely on the issue" at the time of his writing. *Id.* at 362 n.188. *But see* Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997). The court in *Costa* correctly suggests that the D.C. Circuit does belong in the animus plus group. *Costa*, 299 F.3d at 852. Other examples of the animus plus definition include *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1281-82 (8th Cir. 1995), and *Hook v. Ernst & Young*, 28 F.3d 366, 373-74 (3d Cir. 1994).

91. Currently, only the Fourth Circuit subscribes to the animus definition. *See* White v. Fed. Express Corp., 939 F.2d 157, 160 (4th Cir. 1991) (per curiam); Tindall, *supra* note 11, at 362. It may, however, be moving towards an animus plus approach. *Id.* at 362 n.191.

92. *See, e.g.*, Ward, *supra* note 41, at 649; *see also* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 2.7 (3d ed. 1996). Evidence that would satisfy this classic definition is evidence that a decision maker took the plaintiff's membership in a protected class into account at the time of making the challenged employment action. For example, evidence similar to that offered by plaintiff Hopkins in *Price Waterhouse* would meet this definition. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 231-36 (1989) (plurality opinion).

shop foreman that he did not promote the plaintiff "because of her sex"—constituted direct evidence.[93] There, the court noted that "direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."[94] Yet other circuits applying the classic definition have held that a plaintiff's assertions that he had overheard his supervisor express a desire to replace the plaintiff with a "younger and cheaper" worker[95] did not constitute direct evidence sufficient to invoke a mixed-motive analysis, because the statements required an inference to conclude that the employer was motivated by age related animus.[96] Some scholars have asserted that this classic definition of direct evidence is so strict and difficult to meet that "plaintiffs in these circuits have little chance of taking advantage of *Price Waterhouse* burden shifting."[97]

Courts applying the animus plus definition require that the plaintiff "prove a particularly strong case—more than ordinarily would be required for an inference of discrimination to be permissible."[98] This approach has been suggested to correlate with Justice O'Connor's definition of direct evidence—i.e., "evidence of statements by decisionmakers related to the decisionmaking process that reflect discriminatory animus."[99] In *Ostrowski v. Atlantic Mutual Insurance Cos.*,[100] the Second Circuit stated that while it followed Justice O'Connor's direct evidence approach generally, it did not hold a plaintiff to the classic definition.[101] The court asserted it did not use the term "direct" "in its sense as antonym of "'circumstantial,'" for that type of "'direct'" evidence as to a mental state is usually impossible to obtain."[102] The court held that a plaintiff is

93. 207 F.3d 825, 829-30 (6th Cir. 2000).

94. *Id.* at 829 (internal quotation marks omitted) (quoting Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999)).

95. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1218 (5th Cir. 1995).

96. *Id.* at 1218-19.

97. Tindall, *supra* note 11, at 359.

98. Costa v. Desert Palace, Inc., 299 F.3d 838, 852 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003).

99. Tindall, *supra* note 11, at 359 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring)).

100. 968 F.2d 171 (2d Cir. 1992).

101. *Id.* at 181-82.

102. *Id.* at 181 (citing Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1185

entitled to a mixed-motive instruction if she has presented "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude."[103] Using this understanding of direct evidence, the *Ostrowski* court held that the evidence presented by the plaintiff—for example, supervisor statements that an employee who is over 60 could not contribute to the workplace[104]—was sufficiently "direct" to warrant a *Price Waterhouse* jury instruction.[105] Other courts of appeal, such as the Seventh Circuit, have indicated their acceptance of an animus plus definition of direct evidence by referring to statements that require an inference to prove discriminatory intent as "direct evidence," and by instructing lower courts on remand to determine whether comments were "merely stray remarks" unconnected to a challenged employment decision.[106]

The Fourth Circuit is the only animus definition adherent,[107] allowing a plaintiff to carry her burden "by any sufficiently probative direct or indirect evidence."[108] In *White v. Federal Express Corp.*, the court stated that a plaintiff need only prove that "the employer's motive to discriminate was a substantial factor in the adverse personnel action."[109] Therefore, the court did not require a plaintiff to prove to the finder of fact that the evidence offered to establish discrimination was direct evidence.[110] Thus, as one commentator has suggested, the Fourth Circuit is the only circuit that would allow evidence of statistics or stray remarks to satisfy a plaintiff's burden and justify shifting a burden to the defendant.[111]

That the federal circuits have three radically different definitions of what constitutes direct evidence means that a

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(2d Cir. 1992)).

103. *Id.* at 182.

104. *Id.* at 174.

105. *Id.* at 183-84.

106. *See, e.g.*, Robinson v. PPG Indus., Inc., 23 F.3d 1159, 1165 (7th Cir. 1994) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring)).

107. *See supra* note 91.

108. White v. Fed. Express Corp., 939 F.2d 157, 160 (4th Cir. 1991) (per curiam).

109. *Id.*

110. *Id.*

111. Tindall, *supra* note 11, at 363.

plaintiff's evidence might be considered sufficiently "direct" to merit a mixed-motive instruction in animus or animus plus jurisdictions, but may not be considered "direct" in jurisdictions applying the strict classical definition of direct evidence.

II. *COSTA*: THE MOVE AWAY FROM DIRECT EVIDENCE

On August 2, 2002, the Ninth Circuit held in *Costa v. Desert Palace, Inc.* that "Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called 'mixed-motive' case."[112] Costa, the sole woman working in one of the casino's warehouses, alleged the casino's decision to fire her was motivated by her sex.[113] Throughout the course of her employment, Costa's work was characterized as excellent, and as one of her supervisors explained, "We knew when she was out there the job would get done."[114]

Yet despite Costa's strong work history with the casino, she had a number of problems both with colleagues and managers.[115] Costa began to feel as if she "was being singled out because she was a woman," resulting in her being treated as an "outcast."[116] She detailed an extensive series of events that included "informal rebukes, denial of privileges accorded her male co-workers, suspension, and finally discharge."[117] For example, she was often warned and even suspended for the use of profanity while similarly offending men were not disciplined.[118] She also alleged that her termination was due in part to her "failure to conform to sexual stereotypes."[119] Costa was known as "the lady Teamster"; was called "a bitch" and "a fucking cunt"; and was told that "[y]ou got more balls than the guys."[120]

These events culminated in a physical altercation with another Teamster, which the casino alleged was the basis for

112. 299 F.3d 838, 844 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003). Prior to *Costa*, many commentators had suggested that the direct evidence test should be rejected altogether or at least clarified. *See, e.g.*, Tindall, *supra* note 11, at 364-69; Zubrensky, *supra* note 11, at 980-86.

113. *Costa*, 299 F.3d at 844.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 844-45.

118. *Id.* at 845.

119. *Id.*

120. *Id.* at 845-46.

Costa's termination.[121] Costa was trapped by a male colleague, who, upset about a report he believed she made about his "unauthorized lunch breaks," shoved her against a wall.[122] Although Costa was the one to report the incident and the one with physical corroboration of the confrontation (her arm was bruised, while the male colleague showed no injury), the casino disciplined both employees—suspending the male colleague for five days and firing Costa.[123] Costa filed a Title VII suit against the casino alleging sex discrimination.[124]

At trial, the casino alleged that Costa was fired because of her disciplinary history and her confrontation with the male colleague.[125] Costa did not disclaim her disciplinary history, but suggested "rather that her sex was a motivating factor in her termination."[126] The trial court denied the casino's motion for summary judgment on the disparate treatment claim, and allowed the case to go to the jury.[127] The jury returned a verdict in favor of Costa for over $350,000 in back pay, compensatory damages, and punitive damages.[128]

On appeal, a three-member panel of the Ninth Circuit agreed with the casino that it was reversible error to give the jury a mixed-motive instruction in the "absence of substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus."[129] Acknowledging that the Ninth Circuit had not directly addressed the direct evidence issue, it reviewed all the other federal circuits and argued that each of them concluded "that evidence that merely raises an inference of discrimination from differential treatment is not sufficient to shift the burden to the defendant."[130] The court

121. *Id.* at 846.

122. *Id.*

123. *Id.* After Costa and the male colleague complained about their disciplines, an independent arbitrator upheld both the suspension and the termination based on each employee's disciplinary records. Costa v. Desert Palace, Inc., 238 F.3d 1056, 1058 (9th Cir. 2000), *reh'g granted*, 274 F.3d 1306 (2001), *reh'g en banc*, 299 F.3d 838 (2002).

124. *Costa*, 299 F.3d at 846.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Costa v. Desert Palace, Inc., 268 F.3d 882, 884 (9th Cir. 2001), *reh'g granted*, 274 F.3d 1306 (2001), *reh'g en banc*, 299 F.3d 838 (2002), *cert. granted*, 123 S. Ct. 816 (2003).

130. *Id.* at 886.

found that even if Costa's evidence[131] raised an inference of discrimination, it was not sufficient to satisfy *Price Waterhouse*'s "motivating part" standard.[132] Costa, it held, had failed to produce "direct and substantial" evidence that she was treated differently than her colleagues because of her sex.[133] In so holding, the court relied on Justice O'Connor's *Price Waterhouse* direct evidence requirement.[134]

Sitting en banc, the Ninth Circuit reversed the panel's decision, holding that the 1991 Civil Rights Act had overruled *Price Waterhouse*, and thus had also overruled O'Connor's direct evidence requirement.[135] In refusing to hold mixed-motive plaintiffs to a direct evidence standard, the court acknowledged that it departed from other circuits, and said that the varying interpretations of the correct standard of proof in mixed-motive cases have been a "quagmire that defies characterization."[136] To resolve the issue, the court turned to a straightforward look at the text of the statute,[137] radically departing from most of the other federal circuits, which still attempt to incorporate O'Connor's direct evidence requirement into the new scheme of Title VII.[138] The Ninth Circuit suggested that "[t]he legislative history evinces a clear intent to overrule *Price Waterhouse*," and that the 1991 amendments clarified "(1) that a Title VII violation is established through proof that a protected characteristic was 'a motivating factor' in the employment action and (2) that the employer's 'same decision' evidence serves as an affirmative defense with respect to the scope of remedies, not as a defense to liability."[139] Therefore, the court concluded that the premise for Justice

131. The panel suggested that of all of Costa's evidence, only two incidents bore any connection to gender: the assignment of overtime hours and a supervisor's calling Costa "a bitch." *Id.*

132. *Id.* at 889.

133. *Id.*

134. *Id.* The *Costa* panel used language similar to Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*, where she required that the plaintiff show "by *direct* evidence that an illegitimate criterion was a *substantial* factor in the decision." 490 U.S. 228, 276 (1989)(emphasis added).

135. Costa v. Desert Palace, Inc., 299 F.3d 838, 850-51 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003).

136. *Id.* at 851.

137. *Id.* at 850-51.

138. *See supra* notes 85-111 and accompanying text (outlining the three different approaches of direct evidence required by the federal circuits).

139. *Costa*, 299 F.3d at 850.

O'Connor's "passing reference"[140] to direct evidence was "wholly abrogated."[141]

Given that an employer's discriminatory conduct can no longer "escape liability" through an employer's articulation of the same decision defense,[142] the court reasoned that "there is no longer a basis for any special 'evidentiary scheme' or heightened standard of proof to determine 'but for' causation."[143] The court stated its holding simply: "[T]he plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'amotivating factor.'"[144] Because a Title VII plaintiff need not have direct evidence in order to proceed under a mixed-motive theory, the court held that the district court did not err in giving a mixed-motive jury instruction.[145] It reasoned that the "wide array of discriminatory treatment is sufficient to support a conclusion that sex was also a motivating factor in the decision-making process," and thus the instruction was proper.[146]

In addition to holding that a mixed-motive plaintiff need not use direct evidence, the court reframed the purpose of the *McDonnell Douglas* burden-shifting scheme and discussed the differences between pretext cases and mixed-motive cases.[147] It reasoned that *McDonnell Douglas* offers a structure of proof mainly as a tool for plaintiffs to survive a defendant's motion for summary judgment in order to reach trial.[148] Thus, a *McDonnell Douglas* inquiry happens at a fundamentally different time in the litigation than does a mixed-motive inquiry.[149]

Additionally, the court seemed to merge pretext and mixed-motive cases.[150] It said that selecting the proper jury instruction simply rested on a "determination of whether the evidence supports a finding that just one—or more than one—

140. *Id.* at 847.
141. *Id.* at 850.
142. *Id.* at 850-51 (citing H.R. REP. NO. 102-40(I), at 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585).
143. *Id.* at 851.
144. *Id.* at 853-54.
145. *See id.* at 858-59.
146. *Id.* at 859.
147. *Id.* at 854-57.
148. *See id.* at 855-56.
149. *Id.* at 857
150. *See infra* Part IV.A.

factor actually motivated the challenged decision."[151] The court concluded that there are not "two fundamentally different types of Title VII cases. In some cases, the employer may be entitled to the 'same decision' affirmative defense instruction. In others, it may not."[152] Thus, the Ninth Circuit suggested that the only difference between pretext cases and mixed-motive cases is the number of motivations behind the challenged employment action. It disagreed that pretext cases proceed under a *McDonnell Douglas* framework, while mixed-motive cases proceed under *Price Waterhouse*. Instead, *McDonnell Douglas* comes into play at the summary judgement stage for all plaintiffs, while *Price Waterhouse* plays a role only when the trial court determines that more than one motivation was behind the employment action.[153] Over a strong dissent,[154] the Ninth Circuit's opinion in *Costa* eliminated the direct evidence requirement,[155] noted that *McDonnell Douglas* is most important at summary judgment,[156] and significantly reduced the distinction between pretext and mixed-motive actions.[157]

III. THE NINTH CIRCUIT'S REFUSAL IN *COSTA* TO REQUIRE DIRECT EVIDENCE FOR MIXED-MOTIVE PLAINTIFFS IS DEFENSIBLE UNDER TITLE VII AND *PRICE WATERHOUSE*

The Ninth Circuit's opinion in *Costa* puts it squarely in conflict with the other federal circuits, which require a plaintiff to produce some version of direct evidence in order to merit receiving a mixed-motive jury instruction.[158] While it is facially

151. *Costa*, 299 F.3d at 856.

152. *Id.* at 857.

153. *See id.* at 854-58.

154. In dissent, Judge Gould argued that direct evidence should be required because the mixed-motive theory is meant to be "available only in a special subset of cases" in order to prevent the framework from overwhelming all disparate treatment cases. *Id.* at 867 (Gould, J., dissenting). He concluded that *McDonnell Douglas* would effectively be overruled by an interpretation of *Price Waterhouse* that "jettisons the direct evidence requirement, an effect that could not have been intended in *Hopkins* and an effect that will create uncertainty in our settled law." *Id.*

155. *Id.* at 851-54.

156. *Id.* at 855-56.

157. *Id.* at 854-57.

158. *See supra* notes 85-111, 135-46 and accompanying text (discussing the three standards of direct evidence required by federal circuits and the Ninth Circuit's elimination of the direct evidence requirement in *Costa*).

similar to the Fourth Circuit's animus approach,[159] the Ninth Circuit is the first to hold that a plaintiff need not provide direct evidence in order to receive a mixed-motive instruction. As such, it represents a major departure from prevailing common law, and is particularly distant from those circuits holding plaintiffs to the strict classic definition of direct evidence.[160] Given the varying direct evidence approaches, it is not surprising that the Supreme Court granted the casino's petition for certiorari.[161]

This Comment argues that the Court should affirm the Ninth Circuit's refusal to require direct evidence, as this approach is more consistent with both Title VII and the underlying issue in *Price Waterhouse*: causation. To that end, this Part discusses the failings of the direct evidence jurisprudence of the other federal circuits, explains the superiority of the Ninth Circuit's holding in *Costa*, and concludes with a discussion of *Costa*'s weaknesses.

A. THE SHORTCOMINGS OF THE EXISTING DIRECT EVIDENCE JURISPRUDENCE

The federal circuits that impose a direct evidence requirement on mixed-motive plaintiffs suffer from three basic shortcomings. First, the decisions fail to explain why direct evidence is required.[162] Second, they incorrectly impose the higher requirement of direct evidence in order to balance what they believe to be the the relative "ease" of proving a mixed-motive case.[163] Finally, the existing direct evidence jurisprudence undervalues the importance of the changes effected by the 1991 amendments to the Civil Rights Act, and thus places too much emphasis on *Price Waterhouse*.[164]

The federal circuits that require plaintiffs to prove discrimination was a motivating factor in a challenged employment action through the use of direct evidence often do

159. Courts applying an animus definition merely require a plaintiff to prove that discrimination was a substantial factor in a challenged employment action through the use of probative direct or indirect evidence. *See supra* notes 108-11 and accompanying text.

160. *See supra* notes 92-97 and accompanying text (discussing the classic definition of direct evidence).

161. Desert Palace, Inc. v. Costa, 123 S. Ct. 816 (2003).

162. *See infra* notes 165-73 and accompanying text.

163. *See infra* notes 175-84 and accompanying text.

164. *See infra* notes 185-87 and accompanying text.

so without significant discussion of why direct evidence is required. For example, in *Mooney v. Aramco Services Co.*, the Fifth Circuit merely commented that direct evidence is the trigger in order for a plaintiff to proceed under a mixed-motive theory, citing *Price Waterhouse*.[165] The court did not delve extensively into the language of either Title VII or *Price Waterhouse*, which suggests that it did not significantly address the issue of whether direct evidence is actually required.[166] Even when a court has attempted to discuss why direct evidence is required, it fails. In *Mooney*, the court relied on *Armbruster v. Unisys Corp.*, a Third Circuit case noting that the rationale behind requiring direct evidence is the probative strength of such evidence.[167] Yet this does not indicate why direct evidence should be required in order for a plaintiff to proceed under a mixed-motive theory. It simply explains the probative difference between direct evidence (under the classic definition) and other sorts of evidence. That direct evidence is more compelling or probative of discrimination does not in and of itself suggest that it must be proffered in order to merit a mixed-motive jury instruction. Yet rather than discuss why direct evidence is required, the federal circuits tend to focus their attention on what constitutes direct evidence, employing the classic definition, the animus plus definition, or the animus definition.[168]

Further, the direct evidence requirement is not premised on clear statutory language involving direct evidence. The plain language of Title VII, standing alone, indicates that direct evidence is not required to prove disparate treatment.[169] The

165. 54 F.3d 1207, 1216-17 (5th Cir. 1995).

166. *Id.*

167. *See id.* at 1216 n.10. In *Armbruster*, the Third Circuit wrote that

> in the *Price Waterhouse* framework . . . the evidence the plaintiff produces is so revealing of discriminatory animus that it is not necessary to rely on any presumption from the *prima facie* case to shift the burden of production. Both the burden of production and the risk of nonpersuasion are shifted to the defendant who, because of the inference the overt evidence showing the employee's bias permits, must persuade the factfinder that even if discrimination was a motivating factor in the adverse employment decision, it would have made the same employment decision regardless of its discriminatory animus.

Armbruster v. Unisys Corp., 32 F.3d 768, 778 (3d Cir. 1994) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 244-46 (1989)); Griffiths v. Cigna Corp., 988 F.2d 457, 469-70, 470 n.12 (3d Cir. 1993).

168. *See supra* notes 85-111 and accompanying text.

169. 42 U.S.C. §§ 2000e, -1, -17 (2000); *see supra* notes 17, 65-71 and

addition of subsection (m) to section 703 of Title VII makes it clear that an unlawful employment practice is established when a protected characteristic such as race or sex is a "motivating factor" in an employment action.[170] The statute makes no reference to the quantum of evidence required to prove that a motivating factor was the cause of a challenged employment action. Dissenting in *Costa*, Judge Gould argued that this statutory silence on the direct evidence requirement indicated that "Congress left undisturbed Justice O'Connor's holding and the prior circuit decisions that adhered to it."[171] The 1991 amendments to Title VII, however, so fundamentally altered the causation structure of the statute that one cannot merely interpret silence as acquiescence.[172] The relevant legislative history is similarly unhelpful, as Congress neither explicitly affirmed nor rejected the requirement.[173] Because it is not appropriate to interpret silence as an affirmation of the direct evidence requirement, neither the text of Title VII nor the legislative history surrounding the 1991 amendments suggest that direct evidence is required.[174]

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accompanying text (discussing the major substantive sections of Title VII and the 1991 amendments).

170. 42 U.S.C. § 2000e-2(m).

171. Costa v. Desert Palace, Inc., 299 F.3d 838, 866 (9th Cir. 2002) (Gould, J., dissenting), *cert. granted*, 123 S. Ct. 816 (2003).

172. *See infra* notes 189-207 and accompanying text (outlining the causation structure of Title VII and the changes implemented by the 1991 amendments).

173. *See supra* notes 73-84 and accompanying text (describing the relative lack of attention paid by Congress to the direct evidence requirement when amending Title VII); *see also Costa*, 299 F.3d at 850 (citing Watson v. Southeastern Pa. Transp. Auth., 207 F.3d 207, 218-19 (3d Cir. 2000)). Yet neither courts nor commentators seem to take note of the use of the term "nexus" in the Conference Report dealing with Congress's partial rejection of *Price Waterhouse*. In that report, the Committee determined that evidence was sufficient to merit proceeding under a motivating factor test only if "the plaintiff shows a nexus between the conduct or statements and the employment decision at issue." H.R. REP. NO. 102-40 (II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 695, 711. The Committee's discussion suggests that it did not intend to require direct evidence of mixed-motive plaintiffs because direct evidence under a classical definition proves the fact of discriminatory animus in the employment decision without need for an inference or "nexus." *See supra* notes 92-97 and accompanying text. Since the Committee apparently thought that statements requiring a nexus in order to be connected to the employment decision at issue would be relevant under the motivating factor test, it follows that non-direct evidence would be sufficient to trigger mixed-motive analysis because such evidence requires a nexus to the challenged employment action.

174. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON

Circuits requiring direct evidence may believe it is not necessary to discuss why it is required given the assumption that a mixed-motive case is easier for a plaintiff to prove than a pretext case.[175] A mixed-motive case sometimes has been considered slightly easier to prove than a pretext case because the plaintiff only needs to establish that her membership in a protected class was a motivating factor behind the employment action; in a pretext case, a plaintiff must prove that the employer was solely motivated by discrimination.[176] The assumption that a mixed-motive action is easier to prove has prompted the idea that a plaintiff must meet a higher evidentiary standard—the direct evidence requirement—in order to benefit from the "easier" proof scheme.[177] As some jurists have commented, including the dissent in *Costa*, removing the direct evidence requirement would allow plaintiffs who could not meet the higher standards of a pretext case to pursue their action unfairly under a mixed-motive theory.[178]

This assumption that a higher evidentiary standard is required to balance the relative ease of proving a mixed-motive case is flawed for two reasons. First, the essential question in any disparate treatment case is whether the plaintiff has met her burden of proving that she was discriminated against, regardless of whether she has pursued a mixed-motive or a pretext action.[179] The Ninth Circuit confirmed this when Judge

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LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1020-21 (3d ed. 2001).

175. This idea is foreshadowed by Justice O'Connor's concurrence, where she wrote that direct evidence is required to justify "the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation." Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring).

176. *See supra* notes 21-40, 49-55, 65-71 and accompanying text (explaining the pretext theory of intentional discrimination, the *Price Waterhouse* "motivating factor" standard for mixed-motive cases, and the adoption of this test in the 1991 amendments to Title VII).

177. *See* Ward, *supra* note 41, at 658 (arguing that the *Price Waterhouse* mixed-motive framework was "meant to serve as a type of merit system 'rewarding' plaintiffs who provided the best evidence of discrimination").

178. In dissent, Judge Gould wrote that the direct evidence requirement mandates that the plaintiff "produce highly probative, direct evidence, before she may utilize the more lenient, mixed motives test." *Costa*, 299 F.3d at 867 (Gould, J., dissenting).

179. *E.g.*, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (noting that the plaintiff maintains the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the

McKeown noted the "canons of proof" in employment discrimination cases: "[T]he plaintiff retains the 'ultimate burden of persuading the court that she has been the victim of intentional discrimination'; the question comes down to whether she has made her case."[180]

Second, the remedies available to mixed-motive plaintiffs are much more limited than those available to plaintiffs offering a pretext case, which may mitigate against the judicial reluctance to allow plaintiffs to proceed under a mixed-motive theory.[181] A plaintiff who is able to prove that her membership in a protected class was a "motivating factor" in a challenged employment action will only be entitled to equitable relief if the defendant-employer is able to prove that it would have made the same decision absent discrimination.[182] Equitable remedies include declaratory judgments, injunctive relief, and attorney's fees, but exclude back pay, front pay, or reinstatement.[183] Thus, a plaintiff who chooses to proceed along a mixed-motive path bears the very real risk that the litigation will not help her financially. If she is entitled only to equitable relief, she will not be put in the position she would have been in absent discrimination (that is, she will not be in the same potential financial or employment position). A plaintiff entitled to monetary relief, reinstatement, promotion, or other similar remedy (where the defendant is not able to prove it would have made the same decision absent discrimination) is arguably in the same position she would have been in absent discrimination.[184] Because a limited remedy is available under the purportedly easier mixed-motive proof standard, there is no reason to require a heightened evidentiary standard in order to achieve parity.

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plaintiff"); *accord* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

180. *Costa*, 299 F.3d at 855 (citing *Burdine*, 450 U.S. at 256; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).

181. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i)-(ii) (2000) (outlining the available remedies in a mixed-motive case where the defendant successfully proves a same decision defense).

182. *See id.*

183. *Id.*

184. The Supreme Court has noted that one of the most significant purposes of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). This purpose aims to put the injured person in the position she would have been in if the wrong had not been committed. *Id.* at 418-19 (citing Wicker v. Hoppock, 73 U.S. 94, 99 (1867)).

Given that the statute does not refer to the required evidence, and that the legislative history does not clarify the answer, courts that impose a direct evidence requirement on mixed-motive plaintiffs must do so entirely on the basis of *Price Waterhouse*.[185] Judicial reliance on *Price Waterhouse* is necessary considering both the lack of circuit court attention paid to the reasoning behind the direct evidence requirement and the absence of clear statutory guidance. Most courts, however, do not analyze O'Connor's *Price Waterhouse* concurrence, except to state that it requires plaintiffs to present direct evidence in order to receive a mixed-motive jury instruction.[186] This reasoning fails to account for the fundamental change made by the 1991 amendments to Title VII, namely that the amendments altered the causation structure from a but-for system to a lesser, undefined system.[187] Because the existing direct evidence jurisprudence undervalues the importance of this change, it places too much emphasis on *Price Waterhouse*.

In sum, the three basic shortcomings of existing direct evidence jurisprudence are a failure to explain why direct evidence is required, an incorrect imposition of a higher evidentiary standard because of an assumption about the ease of proving a mixed-motive case, and a failure to value the changes effected by the 1991 amendments to the Civil Rights Act.

B. THE SUPERIORITY OF THE NINTH CIRCUIT'S APPROACH

Costa's rejection of the direct evidence requirement runs directly contrary to the other circuits, which adhere to the idea that the direct evidence requirement is meant as a reward for plaintiffs who have direct evidence of discrimination.[188] Instead, the Ninth Circuit's holding was premised on the conclusion that Justice O'Connor's articulation of the requirement was based on Title VII's but-for causation

185. *See, e.g.*, *Costa*, 299 F.3d at 866 (Gould, J., dissenting). Judge Gould argued that Congress's failure to respond directly to Justice O'Connor's direct evidence requirement left both itand the prior decisions that adhered to the direct evidence requirement, undisturbed. *Id.* He wrote that "[a]s we remain bound by the Supreme Court's precedent, we must follow the direct evidence rule as explained in Justice O'Connor's concurrence." *Id.*

186. *See supra* text accompanying notes 165-66.

187. *See Costa*, 299 F.3d at 851-54; *see infra* notes 189-207 and accompanying text.

188. *See supra* notes 175-78 and accompanying text.

system.[189] The court in *Costa* maintained that prior to *Price Waterhouse* and the 1991 amendments to Title VII, a plaintiff's successful Title VII claim must have been based on proof that but for the illegal consideration of the plaintiff's membership in a protected class, the challenged employment action would not have occurred.[190] The Ninth Circuit's premised its holding on the idea that the causation structure of Title VII was fundamentally altered by the 1991 amendments.[191]

Through *Price Waterhouse*, it was settled that but-for causation was required in a plaintiff's disparate treatment case.[192] Each of the three main opinions—Justice Brennan's plurality opinion, Justice O'Connor's concurrence, and Justice Kennedy's dissent—embraced but-for causation in their own way. Justice Brennan initially seemed to dismiss but-for causation, saying that Title VII's "because of" language was not synonymous with but-for causation.[193] Nonetheless, he incorporated but-for causation into a mixed-motive case by suggesting that the defendant may escape liability by proving it would have made the same decision absent discrimination.[194]

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189. *Costa*, 299 F.3d at 847, 850-54. But-for causation is generally used to determine if one factor caused an event. *See* Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 UTAH L. REV. 1029, 1035 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265-66 (5th ed. 1984)). It requires a fact finder to ask if an event would have happened even without the factor in question. *Id.* If the answer is "no," the factor is considered a "but-for" cause. *Id.*

190. *Costa*, 299 F.3d at 851.

191. *Id.* at 850-51.

192. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989). *But cf.* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 52 (1991) (suggesting that courts have found the "but-for" causation model to be an "unsatisfactory formulation" of the plaintiff's burden of proof, and that the practical result is that courts have "been left free to fall back on a purely intuitive sense of what evidence establishes a sufficient causal nexus between motive and act" in order to shift the burden to the defendant).

193. *Price Waterhouse*, 490 U.S. at 240-42 (plurality opinion). Justice Brennan observed that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them." *Id.* at 240. Gudel suggests that the Court's rejection of but-for causation seems based on the idea that Congress "could not have 'meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decisions she challenges'. . . [because] the difficulty in making that proof would defeat the goals of Title VII's as a remedial statute." Gudel, *supra* note 192, at 60.

194. *Price Waterhouse*, 490 U.S. at 244-47 (plurality opinion).

In essence, Justice Brennan simply moved the burden of proof from the plaintiff to the defendant by forcing the defendant to prove the absence of but-for causation as an affirmative defense.[195] As one commentator has noted, "[t]he Court changed the party who bears the burden of proving 'but for' causation, but that concept still defines the only situation in which Title VII liability attaches."[196]

Similarly, Justice O'Connor adhered to but-for causation as the standard for Title VII cases.[197] She disagreed with the plurality's assertion that the language of Title VII was distinct from but-for causation.[198] She stated that Title VII's legislative history and plain language both suggest a "substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action."[199]

Finally, Justice Kennedy suggested that Title VII's familiar "because of" language was intimately connected to but-for causation.[200] Although he acknowledged that courts did not always use the precise words "but-for," he argued that each of the causation constructions were synonymous with but-for causation.[201] At base, he argued, Title VII was directed at employment decisions that result from impermissible, discriminatory motives.[202] Thus, each of the main opinions in *Price Waterhouse* indicate in one way or another that but-for causation is an element of a disparate treatment action.

The 1991 amendments to Title VII are a radical departure from but-for causation, as indicated by the Ninth Circuit.[203] Since the amendments indicated that a plaintiff merely show that one's membership in a protected class was a "motivating

195. *Id.* at 246.

196. Gudel, *supra* note 192, at 61. In dissent, Justice Kennedy made this same point. *Price Waterhouse*, 490 U.S. at 281 (Kennedy, J., dissenting). He wrote that the plurality opinion had merely shifted the burden of proving the lack of but-for causation to the defendant, and concluded that "it is clear that, whoever bears the burden of proof on the issue, Title VII liability requires a finding of but-for causation." *Id.*

197. *Price Waterhouse* at 262-63 (O'Connor, J., concurring).

198. *Id.* at 240-42 (plurality opinion).

199. *Id.* at 262 (O'Connor, J., concurring).

200. *See id.* at 281-82 (Kennedy, J., dissenting).

201. *Id.* ("The verbal forumlae we have used in our precedents are synonymous with but-for causation.").

202. *Id.*

203. Costa v. Desert Palace, Inc., 299 F.3d 838, 850-51 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003)..

factor" behind the employment decision, a plaintiff need not prove that discrimination on the basis of this membership was the but-for cause of the decision.[204] Moreover, the application of but-for causation in tort law suggests that it is not always appropriate in cases where two or more occurrences bring about a single event.[205] Thus, both the 1991 amendments to Title VII and general principles of tort law, from which Title VII's construction of causation stems, suggest that but-for causation is not required in mixed-motive cases.[206] Instead, Title VII embraces a lesser causation standard: An employer is liable for a challenged employment action if discrimination based on the plaintiff's membership in a protected class contributed to the action in any way.

As a result, the *Costa* court properly reasons that the 1991 amendments obviate Justice O'Connor's premise for the direct evidence requirement. Justice O'Connor preferred a direct evidence requirement for disparate treatment plaintiffs based on the notion that a higher evidentiary standard should be applied when a plaintiff cannot prove but-for causation, which she believed was required under Title VII.[207] Because but-for causation no longer needs to be proved in connection with a Title VII allegation, plaintiffs should not be required to produce direct evidence of discrimination to proceed under a mixed-motive theory.

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204. Many commentators echo this point. *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 505 (2001); Zimmer, *supra* note 67, at 600-09; Tristin K. Green, Comment, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1007 (1999).

205. *See* KEETON, *supra* note 189, § 41 at 266. In a classic example, if two men independently shoot and kill a third (the bullets of both men hitting the third man), neither shot is a but-for cause of the man's death. *Id.* Both shooters could not be held liable under a system of but-for causation. *See id.*; *see also* Stuart Bass & Nathan S. Slavin, *Avoiding Sexual Discrimination Litigation in Accounting Firms and Other Professional Organizations: The Impact of the Supreme Court Decision in* Price Waterhouse v. Ann B. Hopkins, 13 WOMEN'S RTS. L. REP. 21, 27 (1991) (discussing the application of but-for causation in mixed-motive cases).

206. *See supra* notes 189-91, 203-05 and accompanying text.

207. Price Waterhouse v. Hopkins, 490 U.S. 228, 262-79 (O'Connor, J., concurring).

C. THE WEAKNESSES OF THE NINTH CIRCUIT'S DECISION IN *COSTA*

Despite the fact that *Costa*'s interpretation of direct evidence is more consistent with Title VII and *Price Waterhouse* than the other federal circuits, the decision has some weaknesses. Although it is superior to the other federal circuits in explaining why it chose not to impose a direct evidence requirement,[208] *Costa* suffers from a lack of detailed attention to the discussion of causation in *Price Waterhouse* and Title VII in general. The Ninth Circuit blithely observed that Justice O'Connor's direct evidence requirement was merely a "passing reference."[209] The court devotes barely two paragraphs out of a twenty-one page opinion to explain the causation issues in *Price Waterhouse*.[210] Because its move from direct evidence puts it in sharp conflict with the other federal circuits, the court should have fully explained the underlying causation issue in *Price Waterhouse* and how the causation structure was altered by the 1991 amendments.

The court also failed to address two basic statutory interpretation arguments that, taken together, may indicate that the amendments did not alter the underlying causation structure of Title VII. One argument is that if the lower courts misinterpreted Title VII and *Price Waterhouse* to include a direct evidence requirement, the Court and Congress would have changed an obviously wrong interpretation of a statute. That neither has acted to clarify the issues of causation and the direct evidence requirement might suggest that the lower courts interpret the two correctly.[211] This argument has less force, however, given that Congress has not taken an opportunity to amend Title VII since 1991, when circuits began to hold plaintiffs to a direct evidence requirement. If it had taken such an opportunity and refused to address the direct evidence requirement, this silence would be more easily interpreted as congressional acquiescence. In addition, the argument that silence suggests the lower courts' direct evidence requirement is correct is generally stronger if there is

208. *See supra* notes 165-68 and accompanying text (discussing *Costa*'s reasoning and the relative lack of explanation of the other federal circuits).

209. *Costa*, 299 F.3d at 851.

210. *See id.*

211. This concept is known as the "acquiescence rule." *See* ESKRIDGE ET AL., *supra* note 174, at 1020-21.

evidence that Congress was aware of the interpretation.[212] No such evidence exists.[213] As a result, the argument does not defeat the Ninth Circuit's choice to eliminate the direct evidence requirement. Nonetheless, the court should have addressed it.

A second canon of statutory interpretation posits that when Congress means to make such a dramatic change in the law, it says so explicitly.[214] Thus, if the 1991 amendments did fundamentally change causation under Title VII, Congress is expected to realize the import of the change and note it in some way, either explicitly in the statute or somewhere in the legislative history. This argument fails to recognize, however, that Congress often does not signal that it is making an important change in the law, partially because Congress is not always aware of the import that changes in the law can have.[215] In addition, arguments involving legislative inaction have been strongly criticized both by commentators and jurists, who argue that since it is difficult enough to infer evidence of intent from legislative action, it is even more difficult to take inaction as such evidence.[216] In any event, it is curious that the court in *Costa* failed to discuss either of these issues because of its significant departure from the direct evidence requirement.

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212. *See id.* at 1021.

213. *See supra* notes 75-84 and accompanying text (noting the portions of the legislative history behind the 1991 amendments relevant to the direct evidence problem).

214. This concept is sometimes called the "dog that did not bark" canon. *See* ESKRIDGE ET AL., *supra* note 174, at 1020. The canon refers to the expectation that legislative "watchdogs" will "bark" at a significant statutory change. *Id.* Examples of this reasoning can be found in Justice Stevens's majority opinions in *Chisom v. Roemer*, 501 U.S. 380 (1991), and *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

215. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640-56 (1990) (detailing criticisms of the traditional canons of statutory interpretation).

216. *See, e.g.*, ESKRIDGE ET AL., *supra* note 174, at 1034 (citing HENRY HART, JR. & ALBERT SACKS, THE LEGAL PROCESS 1313-70 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)); John Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737, 746-50 (1984)); *see also* Eskridge, *supra* note 215, at 634-35, 640. Eskridge notes that legislative silence "is usually too ambiguous to count as legislative history." *Id.* at 640.

IV. *COSTA*'S IMPACT ON THE DIRECT EVIDENCE REQUIREMENT AND THE ANALYTICAL FRAMEWORK FOR EMPLOYMENT DISCRIMINATION CASES

In addition to being significantly different from the other circuits, the Ninth Circuit's elimination of the direct evidence requirement in *Costa* is notable because it has three major effects for disparate treatment cases. First, it merges pretext and mixed-motive cases.[217] Second, it de-emphasizes the *McDonnell Douglas* standard.[218] Finally, it signals a move towards the decreasing force of presumptions in employment discrimination law, especially when considered in conjunction with other recent Supreme Court decisions.[219]

A. ELIMINATING THE DIRECT EVIDENCE REQUIREMENT RESULTS IN A MERGER OF PRETEXT AND MIXED-MOTIVE CASES

Without the direct evidence requirement, there seems to be little practical difference between pretext and mixed-motive cases.[220] As the *Costa* court noted, the main distinction between pretext cases and mixed-motive cases is the number of motivations allegedly behind a challenged employment action.[221] Thus the distinction is factual, not legal. This merger is a necessary by-product of not requiring direct evidence. Circuits requiring direct evidence segment disparate treatment cases into the pretext and mixed-motive classes on the basis of direct evidence.[222] In contrast, the Ninth Circuit's

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217. *See infra* notes 220-32 and accompanying text.

218. *See infra* notes 233-45 and accompanying text.

219. *See infra* notes 246-56 and accompanying text; *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-12 (2002) (holding that a complaint in an employment discrimination suit need not plead facts establishing a prima facie case of discrimination).

220. *See* Zimmer, *supra* note 67, at 600-09; Green, *supra* note 204, at 1004-07; Mizer, *supra* note 65, at 260-62. Tristin K. Green argues that *McDonnell Douglas* applies whenever the plaintiff has only circumstantial evidence of discrimination (and not direct evidence), but "encompasses both the falsity-of-proffered-reason method [pretext cases] and the motivating-factor method of proof [mixed-motive cases]." Green, *supra* note 204, at 1004. Mizer, on the other hand, argues that the plain language of Title VII has eliminated the distinction between pretext and mixed-motive cases because the structure of the Act suggests that a "motivating factor test controls all discrimination claims." Mizer, *supra* note 65, at 253.

221. Costa v. Desert Palace, Inc., 299 F.3d 838, 855-58 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003).

222. *See supra* notes 85-91 and accompanying text (discussing the impact of requiring direct evidence on putative mixed-motive plaintiffs and the three

holding suggests that even if a plaintiff could produce direct evidence of discrimination, her case would proceed regardless of whether she did not have such evidence.[223] Indeed, the only element that changes the analysis is the actual number of motivations behind the challenged employment action.[224] Given the elimination of the direct evidence requirement as a prerequisite for the "motivating factor" test, *Costa* suggests that cases involving a single motivating factor should be analyzed under section 703(a)'s "because of" standard, while mixed-motive cases (both those meeting the old direct evidence requirement and those unable to meet the requirement) should be governed by the section 703(m) "motivating factor" test.[225] In this fashion, eliminating the direct evidence requirement merges the pretext and mixed-motive theories.

Yet merging the pretext and mixed-motive theories of intentional discrimination seems directly contrary to one of Title VII's major organizing principles: the separation of section 703(a) and section 703(m). As discussed above, section 703(a) makes an employment action taken "because of" someone's membership in a protected class unlawful,[226] while section 703(m) sets out the "motivating factor" test.[227] Some might argue that if Congress had intended to subject both sets of claims to the motivating factor test, it would have said so in some fashion or another, given that the "because of" test has been the fundamental language since the inception of Title VII in 1964.[228]

Despite the separation of section 703(a) and section

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standards of direct evidence required by the federal circuits).

223. *Costa*, 299 F.3d at 853-58.

224. *See id.* at 856-58.

225. *See id.* at 856-57. In *Costa*, the Ninth Circuit suggested that a case should proceed under the "because of" standard if "the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking." *Id.* at 856. The "motivating factor" test should be used, it argued, when the facts support "a finding that discrimination is one of two or more reasons for the challenged decision." *Id.*

226. 42 U.S.C. § 2000e-2(a) (2000).

227. *Id.* § 2000e-2(m).

228. This, in essence, is Judge Stahl's interpretation in *Carey v. Mt. Desert Island Hosp.*, 156 F.3d 31, 42-48 (1998) (Stahl, J., dissenting). Judge Stahl suggested that Congress's enactment of the motivating factor test should not be interpreted as eradicating "the established legal landscape governing the litigation of disparate treatment cases," and thus proposed that the test should not apply to all pretext cases. *Id.* at 45-46.

703(m), *Costa*'s merging of pretext and mixed-motive cases is appropriate. The plain language of Title VII indicates that an unlawful employment practice is established when an employment decision is made "because of" one's membership in a protected group,[229] or when that membership is simply a "motivating factor."[230] When taken with the elimination of the direct evidence requirement, this language suggests that the number of motivations behind a challenged employment action should determine which of the two sections—703(a) or 703(m)—applies.[231] Even if this results in a merging of the pretext and mixed-motive cases, the "because of" discrimination test (under section 703(a)) and "motivating factor" discrimination test (under section 703(m)) are not collapsed. That the two tests of discrimination are not collapsed cuts strongly against the argument that pretext and mixed-motive cases should not be merged because 703(a) or 703(m) are separated. Therefore, mixed-motive and pretext cases are not fundamentally different causes of action.[232]

B. ELIMINATING THE DIRECT EVIDENCE REQUIREMENT RESULTS IN A DE-EMPHASIS OF *MCDONNELL DOUGLAS*

Removing the direct evidence requirement, and thus conflating pretext and mixed-motive cases, affects the *McDonnell Douglas* framework. As suggested by the Ninth Circuit, *McDonnell Douglas* is most important at summary judgment because it articulates the general standard a plaintiff must meet in order to survive a defendant's summary judgment motion.[233] The essence of *McDonnell Douglas* is that the plaintiff must prove that an employer's legitimate nondiscriminatory reason for a challenged employment action

229. 42 U.S.C. §2000e-2(a).

230. *Id.* § 2000e-2(m).

231. *See supra* note 225 and accompanying text.

232. Other commentators have suggested the distinction between pretext cases and mixed-motive cases should be eliminated. *See* Mizer, *supra* note 65, at 253. Mizer argues that the 1991 Act created one controlling test for all discrimination claims—the "motivating factor" test. *Id.* Based upon this "uniform approach to disparate treatment claims," Mizer proposes a single set of jury instructions that would apply in both the pretext and mixed-motive cases. *Id.* at 253, 263.

233. Costa v. Desert Palace, Inc., 299 F.3d 838, 854-57 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003); *see supra* notes 148, 153 and accompanying text.

is pretext for discrimination.[234] In such a situation, there is more than one reason asserted for the employment action: discrimination, which is alleged by the plaintiff, and a legitimate nondiscriminatory reason, alleged by the defendant.[235] Once the determining factor between the use of *McDonnell Douglas* framework and the *Price Waterhouse* framework is no longer direct evidence, but the presence of a single- or multiple-factor motive, *McDonnell Douglas* is no longer relevant. Given the presence of more than one motivation, courts should apply section 703(m)'s "motivating factor" test.[236] The limited "because of" standard should apply only in two circumstances: where discrimination on the basis of the plaintiff's membership in a protected class is the sole reason for the challenged employment action, or where discrimination did not play any role in the decision.[237]

Costa thus greatly diminishes the impact of *McDonnell Douglas*. While some have feared this result,[238] it is understandable given the current state of employment discrimination. Unlike earlier discrimination that was more overt, modern discrimination is often premised on a number of

234. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-07 (1973); *see supra* notes 24-40 and accompanying text.

235. Professor Linda Hamilton Krieger properly notes that "[b]ecause no one [employee] is perfect, few employers will be unable to articulate some plausible reason for firing or failing to hire or promote any particular employee or applicant." Krieger, *supra* note 20, at 1178. The frequency of employer assertions of legitimate reasons behind employment actions strongly suggests that most cases falling into the *McDonnell Douglas* framework will be cases involving multiple motives.

236. *See supra* notes 221-32 and accompanying text.

237. *See Costa*, 299 F.3d at 856; *supra* note 225 and accompanying text. Discrimination on the basis of the plaintiff's membership in a protected class can be the sole reason for the employment action if the defendant-employer asserts a legitimate reason for the action that the plaintiff can prove is mere pretext for discrimination. Thus, even though the defendant has offered another reason for the employment action (seemingly forcing the "motivating factor" test), if the plaintiff can prove pretext, there is only one reason for the employment action (and the "because of" test applies). Nonetheless, given the practical difficulty of proving pretext, the *McDonnell Douglas* standard will be used far less frequently when plaintiffs are not required to proffer direct evidence in order to take advantage of the mixed-motive framework. *Cf.* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-49 (2000); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

238. *Costa*, 299 F.3d at 867 (Gould, J., dissenting). Gould argued both that *McDonnell Douglas* would effectively be overruled by an interpretation of *Price Waterhouse* that eliminated the direct evidence requirement, and that such a result could not have been intended. *Id.*

interrelated factors that are often products of unconscious bias.[239] Because modern discrimination is less likely to be based on a sole factor, and because the *McDonnell Douglas* framework does not apply to cases involving only one reason behind the challenged employment action, *McDonnell Douglas* is simply not as relevant in the modern context. It was the first of the Court's forays into the problem of employment discrimination, and served its purpose of defining what general standard a plaintiff must meet in order to successfully maintain a Title VII action.[240] Although the American judicial system is premised on following precedent, legal theories also must fit an ever-changing picture of discrimination.[241]

In addition, the refusal to apply direct evidence and the resulting merger of the pretext and mixed-motive theories is more compatible with the plaintiff-friendly scheme of Title VII. While some worry that a step away from direct evidence overburdens defendants,[242] the addition of section 706(g)(2)(B) addresses this concern by limiting a defendant's liability to equitable relief if it proves that it would have taken the same employment action absent discrimination.[243] The "same decision" defense is therefore another way Title VII balances the interests of the employer and the employee.[244] This also

239. For a full articulation of this idea, see Krieger, *supra* note 20, at 1164 (summarizing her argument that current Title VII jurisprudence is inadequate to address the "subtle, often unconscious forms of bias" that Title VII was intended to address); and Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 CORNELL L. REV. 899, 913-15 (2001).

240. *See supra* notes 21-29 and accompanying text (discussing *McDonnell Douglas* and its articulation of the elements of a plaintiff's prima facie case of discrimination).

241. *See, e.g.*, BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 1-3 (1924); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1-2 (4th ed. 1943). In discussing the needs of modern law, then-Judge Cardozo wrote of "the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth." CARDOZO, *supra*, at 1.

242. *See* Ward, *supra* note 41, at 658-60. Joseph J. Ward argues that doing away with the direct evidence requirement would provoke plaintiffs to file "excessive or frivolous claims," which will increase the defendant's cost of doing business since "jurors typically side with the employee in such cases, rather than the 'Goliath' employer." *Id.* at 659.

243. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2000); *see supra* notes 66-71 and accompanying text (outlining the 1991 amendments to Title VII relevant to mixed-motive cases).

244. *Cf.* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358-61 (1995). In *McKennon*, the Court sought to "recognize the duality between the legitimate interests of the employer [limiting damages for a plaintiff-employee

will discourage the filing of "excessive or frivolous" claims because employees who face employers with strong proof that they would have made the same decision absent discrimination will only be able to receive equitable relief, declaratory relief, injunctive relief, or the award of attorney's fees.[245] This inability to receive monetary compensation also suggests that an employee will be less likely to file an employment discrimination claim against an employer able to assert the same decision defense.

C. THE BROADER IMPLICATIONS OF ELIMINATING THE DIRECT EVIDENCE REQUIREMENT

Finally, eliminating the direct evidence requirement may signal a move towards decreasing the force of presumptions in employment discrimination law. In refusing to require direct evidence, the Ninth Circuit diminished the importance of *McDonnell Douglas*,[246] and thereby reduced the utility of the most significant burden-shifting and presumption-creating approach in employment discrimination law.[247] Instead, the *Costa* approach allows greater access to the mixed-motive theory because of the elimination of the direct evidence requirement. Thus the focus is on whether, given the totality of the evidence, the plaintiff has proven she suffered discrimination.[248] This approach is seen in the language of the opinion itself, in Judge McKeown's point that the plaintiff must ultimately prove that she was intentionally discriminated against.[249] Instead of relying on elaborate burden-shifting schemes and presumptions, the Ninth Circuit achieved

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given wrongdoing on the employee's part] and the important claims of the employee who invokes the national employment policy mandated by the Act." *Id.* at 361.

245. 42 U.S.C. § 2000e-5(g)(2)(B)(ii); *see supra* notes 66-71, 182-83 and accompanying text (discussing the remedial limitations imposed by the 1991 amendments in cases where an employer successfully asserts the "same decision" defense).

246. *See supra* notes 233-41 and accompanying text.

247. As discussed above, the burden-approach of *McDonnell Douglas* and *Burdine* has been the traditional framework for employment discrimination cases. *See supra* notes 21-40 and accompanying text (discussing intentional pretextual discrimination).

248. Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002) (en banc) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)), *cert. granted*, 123 S. Ct. 816 (2003).

249. *Id.*

simplicity by looking at the plain text of the statute.[250]

This same simplicity is seen in recent Supreme Court cases involving employment discrimination. For example, in *Swierkiewicz v. Sorema N.A.*,[251] the Court held that a complaint in an employment discrimination lawsuit need not plead specific facts establishing a prima facie case of discrimination.[252] There, the Second Circuit had required the plaintiff's pleading to specify facts going to a prima facie case of discrimination in order to survive the defendant's motion to dismiss.[253] In reversing, the Supreme Court reasoned that the requirements for establishing a prima facie case do not correlate with the pleading standard a plaintiff must meet in order to survive a motion to dismiss.[254] It concluded that "[g]iven that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases."[255] The Court's refusal to approve judicially heightened pleading standards suggests it views employment discrimination cases in a flexible light. When considered with *Costa*, this may suggest that employment discrimination jurisprudence is moving towards a simpler standard: The plaintiff must prove she was the victim of discrimination. Instead of needing to meet any specific minimum standard beyond regular pleading rules, a plaintiff must simply prove by the preponderance of the evidence that her employer discriminated against her. In the words of Judge McKeown, the ultimate question "comes down to whether she has made her case."[256]

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250. *Id.* at 851.

251. 534 U.S. 506 (2002).

252. *Id.* at 510-12.

253. *Id.* at 510. Thus, the Court of Appeals believed that the plaintiff was required to allege (1) his membership in a protected class; (2) his qualification for the job; (3) that he suffered an adverse employment action; and (4) other "circumstances that support an inference of discrimination." *Id.*

254. *Id.* at 511. The Court held that the prima facie case is not commensurate with these pleading standards for two reasons. First, *McDonnell Douglas* does not apply in every employment discrimination case. *Id.* For example, it does not apply when a plaintiff can prove overt evidence of discrimination. *Id.* Second, because the "precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Id.* at 512 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

255. *Id.*

256. Costa v. Desert Palace, Inc., 299 F.3d 838, 844 (9th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 816 (2003) (quoting Reeves v. Sanderson

CONCLUSION

In *Costa v. Desert Palace, Inc.*, the Ninth Circuit held that direct evidence is not required for a plaintiff to proceed under a mixed-motive theory; instead, a plaintiff could succeed through the use of either direct or circumstantial evidence. Differing significantly from the other federal circuits' decisions, *Costa* reached the correct conclusion, given that the 1991 amendments to Title VII changed the statute's underlying method of but-for causation to a lesser, undefined method. The Ninth Circuit's refusal to require direct evidence has far-reaching ramifications for disparate treatment cases, as the refusal merges pretext and mixed-motive cases, and drastically reduces the importance of *McDonnell Douglas*. Yet because of the significance of its eliminating the direct evidence requirement, the Ninth Circuit erred in failing to explain its holding fully. Despite *Costa's* weaknesses, the Supreme Court should affirm the Ninth Circuit's refusal to require direct evidence of mixed-motive plaintiffs, as this is the correct interpretation of both Title VII and *Price Waterhouse*.

Plumbing Prods., 530 U.S. 133, 142-49 (2000)); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).