

# OASIS OR MIRAGE? *DESERT PALACE* AND ITS IMPACT ON THE SUMMARY JUDGMENT LANDSCAPE

KRISTINA N. KLEIN\*

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## I. INTRODUCTION

In the summer of 2003, the United States Supreme Court, in *Desert Palace, Inc. v. Costa*, held that a plaintiff in a Title VII employment discrimination case no longer needed to produce direct evidence in order to receive a mixed-motive jury instruction.<sup>1</sup> While the Court clearly overruled the direct evidence requirement set forth in *Price Waterhouse v. Hopkins*,<sup>2</sup> it remains unclear what impact, if any, *Desert Palace* has beyond its narrow holding.<sup>3</sup>

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\* J.D., Florida State University College of Law, 2006; M.S. Florida International University, 2002; B.S., University of Nebraska-Lincoln, 1995. Special thanks to Professors Gregory Mitchell and Charles Ehrhardt for their valuable guidance on earlier drafts of this Note.

1. 539 U.S. 90 (2003).

2. 490 U.S. 228, 276 (1989) (O'Connor, J., concurring in judgment). In *Price Waterhouse*, Justice O'Connor wrote that "the burden on the issue of causation" only shifts to the employer where "a disparate treatment plaintiff [could] show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* While no other Justice joined O'Connor's concurrence, most courts considered her concurrence as controlling. See Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 873 (2004) ("Justice O'Connor's viewpoint concerning direct versus circumstantial evidence, though expressed in a concurring opinion, rose to predominance among the circuits. The rationale for adopting [her] position was that it provided the narrowest ground for the Court's decision.").

3. T.L. Nagy, *The Fall of the False Dichotomy: The Effect of Desert Palace v. Costa on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 138 (2004) ("[*Desert Palace*] has sent a buzz of excitement and confusion among members of the employment bar and judges of the lower federal courts."); Michael Abbott, Note, *A Swing and a Miss: The U.S. Supreme Court's Attempt to Resolve the Confusion over the Proper Evidentiary Burden for Employment Discrimination Litigation in Costa v. Desert Palace*, 30 J. CORP. L. 573, 587 (2005) (noting that *Desert Palace* did little to resolve confusion as

“No issue is more crucial to the litigation of intentional discrimination cases than determining what effect [*Desert Palace*] has on the pretext proof structure developed by the Court in *McDonnell Douglas Corp. v. Green*.”<sup>4</sup> This is especially true at the summary judgment stage, “where most employment discrimination cases are either won or lost.”<sup>5</sup> Unfortunately, however, courts have failed to reach a consensus in terms of *Desert Palace*’s proper effect on the summary judgment analysis in Title VII litigation. As one scholar recently noted, “Litigants, lawyers, and judges need an answer to that question now.”<sup>6</sup>

This Note ultimately addresses the proper post-*Desert Palace* Title VII summary judgment analysis. Accordingly, Part I of this Note begins by reviewing the pre-*Desert Palace* landscape. It provides a general overview of the *McDonnell Douglas*<sup>7</sup> single-motive analysis, often referred to as “pretext” analysis, and the *Price Waterhouse* mixed-motive analysis. Also, it addresses the Civil Rights Act of 1991.<sup>8</sup> Part II then analyzes the Court’s unanimous decision in *Desert Palace, Inc. v. Costa*. Part III narrows the focus to summary judgment and reviews the Title VII summary judgment landscape that existed prior to *Desert Palace*. Part IV then explores the three general responses to *Desert Palace*’s impact on summary judgment. Finally, Part V counters two of these responses and concludes with an argument for *Desert Palace*’s proper impact at the summary judgment stage of a Title VII claim.

## II. THE PRE-*DESERT PALACE* LANDSCAPE

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . race, color, religion, sex, or national origin.”<sup>9</sup> The central question in every claim of employment discrimination, therefore, is “whether the plaintiff was the victim of intentional discrimination.”<sup>10</sup> Thus, proving intentional discrimination requires that a plaintiff demonstrate that an employer made an adverse em-

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“clearly evidenced by the application of the Court’s holding by the several District and Circuit courts that have followed the opinion”).

4. William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1550 (2005).

5. Jaclyn Borcharding, Note, *Deserting McDonnell Douglas? Desert Palace, Inc. v. Costa*, 57 BAYLOR L. REV. 243, 262 (2005).

6. Corbett, *supra* note 4, at 1550.

7. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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

9. 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).

10. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

ployment decision against them because of their race, sex, or other protected category.

Prior to *Desert Palace*, two frameworks governed the Title VII employment discrimination landscape: the *McDonnell Douglas* “single-motive,” three-step, burden-shifting framework and the *Price Waterhouse* “mixed-motive” framework.<sup>11</sup>

#### A. *The McDonnell Douglas Single-Motive Analysis*

In 1973, in response to “a notable lack of harmony” in causation analysis among the lower courts, the Supreme Court, in *McDonnell Douglas Corp. v. Green*, created a burden-shifting framework to be used in all Title VII cases alleging discriminatory treatment.<sup>12</sup> In short, the *McDonnell Douglas* three-prong framework requires (1) the plaintiff to establish a prima facie case, (2) the defendant to articulate a legitimate, nondiscriminatory reason for its adverse action, and (3) the plaintiff to prove that the defendant’s reason is pretext.<sup>13</sup> In later cases, such as *Texas Department of Community Affairs v. Burdine*<sup>14</sup> and *St. Mary’s Honor Center v. Hicks*,<sup>15</sup> the Court clarified the burdens of proof associated with each prong.

First, the plaintiff must establish a prima facie case of intentional discrimination.<sup>16</sup> While the prima facie case will vary depending on the different factual situations involved in an individual claim,<sup>17</sup> in the context of hiring, a plaintiff generally must show that (1) the plaintiff is part of a protected group, (2) the plaintiff applied and was

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11. Davis, *supra* note 2, at 863.

12. *McDonnell Douglas*, 411 U.S. at 801-02; see also Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 324 (1997). As Professor Selmi explained:

In a series of cases beginning in 1973, the Court created what has become a familiar proof structure for individual cases of employment discrimination. The structure is familiar not only because it has become an entrenched part of employment discrimination law, but also because it was developed based on familiar principles of evidence, including the use of presumptions to control the order of proof.

*Id.* (footnote omitted).

13. *McDonnell Douglas*, 411 U.S. at 802, 804.

14. 450 U.S. 248 (1981).

15. 509 U.S. 502 (1993).

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

17. *Id.* at 802 n.13; see, e.g., *Benton v. ARA Food Servs. Inc.*, 8 F.3d 816, No. 93-1002, 1993 WL 425183, at \*1 (4th Cir. Oct. 21, 1993) (proving a violation in a termination case requires a plaintiff to show that “(1) that he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory, (3) in spite of [his] qualifications and performance, he was fired, and (4) the position remained open to similarly qualified applicants after his dismissal”); *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 963 (11th Cir. 1997) (proving a violation in a failure to promote case requires a plaintiff to show that “he is a member of a protected class; he was qualified for and applied for the promotion; he was rejected; and other equally or less qualified employees who were not members of the protected class were promoted”).

qualified for the job for which the employer was hiring, (3) that, despite the plaintiff's qualifications, the plaintiff was rejected, and (4) that, after rejection, the position remained open.<sup>18</sup> Requiring plaintiffs to establish the prima facie case, as the *Burdine* Court explained, "serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."<sup>19</sup> For example, again in the context of hiring, the prima facie case demonstrates that a plaintiff's rejection did not result from the two most common legitimate reasons an employer might rely on for rejecting a job applicant: "an absolute or relative lack of qualifications or the absence of a vacancy in the job sought."<sup>20</sup> However, once a plaintiff successfully proves the prima facie case, a presumption<sup>21</sup> of illegal discrimination is created.<sup>22</sup>

Second, after a plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action.<sup>23</sup> The Court has explained that while a defendant employer does not have to convince a court that it was motivated by its proffered reason, the defendant must at least present sufficient evidence to raise a genuine issue of fact as to whether it discriminated against the plaintiff.<sup>24</sup> The defendant only bears a burden of production, not persuasion, and thus, does not have to persuade a court that it was actually motivated by the legitimate, nondiscriminatory reason.<sup>25</sup> Once the defendant satis-

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

19. *Burdine*, 450 U.S. at 253-54.

20. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

21. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993). Writing for the majority, Justice Scalia explained:

To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case . . . .

*Id.*

22. *Burdine*, 450 U.S. at 254. Further, the Court, in *Furnco Construction Corp. v. Waters*, explained:

A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

438 U.S. 567, 577 (1978) (citation omitted).

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

24. *Burdine*, 450 U.S. at 254-55.

25. *Id.*

fies this burden of production, the presumption of illegal discrimination is eliminated.<sup>26</sup>

Finally, assuming the employer's articulated reason suffices, the burden then shifts back to the plaintiff to show that the employer's stated reason is pretext.<sup>27</sup> Plaintiffs can demonstrate pretext by providing evidence showing that the employer's stated reason is not the true reason for the adverse employment decision.<sup>28</sup> In *McDonnell Douglas*, the Supreme Court articulated several ways plaintiffs could prove pretext, including the following: use of a comparator to prove that nonminorities were involved in similar acts of misconduct but were not terminated or were promoted; demonstrate how the employer treated the plaintiff during employment; present the employer's general policies and practices in terms of minority employment; or provide statistical evidence.<sup>29</sup> Ultimately, the burden of persuasion remains with the plaintiff.<sup>30</sup>

Because proving intentional discrimination is quite difficult<sup>31</sup> and because cases involving alleged discrimination "pose difficult and sensitive issues of subjective intent and objective action,"<sup>32</sup> the *McDonnell Douglas* analysis provides an invaluable method of "pro-

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26. *Id.* at 255 ("If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted . . .").

27. *McDonnell Douglas*, 411 U.S. at 804.

28. *Burdine*, 450 U.S. at 256.

29. *McDonnell Douglas*, 411 U.S. at 804-05.

30. *Burdine*, 450 U.S. at 253 ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). In *Hicks*, Justice Scalia explained that the *McDonnell Douglas* burden-shifting framework operates like all presumptions, as described in Federal Rule of Evidence 301:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

*Id.*

31. Davis, *supra* note 2, at 864. Professor Davis, in response to why the Court created the *McDonnell Douglas* burden-shifting framework, explained:

One might wonder why the Court felt obliged to engage in such an endeavor. Subtle discrimination cases such as *McDonnell Douglas* had dogged the judiciary because of the elusiveness of proving or disproving discriminatory intent. Unlike most other types of cases, discrimination suits often rest on a thin evidentiary base. By way of contrast, in a breach of contract case written documents frequently provide an evidentiary record of relevant transactions. In auto accident cases, forensic evidence and eyewitness accounts may resolve contested issues of fact. But many discrimination cases depend on revealing shadowy motives that no one would publicly articulate or be foolish enough to memorialize.

*Id.*

32. *Hall v. Ala. Ass'n of Sch. Bds.*, 326 F.3d 1157, 1167 (11th Cir. 2003) (internal quotation marks omitted).

gressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination.”<sup>33</sup> As the *Burdine* Court explained, the burden of persuasion “that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”<sup>34</sup> Accordingly, “[t]he *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.”<sup>35</sup>

### B. *The Price Waterhouse Mixed-Motive Analysis*

The *McDonnell Douglas* scheme was born out of the notion that Title VII cases required proof of *but-for*, or sole-factor, causation.<sup>36</sup> This meant that plaintiffs essentially had to prove that *but for* the plaintiff’s protected status, the employer would not have taken the adverse employment action.<sup>37</sup> The Court’s decision in *Price Waterhouse v. Hopkins*, however, broadened the causation element to allow plaintiffs to prove a Title VII violation if a plaintiff can demonstrate that an impermissible reason was a *factor* in the employment decision.<sup>38</sup> Most importantly, *Price Waterhouse* rejected the notion that employers act with only a single motive, and a mixed-motive analysis was born.<sup>39</sup>

The facts of *Price Waterhouse* illustrate the need for a mixed-motive framework. Ann Hopkins, a senior manager at Price Waterhouse, was denied partnership and sued claiming she was discriminated against on the basis of her sex.<sup>40</sup> The year Hopkins was up for partner, she was the only woman out of eighty-eight candidates.<sup>41</sup> Despite securing major contracts<sup>42</sup> with greater success than any other candidate, Hopkins was denied partnership for lack of interpersonal skills.<sup>43</sup> Apparently,

33. *Burdine*, 450 U.S. at 255 n.8.

34. *Id.* at 253.

35. *Id.*

36. Corbett, *supra* note 4, at 1567-68. Professor Corbett explained:

It is often stated that the *McDonnell Douglas* pretext analysis adopted a but-for standard of causation. Indeed, I have said that. I want to confess that I now have reservations about characterizing the pretext analysis as incorporating but-for causation. It may be more accurate to characterize the pretext analysis, at least as it is stated (though perhaps not as it is applied), as incorporating sole-factor causation.

*Id.* (footnotes omitted).

37. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989).

38. *Id.* at 241 (emphasizing that “since we know that the words ‘because of’ do not mean ‘solely because of,’ we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations” (footnote omitted)).

39. *Id.*

40. *Id.* at 231-32.

41. *Id.* at 233 (“Of the 662 partners at the firm at that time, 7 were women.”).

42. *Id.* (noting that Hopkins secured a \$25 million contract with the Department of State).

43. *Id.* at 234-35.

while clients viewed her aggressiveness and attention to detail favorably, staff members complained that Hopkins was “abrasive” and “brusque.”<sup>44</sup> At the same time, there were written comments—submitted by partners when Hopkins was a partnership candidate—that reflected sexual stereotyping.<sup>45</sup> For example, partners described Hopkins as “macho” and in need of “a course at charm school.”<sup>46</sup> Partners complained of Hopkins’ use of profanity “because it’s a lady using foul language.”<sup>47</sup> But, the “*coup de grace*,” as the Court described it, was a member of the policy board advising Hopkins that to improve her chances for partnership, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up [sic], have her hair styled, and wear jewelry.”<sup>48</sup>

The *Price Waterhouse* plurality rejected the notion that Title VII claims require but-for causation.<sup>49</sup> Instead, the plurality construed the “because of” element as meaning that the discriminatory, improper reason could be a sufficient, even if it is not a necessary, condition of an adverse employment action.<sup>50</sup> Here, while Price Waterhouse had a legitimate reason for its employment action (Hopkins’ lack of interpersonal skills), according to the plurality it nonetheless violated Title VII because Hopkins’ gender was a relevant factor in its decision to deny her partnership.<sup>51</sup> Thus, a mixed-motive analysis was born, which recognized that employers could take action against an employee for both legitimate and illegitimate reasons.

As Justice White explained in his concurring opinion:

The Court has made clear that “mixed-motives” cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, “the issue is whether either illegal or legal motives, but not both, were the ‘true’ motives behind the decision.” In mixed-motives cases, however, there is no one “true” motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.<sup>52</sup>

The most important aspect of *Price Waterhouse*, however, is Justice O’Connor’s concurrence.<sup>53</sup> While concurring in judgment, Justice

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44. *Id.* at 234.

45. *Id.* at 235.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 240 (“To construe the words ‘because of’ as colloquial shorthand for ‘but-for causation’ . . . is to misunderstand them.”).

50. *Id.* at 240-41.

51. *See id.* at 239.

52. *Id.* at 260 (White, J., concurring) (citations omitted).

53. Justice O’Connor’s opinion was considered “as the concurrence issued on the narrowest grounds, and thus has been viewed as part of the ‘rule’ from *Price Waterhouse*.” Cassandra A. Giles, Note, *Shaking Price Waterhouse: Suggestions for a More Workable*

O'Connor rejected the plurality's opinion that "because of" did not require but-for causation.<sup>54</sup> Instead, in order to shift the burden on the issue of causation back to the defendant, the "plaintiff must show by *direct evidence* that an illegitimate criterion was a *substantial factor* in the decision."<sup>55</sup> Thus, according to Justice O'Connor, "once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination."<sup>56</sup> Justice Kennedy's dissent in *Price Waterhouse* labeled Justice O'Connor's direct-evidence requirement as the "actual holding" of the case.<sup>57</sup> Accordingly, following the *Price Waterhouse* decision, most courts had adopted Justice O'Connor's direct evidence requirement.<sup>58</sup>

### C. *The Civil Rights Act of 1991*

In the Civil Rights Act of 1991 (the 1991 Act), Congress codified the mixed-motive analysis: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."<sup>59</sup> Once the plaintiff has made this showing, an employer cannot escape liability. However, through use of a limited affirmative defense, if an employer can demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor," it can restrict the plaintiff's damages to injunctive, declaratory relief, and attorney's fees and costs.<sup>60</sup>

Significantly, instead of embracing Justice O'Connor's "substantial factor" test, Congress formalized the plurality's "motivating factor" analysis.<sup>61</sup> Congress, however, did not follow *Price Waterhouse's* "same-decision" affirmative defense, which allowed defendants to escape li-

*Approach to Title VII Mixed Motive Disparate Treatment Discrimination Claims*, 37 IND. L. REV. 815, 816 (2004).

54. *Price Waterhouse*, 490 U.S. at 262 (White, J., concurring).

55. *Id.* at 276 (emphasis added).

56. *Id.* (quoting the lower court's opinion, *Hopkins v. Price Waterhouse*, 825 F.2d 458, 470-71 (D.C. Cir. 1987)).

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

58. See, e.g., *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (8th Cir. 2002); *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999); *Trotter v. Bd. of Trs. of Univ. of Ala.*, 91 F.3d 1449, 1453-54 (11th Cir. 1996). All of these cases were either directly or indirectly abrogated by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

59. 42 U.S.C. § 2000e-2(m) (2000) (emphasis added).

60. § 2000e-5(g)(2)(B).

61. Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 92 (2004) (noting that the 1991 Act "clarified the *Price Waterhouse* plurality's motivating factor test and made it a formal part of Title VII").

ability completely; instead it chose to limit the defense so that a plaintiff's monetary recovery would be reduced to attorney's fees and costs.<sup>62</sup>

Post-*Price Waterhouse* and despite the 1991 Act, most courts still followed Justice O'Connor's *Price Waterhouse* concurrence and required plaintiffs to present direct evidence in order to proceed on a mixed-motive theory.<sup>63</sup> In fact, before the Ninth Circuit's en banc holding in *Desert Palace*, "every single court of appeals but the Ninth Circuit had adopted the evidentiary rule set out in Justice O'Connor's *Price Waterhouse* opinion."<sup>64</sup>

### III. ANALYSIS OF THE *DESERT PALACE* DECISION

Justice Thomas, writing for a unanimous Court in *Desert Palace, Inc. v. Costa*, explained, "This case provides us with the first opportunity to consider the effects of the 1991 Act on jury instructions in mixed-motive cases."<sup>65</sup> And, based on the language in the 1991 Act, the Supreme Court held that direct evidence is not required for a plaintiff to obtain a mixed-motive jury instruction.<sup>66</sup>

In *Desert Palace*, Catharina Costa claimed she was discriminated against based on her gender.<sup>67</sup> Costa was the only female worker in a Las Vegas hotel and casino warehouse.<sup>68</sup> During her employment, Costa had problems with coworkers and management, which led to frequent disciplinary action and suspension.<sup>69</sup> After a physical altercation with a male coworker, Costa was terminated while the male coworker received a five-day suspension.<sup>70</sup> The district court, despite the lack of direct evidence, gave a mixed-motive jury instruction.<sup>71</sup> The jury found in favor of Costa, awarding her backpay, compensatory damages, and punitive damages.<sup>72</sup>

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62. *Id.* at 92-93; Daniel P. Johnson, Note, *Employment Law: Desert Palace, Inc. v. Costa: Returning to Title VII's Core Principles by Eliminating the Direct Evidence Requirement in Mixed-Motive Cases*, 57 OKLA. L. REV. 403, 427 (2004) (explaining that the 1991 Act, unlike *Price Waterhouse*, "limits the remedies available to plaintiffs if the defendant is able to prove by a preponderance of the evidence that it would have taken the same adverse employment action even if the forbidden characteristic was not considered").

63. *Desert Palace*, 539 U.S. at 95 (noting that a number of courts, relying on Justice O'Connor's concurrence, "held that direct evidence is required to establish liability under § 2000e-2(m)"); Chambers, *supra* note 61, at 90 (noting that even though Justice O'Connor's opinion was "written only for herself," her opinion "was considered by many to be the operative holding of *Price Waterhouse*").

64. Nagy, *supra* note 3, at 141.

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

66. *Id.* at 92.

67. *Id.* at 96.

68. *Id.* at 95.

69. *Id.*

70. *Id.* at 95-96.

71. *Id.* at 96.

72. *Id.* at 97. Ultimately, the jury awarded Costa \$364,377.74: "\$200,000 in compensatory damages, \$100,000 in punitive damages, and \$64,377.74 in backpay." Michael J.

Desert Palace appealed, and the court of appeals initially held that the district court erred in giving the mixed-motive instruction because Costa provided no direct evidence of discrimination.<sup>73</sup> After rehearing the case en banc, however, the court of appeals held that the 1991 Act abrogated Justice O'Connor's direct evidence requirement.<sup>74</sup>

The Supreme Court affirmed, ultimately rejecting the direct evidence requirement. Recognizing the value of circumstantial evidence in proving discrimination, the Court stressed that “[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.’”<sup>75</sup> Thus, plaintiffs are no longer required to present direct evidence in order to receive a mixed-motive instruction.

#### IV. THE SUMMARY JUDGMENT LANDSCAPE—PRE-*DESERT PALACE*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”<sup>76</sup> Defendant employers, “in order to prevail, must do one of two things: show that the [plaintiff] has no evidence to support [its] case, or present ‘affirmative evidence demonstrating that the [plaintiff] will be unable to prove . . . [its] case at trial.’”<sup>77</sup> Once the defendant moves for summary judgment, the burden shifts to the plaintiff to demonstrate why summary judgment is inappropriate.<sup>78</sup> To survive summary judgment, the plaintiff “must set forth specific facts showing that there is a genuine issue [of material fact] for trial.”<sup>79</sup>

In the employment context at the summary judgment stage, the ultimate question of law is “whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of [the protected characteristic.]”<sup>80</sup> While standard civil litigation rules apply to Title VII cases, the Court developed the *McDonnell Douglas* framework to

Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1916 n.121 (2004) (citing *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 846 (9th Cir. 2002)).

73. *Desert Palace*, 539 U.S. at 97.

74. *Id.*

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

76. FED. R. CIV. P. 56(c).

77. *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quoting *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc)).

78. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

79. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

80. *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1018 (8th Cir. 2005) (alteration in original) (quoting *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996)).

guide judges and factfinders in evaluating circumstantial evidence of discrimination in the employment context.<sup>81</sup> Prior to *Desert Palace*, the summary judgment landscape followed the same basic single-motive and mixed-motive dichotomy.

Under the *McDonnell Douglas* single-motive approach, a defendant employer will be granted summary judgment if it articulates a legitimate, nondiscriminatory reason for the adverse employment decision and the plaintiff fails to demonstrate that the stated reason is pretext.<sup>82</sup> *Price Waterhouse*, however, only requires the plaintiff to demonstrate that a discriminatory reason was a motivating factor.<sup>83</sup> Thus, even when an employer provides a legitimate, nondiscriminatory reason, a plaintiff can survive summary judgment by demonstrating that an impermissible reason remained “a factor” in the adverse employment decision.<sup>84</sup>

Thus, the two approaches differ on who bears the ultimate burden of “proving or disproving the defendant’s nondiscriminatory justification for the challenged decision: under *McDonnell Douglas* the plaintiff must disprove the defendant’s alleged nondiscriminatory reason, while under *Price Waterhouse* the defendant must prove that its alleged nondiscriminatory reason was a determinative cause for the adverse employment decision.”<sup>85</sup>

#### V. *DESERT PALACE*’S POTENTIAL IMPACT ON SUMMARY JUDGMENT

In terms of the viability of the *McDonnell Douglas* burden-shifting analysis at the summary judgment stage, there are essentially three responses to *Desert Palace*: (1) the Eighth and Eleventh Circuit Courts of Appeals hold that *McDonnell Douglas* is unaffected by *Desert Palace*,<sup>86</sup> (2) many scholars argue that *Desert Palace* signifies the death of *McDonnell Douglas*,<sup>87</sup> and (3) the Fourth and Fifth Circuit Courts of Appeal argue that *Desert Palace* alters the third prong of the *McDonnell Douglas* framework.<sup>88</sup>

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81. Chambers, *supra* note 61, at 84. (“When Title VII was enacted, standard civil litigation rules applied to disparate treatment cases. However, in *McDonnell Douglas v. Green*, the Court developed a pretext test that forced factfinders to evaluate circumstantial evidence in a particular way.”).

82. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

83. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

84. See *id.*

85. Davis, *supra* note 2, at 860 (footnotes omitted).

86. *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004).

87. See, e.g., Jeffrey A. Van Detta, “*Le Roi Est Mort; Vive le Roi!*”: An Essay on the Quiet Demise of *McDonnell Douglas* and the Transformation of Every Title VII Case After *Desert Palace, Inc. v. Costa* into a “Mixed-Motives” Case, 52 DRAKE L. REV. 71 (2003).

88. *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

Between the three options—applying *Desert Palace* solely to mixed-motive cases, abandoning *McDonnell Douglas*, or merging *Desert Palace* with *McDonnell Douglas*—this Note argues that, ultimately, *Desert Palace* merely modifies the *McDonnell Douglas* summary judgment analysis.

#### A. Leaving McDonnell Douglas Unaffected

Many courts and commentators argue that *Desert Palace* has no impact on the *McDonnell Douglas* single-motive framework. In fact, in response to recent scholarly articles, one court made clear that “to paraphrase Mark Twain, reports of the death of *McDonnell Douglas* are exaggerated.”<sup>89</sup>

There are four basic arguments why *McDonnell Douglas* remains unaffected: (1) *Desert Palace*’s holding was too narrow, (2) that, because *Desert Palace* did not cite to *McDonnell Douglas*, it clearly has no effect on it, (3) *Desert Palace*’s holding does not address pretrial litigation, and (4) the Supreme Court, post-*Desert Palace*, has spoken directly to *McDonnell Douglas*’s continued validity.<sup>90</sup>

First, *Desert Palace*’s holding is too narrow. As the Eleventh Circuit stressed in *Cooper v. Southern Co.*, “the *Desert Palace* holding was expressly limited to the context of mixed-motive discrimination cases under 42 U.S.C. § 2000e-2(m).”<sup>91</sup> Further, the Supreme Court expressly made clear that it did not decide whether its analysis applied in other contexts.<sup>92</sup> The Eighth Circuit in *Griffith v. City of Des Moines*, in rejecting the argument that *Desert Palace* modified the *McDonnell Douglas* framework, made clear that because *Desert Palace* only dealt with mixed-motive jury instructions, it therefore had no effect on summary judgment.<sup>93</sup>

Second, if *Desert Palace* significantly changed the Title VII landscape, then surely the Supreme Court would have at least cited *McDonnell Douglas* in its decision. “[I]f those declaring *McDonnell Douglas* dead were correct, that death came through an odd silence.”<sup>94</sup> The Eleventh Circuit acknowledged that “the fact that the

89. *Herawi v. Ala. Dep’t of Forensic Scis.*, 311 F. Supp. 2d 1335, 1345 (M.D. Ala. 2004).

90. See, e.g., Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 *DRAKE L. REV.* 383, 395-402 (2004).

91. *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004).

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

93. *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) (“*Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit’s controlling summary judgment precedents.”).

94. Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas nor Transformed All Employment Discrimi-*

Court did not even mention *McDonnell Douglas* in *Desert Palace* makes us . . . reluctant to believe that *Desert Palace* should be understood to overrule that seminal precedent.”<sup>95</sup>

Third, because *Desert Palace* dealt with mixed-motive jury instructions, it has no effect on summary judgment. As the Eighth Circuit stressed in *Torlowei v. Target*, “*Desert Palace* is applicable to post-trial jury instructions, and not to the analysis performed at summary judgment.”<sup>96</sup> Therefore, the *McDonnell Douglas* framework is still properly applied at earlier stages of the proceeding, like summary judgment, whereas *Desert Palace* does not apply until the trial phase.<sup>97</sup>

Finally, the Supreme Court approved the continued validity of *McDonnell Douglas* after its *Desert Palace* holding.<sup>98</sup> The Eighth Circuit in *Griffith* pronounced that “[f]or concrete evidence confirming that *Desert Palace* did not forecast a sea change in the Court’s thinking, we need look no further than *Raytheon Co. v. Hernandez*, a post-*Desert Palace* decision in which the Court approved use of the *McDonnell Douglas* analysis at the summary judgment stage.”<sup>99</sup>

As the *Raytheon* Court explained:

The Court in *McDonnell Douglas* set forth a burden-shifting scheme for discriminatory treatment cases. Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer’s explanation is pretextual. The Courts of Appeals have consistently utilized this burden-shifting approach when reviewing motions for summary judgment in disparate-treatment cases.<sup>100</sup>

If the Court “had opined that [*Desert Palace*] overruled *McDonnell Douglas*, then *Raytheon* presented an excellent opportunity for the

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*nation Cases to Mixed-Motive*, 36 ST. MARY’S L.J. 395, 405 (2005) (“[N]othing in *Desert Palace* hints at the death or even wounding of *McDonnell Douglas*.”).

95. *Cooper*, 390 F.3d at 725 n.17.

96. *Torlowei v. Target*, 401 F.3d 933, 934 (8th Cir. 2005).

97. *See Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1017 (8th Cir. 2005) (finding that because *Desert Palace* was a post-trial appeal, it “really has no direct impact in the summary judgment context”).

98. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

99. *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) (citation omitted); *see also Helfrich v. Lehigh Valley Hosp.*, No. Civ.A. 03-CV-05793, WL 1715689, at \*6 (E.D. Pa. July 21, 2005) (noting *Raytheon*’s implicit confirmation that the *McDonnell Douglas* framework still applies at summary judgment).

100. *Raytheon*, 540 U.S. at 49 n.3 (citations omitted).

Court to say so.”<sup>101</sup> Accordingly, along with the Eighth and Eleventh Circuits, the Third, Sixth, Ninth and Tenth Circuits, even though not addressing *Desert Palace*’s effect on *McDonnell Douglas* directly, have continued to apply the *McDonnell Douglas* analysis to disparate treatment cases.<sup>102</sup>

### B. Abandoning McDonnell Douglas

By eliminating the direct evidence requirement, *Desert Palace* removed the only legal distinction that separated single-motive *McDonnell Douglas* cases and mixed-motive *Price Waterhouse* cases.<sup>103</sup> Thus, because there is no longer a viable way to distinguish between those cases operating under a single-motive analysis and those operating under a mixed-motive analysis, all cases should be treated as mixed-motive. Accordingly, pursuant to *Desert Palace*, applying the *McDonnell Douglas* framework is no longer justified.

Less than a week after *Desert Palace* was decided, the first case to apply its holding was *Dare v. Wal-Mart Stores, Inc.*<sup>104</sup> In *Dare*, the court made clear that, post-*Desert Palace*, the *McDonnell Douglas* framework should be abandoned.<sup>105</sup>

The *Dare* court explained that, under a single-motive analysis, “either the plaintiff is correct in alleging that an illegitimate factor alone motivated the defendant or the defendant’s legitimate nondiscriminatory reason was the only reason for the decision.”<sup>106</sup> Thus, when the court considers the parties’ “mutually exclusive reasons for the employment decision, only two scenarios are possible: either the defendant’s proffered reason is (a) true and valid; or it is (b) false and invalid.”<sup>107</sup> Under (b) the plaintiff wins; however, under (a), *McDonnell Douglas* would dictate that the defendant wins.<sup>108</sup> Because under scenario (a) a plaintiff (for example, Ann Hopkins) operating under a

101. Hedican et al., *supra* note 90, at 401.

102. *McClam-Brown v. Boeing Co.*, 142 F.App’x 75, 77 (3d Cir. 2005) (“We need not resolve appellants’ contention that the District Court should have conducted an inquiry under *Desert Palace*, rather than *McDonnell Douglas*, however, because appellants failed to produce sufficient direct or circumstantial evidence to cast doubt on Boeing’s stated reasons for the challenged employment actions.”); *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444 (6th Cir. 2004) (refusing to apply a mixed-motive analysis for an ADA claim); *Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003) (analyzing Title VII case under the *McDonnell Douglas* framework without mentioning *Desert Palace*); *Tesh v. U.S. Postal Serv.*, 349 F.3d 1270 (10th Cir. 2003) (applying *McDonnell Douglas* without reference to *Desert Palace*).

103. *Borcherding*, *supra* note 5, at 244; *see also* *Chambers*, *supra* note 61, at 95 (arguing that *Desert Palace* implicitly eliminated “any logical distinction” between mixed-motive and pretext cases).

104. 267 F. Supp. 2d 987 (D. Minn. 2003).

105. *Id.* at 991-92.

106. *Id.* at 991.

107. *Id.*

108. *Id.*

mixed-motive theory would lose, the *Dare* court felt the need to scrap the *McDonnell Douglas* framework altogether. The *Dare* court made clear that the result in scenario (a), therefore, “is incomplete, illogical, and prohibited by the Civil Rights Act of 1991.”<sup>109</sup>

The *Dare* court further stressed that “[t]he dichotomy produced by the *McDonnell Douglas* framework is a false one . . . [because] few employment decisions are made solely on [the] basis of one rationale to the exclusion of all others.”<sup>110</sup> Ultimately, the *Dare* court made clear that it did “not see the efficacy in perpetuating this legal fiction implicitly exposed by the Supreme Court’s ruling in *Desert Palace*.”<sup>111</sup>

While acknowledging that *Desert Palace* did not expressly overrule *McDonnell Douglas*, based on what the Court said, “it necessarily follows that *McDonnell Douglas* is gone.”<sup>112</sup> In fact, some “insist that ‘the Supreme Court did not say what impact *Desert Palace* would have on *McDonnell Douglas* [because] the result is so obvious it is likely the Court felt no need to explain’—that result being summary judgment is almost never proper.”<sup>113</sup> Essentially, then, *Desert Palace* means that all cases can now be considered mixed-motive; therefore, even when a defendant articulates a legitimate, nondiscriminatory reason, the case should still proceed to a jury to determine if the alleged discriminatory reason was still a relevant factor.<sup>114</sup>

As one scholar metaphorically stated:

It is time to climb out of the cave and look at employment discrimination law in the bright light of the sun. Although it was understandable that we looked at discrimination cases and saw the shadows (the *McDonnell Douglas* pretext analysis and the mixed-motives analysis) while we were prisoners in the cave, we cannot remain so shackled. On a sunny day in June 2003, the fetters of some prisoners were taken off, and we ascended out of the cave into the *Desert* and the light of the upper world.<sup>115</sup>

Despite pleas to “see the light,” no circuit court of appeals has held that *Desert Palace* mandates that courts no longer apply *McDonnell Douglas* at the summary judgment stage. This, however, has not pre-

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109. *Id.*

110. *Id.*

111. *Id.* at 992.

112. Corbett, *supra* note 4, at 1562.

113. Keelan v. Majesco Software, Inc., 407 F.3d 332, 340 (5th Cir. 2005) (alteration in original).

114. See Kerry S. Acocella, Note, *Out with the Old and in with the New: The Second Circuit Shows It’s Time for the Supreme Court to Finally Overrule McDonnell Douglas*, 11 CARDOZO WOMEN’S L.J. 125, 126 (2004) (“Because the *McDonnell Douglas* pretext analysis will unfairly lead to the dismissal of certain legitimate cases at the summary judgment stage, the Supreme Court should explicitly reject it as it implicitly did in *Desert Palace*.”).

115. Corbett, *supra* note 4, at 1552-54 (claiming that after years of defending the *McDonnell Douglas* analysis, he has now seen “the bright light of the *Desert (Palace) sun*”).

vented some scholars from their continued stance that *McDonnell Douglas* is dead.<sup>116</sup>

### C. Merging *Desert Palace* into the *McDonnell Douglas Framework*

Several courts and commentators suggest that *Desert Palace* should make it more difficult for defendant employers to win motions for summary judgment. As “the standard for when an issue can go to the jury is the same as the summary judgment standard, some courts have concluded that *Desert Palace* alters the summary judgment analysis for every Title VII claim.”<sup>117</sup>

In *Rachid v. Jack in the Box, Inc.*, the Fifth Circuit Court of Appeals concluded that *Desert Palace* requires a new analysis called “the modified *McDonnell Douglas* approach.”<sup>118</sup> This approach merges the *McDonnell Douglas* single-motive and *Price Waterhouse* mixed-motive analyses.<sup>119</sup> In effect, however, all that changes is a modification of the third-prong of the *McDonnell Douglas* framework.<sup>120</sup>

Under this modified *McDonnell Douglas* approach, the first two prongs of *McDonnell Douglas* remain the same.<sup>121</sup> First, a plaintiff must establish a prima facie case, and second, the defendant employer “must articulate a legitimate, non-discriminatory reason for” the adverse employment action.<sup>122</sup> At the third prong, however, a plaintiff has two options: (1) the plaintiff can show that the defendant’s articulated reason was pretext (the “pretext” option); or (2) the plaintiff can show that, while the defendant’s articulated reason may be true, another motivating factor for the decision was discriminatory (the “mixed-motive” option).<sup>123</sup>

In *Diamond v. Colonial Life & Accident Insurance, Co.*, the Fourth Circuit explained that “a Title VII plaintiff may ‘avert summary judgment . . . through two avenues of proof.’ ”<sup>124</sup> In the first avenue, “[a] plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of

116. See, e.g., Jeffrey A. Van Detta, *Requiem for a Heavyweight: Costa as Countermonument to McDonnell Douglas—A Countermemory Reply to Instrumentalism*, 67 ALB. L. REV. 965, 966 (2004) (predicting “that many courts would not at first grasp the revolution and would instead resort to instrumentalist rationalizations to ‘preserve the phenomenon’ of *McDonnell Douglas-Burdine*”).

117. *Herawi v. Ala. Dep’t of Forensic Scis.*, 311 F. Supp. 2d 1335, 1345 (M.D. Ala. 2004) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) and *Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc.*, 285 F. Supp. 2d 1180, 1196 (N.D. Iowa 2003)).

118. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 313 (5th Cir. 2004).

119. *Id.* at 312.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. 416 F.3d 310, 318 (4th Cir. 2005) (quoting *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (en banc)).

material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision."<sup>125</sup> This first avenue, pursuant to the 1991 Act, does not require the plaintiff to show that the impermissible factor was the sole factor. Instead, it is enough to show that it was a motivating factor.<sup>126</sup> The second avenue allows the plaintiff to "proceed under [the *McDonnell Douglas*] 'pretext' framework, under which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination."<sup>127</sup>

Thus, under this modified approach, a plaintiff is no longer confined to demonstrating pretext to survive summary judgment. "Rather, at step three, a plaintiff need only present sufficient evidence, of any type, for a jury to conclude that the plaintiff's disability was a 'motivating factor' for the employment action, even though the defendant's legitimate reason may also be true or have played some role."<sup>128</sup> Ultimately, "[b]ecause there is no requirement that a case be classified at the summary judgment stage, a plaintiff should be able to defeat a motion for summary judgment by producing sufficient evidence that the discriminatory reason was a motivating factor."<sup>129</sup>

## VI. *DESERT PALACE'S* PROPER IMPACT ON SUMMARY JUDGMENT

As is often the case between two extremes—abandoning *McDonnell Douglas* or strict adherence to *McDonnell Douglas*—the truth lies somewhere in the middle. Accordingly, because strict adherence to the single-motive *McDonnell Douglas* framework will lead to valid claims being improperly disposed of at summary judgment and because abandoning *McDonnell Douglas* will create disharmony among the lower courts in properly evaluating summary judgment claims, *Desert Palace's* proper impact must be viewed as modifying the *McDonnell Douglas* framework.

### A. *A Rejection That McDonnell Douglas Is Unaffected*

Strict adherence to the single-motive *McDonnell Douglas* framework at the summary judgment stage is unworkable for two reasons: (1) trying to label cases as sole-factor or motivating-factor at the summary judgment stage is impractical, and, therefore, (2) requiring all cases to satisfy the pretext standard will lead to some cases—for

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125. *Id.*

126. *Id.*

127. *Id.* (quoting *Hill*, 354 F.3d at 285) (alteration in original).

128. *Ordahl v. Forward Tech. Indus., Inc.*, 301 F. Supp. 2d 1022, 1027 (D. Minn. 2004).

129. *Corbett*, *supra* note 4, at 1575-76.

example, Ann Hopkins' case against Price Waterhouse—to be improperly dismissed at summary judgment.<sup>130</sup>

While it makes sense that *Desert Palace* should make it easier for a plaintiff to survive a motion for summary judgment, it is still not clear who can proceed under a mixed-motive analysis at the summary judgment stage.<sup>131</sup> In fact, determining what precisely constitutes a mixed-motive versus a single-motive case early in the proceedings may prove problematic. While *Desert Palace* makes clear that either direct or circumstantial evidence may be used to establish a valid mixed-motive case,<sup>132</sup> the question remains as to how much evidence is sufficient to warrant a mixed-motive analysis.

According to the *Price Waterhouse* Court, an intentional discrimination case need not be labeled “single-motive” or “mixed-motive” at the summary judgment stage.<sup>133</sup> The plurality recognized that plaintiffs will often allege both pretext and, in the alternative, motivating factor.<sup>134</sup> Ultimately, the court decides whether a case is properly labeled single-motive or mixed-motive.<sup>135</sup> However, a court will postpone its determination until later in the proceedings to determine which cases will be allowed to proceed under the mixed-motive analysis.<sup>136</sup>

One option is for Congress or the Supreme Court to articulate a uniform standard for lower courts to apply in determining whether a plaintiff at the summary judgment stage has presented enough evidence to merit mixed-motive treatment.<sup>137</sup> The better option, however, is to continue to follow a modified *McDonnell Douglas* framework.

### B. A Rejection That McDonnell Douglas Is Dead

Abandoning *McDonnell Douglas* altogether, and treating all Title VII cases the same, is the wrong solution because removing the

130. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989).

131. Darlene A. Vorachek, *Litigation Strategy: Summary Judgment, Including Views from the Bench*, in LITIGATION 2004, at 851, 864 (PLI Litig. & Admin. Practice, Course Handbook Series No. 3352, 2004).

132. Chambers, *supra* note 61, at 83 (“Before *Desert Palace*, the motivating-factor instruction was considered by many to be available only when a plaintiff had presented direct evidence to support the claim that an illegitimate factor was a motivating factor in a job decision.”).

133. *Price Waterhouse*, 490 U.S. at 247 n.12.

134. *Id.*

135. *Id.*

136. *Id.*

137. For more information regarding suggested methods for determining the sufficiency of evidence that would justify a case being labeled mixed-motive, see Chambers, *supra* note 61, at 101-02 (suggesting three possible methods to determine the sufficiency of evidence). See also R. Joseph Barton, *Determining the Meaning of “Direct Evidence” in Discrimination Cases within the 11th Circuit: Why Judge Tjoflat Was (W)right*, FLA. B.J., Oct. 2003, at 42, 42 (advocating a three-prong “preponderance” standard set forth by Judge Tjoflat in the 11th Circuit).

framework will lead to increased judicial discretion and a return to the “notable lack of harmony” that existed prior to *McDonnell Douglas*.<sup>138</sup>

First, some advocates of this approach incorrectly argue that, post-*Desert Palace*, all disparate treatment cases should be treated the same—as mixed-motive.<sup>139</sup> However, Congress has clearly recognized two types of claims: (1) single-motive, where a winning plaintiff is entitled to the full array of damages, and (2) mixed-motive, where a winning plaintiff is entitled to only limited damages.<sup>140</sup> While defendants in either a single-motive or mixed-motive cases will arguably present what amounts to a same-decision defense, this is not reason alone to warrant treating all disparate treatment cases the same.<sup>141</sup> Congress would not have articulated two separate remedial schemes if it intended the same test to apply. Congress clearly intended that a defendant who proves that an employment decision was based entirely on a legitimate, nondiscriminatory reason will avoid damages altogether. However, where a defendant satisfies the same-decision test, such defendant will remain liable for limited damages where a plaintiff demonstrates that his or her protected category was a motivating factor in the decision.

Second, abandoning the *McDonnell Douglas* framework will “likely be a reversion to an older litigation model in which trial judges are not given specific rules to use to resolve specific types of disparate treatment cases, but instead have substantial discretion to dispose of all types of disparate treatment cases as they see fit.”<sup>142</sup> This is especially true in the context of summary judgment, where absolute judicial discretion is more likely to lead to judges dismissing any relatively weak case.<sup>143</sup> At a minimum, the modified *McDonnell Douglas* framework requires judges to apply both the single-motive

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138. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

139. Davis, *supra* note 2, at 863 (arguing to “abandon the *McDonnell Douglas* framework and declare that the *Price Waterhouse* approach governs all individual disparate treatment cases”).

140. 42 U.S.C. § 2000e-5(g)(2)(B) (2000) (stating that when an employer demonstrates it “would have taken the same action in the absence of the impermissible motivating factor, the court . . . may grant declaratory relief, injunctive relief . . . and attorney’s fees,” but not “award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment”); see also Chambers, *supra* note 61, at 93 (“[I]f the employer can prove that its decision would have been the same regardless of the use of the illegitimate factor, the plaintiff’s monetary recovery is limited.”).

141. See *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 992 (D. Minn. 2003).

142. Chambers, *supra* note 61, at 84.

143. Henry L. Chambers Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 133 (2005) (“Allowing any more judicial discretion than is absolutely necessary is particularly troubling because the exercise of discretion in the context of deciding summary adjudication replaces the judgment of a reasonable factfinder.”); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561 (2001) (“It seems clear that courts are hostile to employment discrimination cases, and I think the reason has to do not just with the perception that the cases are too easy to bring but also that most are lacking merit.”).

analysis and the mixed-motive analysis. Thus, while judges need not distinguish between single-motive and mixed-motive cases at the summary judgment stage,<sup>144</sup> a modified approach, unlike abandoning *McDonnell Douglas* altogether, will at least provide a roadmap to judges who otherwise may be too quick to dispose of disparate treatment cases at the summary judgment stage.<sup>145</sup>

*C. The Truth Lies in the Middle: Accepting a Modified McDonnell Douglas Framework*

Ultimately, *Desert Palace's* proper impact on the summary judgment stage of a Title VII claim simply requires a modification of the third prong of *McDonnell Douglas*. The modified *McDonnell Douglas* framework will ensure relative uniformity and harmony among the lower courts and will ensure that mixed-motive cases will survive summary judgment.

Justice Scalia made clear in *Hicks* that “[t]he *McDonnell Douglas* methodology was ‘never intended to be rigid, mechanized or ritualistic.’”<sup>146</sup> Further, several Justices have also recognized that “[c]ontinued adherence to the evidentiary scheme established in *McDonnell Douglas* . . . is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar,”<sup>147</sup> not to mention this student.<sup>148</sup>

## VII. CONCLUSION

“[I]t is difficult to overestimate the import of summary adjudication,”<sup>149</sup> especially in the employment context where summary judgment is the standard tool used by employers to dispose of disparate treatment claims.<sup>150</sup> Further, for courts, summary judgment is “a popular means for clearing dockets, and disposing of many of these cases.”<sup>151</sup> Accordingly, it is immensely important that courts reach

144. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989).

145. For more information regarding the bias that influences a court's treatment of discrimination cases, see *Selmi*, *supra* note 143, at 561-75.

146. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

147. *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined in Justice Kennedy's dissent. *Id.*

148. *Davis*, *supra* note 2, at 859 (“Employment discrimination law has befuddled most of those who have attempted to master it.”).

149. *Chambers*, *supra* note 143, at 107.

150. Donald J. Spero, *Desert Palace, Inc. v. Costa—Does McDonnell Douglas Survive?*, FLA. B.J., Nov. 2004, at 53, 53 (“[M]otions for summary judgment are routinely filed by defendants in discrimination cases.”).

151. Eric S. Riester, Comment, *Making Sense of Pretext: An Analysis of Evidentiary Requirements for Summary Judgment Litigants in the Fifth Circuit in Light of Reeves v. Sanderson Plumbing Products, and a Proposal for Clarification*, 34 ST. MARY'S L.J. 261, 265 (2002).

the proper consensus on how to analyze Title VII claims at the summary judgment stage. A modified *McDonnell Douglas* framework builds such consensus. Abandoning *McDonnell Douglas* altogether only makes things worse.