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*

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On June 9, 2003, the Supreme Court decided *Desert Palace, Inc. v. Costa*,[1] resolving a longstanding disparity among the circuit courts[2] on the issue of whether direct evidence of discrimination is required in order for a plaintiff to obtain a mixed-motive jury instruction under Title VII of the Civil Rights Act.[3] A mixed-motive analysis presumes that an employer took action against an employee based on *both* legitimate and illegitimate considerations. By contrast, the pretext analysis, first adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[4] presumes that the employer based its decision on *either* a legitimate or an illegitimate consideration, but not both. Consider the hypothetical of a female employee claiming she was terminated simply because she is a woman. Assume shortly before her termination, the employee's supervisor informed her that he preferred to hire men because they "are hands-down more responsible and better at getting the job done" than women. But also assume that the supervisor made this statement while reprimanding the employee for being late to work for the third time that week. Terminating the employee because the supervisor preferred to employ men rather than women is clearly illegitimate and actionable under Title VII, but terminating the employee based on her poor job performance is a completely legitimate consideration for which the employer should not be held liable. The pretext analysis would require the employee to prove that she was terminated because of her gender, and that her tardiness is merely a red herring raised by her employer to conceal its discrimination. By contrast, the mixed-motive theory

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

[2] The Supreme Court's holding in *Desert Palace* abrogated the position of the circuit courts which required a plaintiff to offer direct evidence in order to proceed on a mixed-motive theory. *See, e.g.*, Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Trotter v. Bd. of Trs. of Univ. of Ala., 91 F.3d 1449, 1453-54 (11th Cir. 1996); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995).

[3] Since 1964, Title VII of the Civil Rights Act has stated that it is an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

[4] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

would simply require the employee to prove that her gender was a motivating factor in the employer's decision to terminate her, even if her tardiness was also a factor.

Before *Desert Palace*, certain courts required direct evidence of employer discrimination, rather than the far more typical circumstantial evidence, in order for the plaintiff to obtain a mixed-motive jury instruction.[5] However, in a narrowly-tailored and concise opinion[6] written by Justice Thomas, with a concurrence by Justice O'Connor,[7] the Supreme Court unanimously affirmed the Ninth Circuit Court of Appeals' en banc holding[8] in *Costa v. Desert Palace, Inc.* that rejected the direct evidence requirement for a mixed-motive jury instruction under Title VII.[9]

Part I of this note will familiarize the reader with the two separate types of analyses, pretext and mixed-motive, traditionally applied to Title VII employment discrimination claims. Part II will discuss the rise of plaintiff Catharina Costa's claim against her employer, defendant Desert Palace, from the District Court of Nevada through an appeal to the Ninth Circuit. Part III will focus specifically on the holding of the Supreme Court in *Desert Palace* and the rejection of the direct evidence requirement. Through examining a recent Second Circuit case, Part IV will analyze the practical effects of the Supreme Court's rejection of the direct evidence requirement and critique the plethora of recent scholarship focusing on whether the *McDonnell Douglas* pretext theory is dead. Finally, this note will conclude with the argument that the mixed-motive framework, as modified by the Supreme Court in *Desert Palace*, is now technically available to all Title VII claims. 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*.

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[5] *See supra* note 2.

[6] Justice Thomas' opinion is approximately 3000 words, including footnotes. However, its succinctness did not stop one commentator from referring to it as "[n]othing less than the most significant Supreme Court decision of the October 2002 Term . . . the 'sleeper' decision of this Term." 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, 73 (2003).

[7] Justice O'Connor's concurring opinion in *Desert Palace* addressed the impact of the Civil Rights Act of 1991 on the continued validity of her concurring opinion in *Price Waterhouse*. *See infra* Part III.

[8] Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) (en banc). This decision affirmed in part and reversed and remanded in part an earlier decision by a three-judge panel of the Ninth Circuit. *See* Costa v. Desert Palace, Inc., 268 F.3d 882 (holding that an employee lacking direct evidence was not entitled to a mixed-motive jury instruction).

[9] *Desert Palace*, 539 U.S. 90 at 101-02.

I. DEVELOPMENT OF THE MIXED-MOTIVE ANALYSIS IN EMPLOYMENT DISCRIMINATION CLAIMS

A. The Civil Rights Act of 1964 and the Pretext Analysis

In order to eliminate discriminatory employment practices,[10] Congress enacted the Civil Rights Act of 1964, making it illegal under Title VII for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11] Initially, the Supreme Court interpreted Title VII to require a plaintiff to prove that the discrimination by the employer was based *solely* on plaintiff's membership in one of Title VII's enumerated protected classes (i.e., race, color, religion, sex, or national origin).[12] In order to prove such discrimination, the plaintiff was subjected to an exceedingly complex three-step burden-shifting approach originally adopted by the Supreme Court in *McDonnell Douglas*[13] and further developed in *Texas Dep't of Cmty. Affairs v. Burdine*.[14] Such a complex framework was presumably developed because of the unique nature of employment discrimination claims that often rest on "a thin evidentiary basis," where proving a case "often requires the plaintiff to reveal the defendant's secret thoughts."[15]

Under this complex approach known as the "pretext analysis," the plaintiff is initially required to establish, by a preponderance of the evidence, a prima facie case of discrimination by the employer through four distinct elements.[16] First, the plaintiff must prove that he or she is a member of one of the protected classes enumerated in Title VII.[17] Second, the plaintiff must prove that he or she applied and was qualified for a job for which the employer was seeking applicants.[18] Third, the plaintiff must prove that the employer rejected him or her for this position.[19] Fourth and finally, the plaintiff must prove that the position was still not filled after he or she was rejected, and the employer continued to solicit

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[10] *See McDonnell Douglas*, 411 U.S. at 800.

[11] 42 U.S.C. § 2000e-2(a)(1) (2004).

[12] *See McDonnell Douglas*, 411 U.S. at 802-07.

[13] *Id.*

[14] Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981).

[15] Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 864 (2004).

[16] *See McDonnell Douglas*, 411 U.S. at 802. The four elements set forth by the Supreme Court in *McDonnell Douglas* were tailored to a factual situation where failing to hire the plaintiff was the employment decision at issue. The Court pointed out that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 note 13. *See infra* Part IV of this note for a discussion of *Sanders v. City of New York* and its alternative set of prima facie factors.

[17] *Id.* at 802. Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

[18] *Id.*

[19] *Id.*

applications from candidates comparable to the plaintiff.[20] Supposedly, the primary function of requiring the plaintiff to make this prima facie showing of discrimination is to eliminate "the most common nondiscriminatory reasons" for an employment decision.[21]

Once a plaintiff establishes a prima facie case of discrimination by the employer through these four factors, the presumption is that the employer's action was the result of discrimination.[22] The employer may now attempt to rebut this presumption of discrimination by offering evidence of legitimate and nondiscriminatory reasons for making the employment decision at issue.[23] This is merely a burden of production, and the defendant is not required to persuade the court that the proffered reasons motivated the employment decisions.[24] Rather, the defendant must simply produce evidence that raises a genuine issue of material fact as to whether the defendant actually discriminated against the plaintiff, by clearly demonstrating supposedly legitimate reasons for making the employment decision.[25] If the defendant meets this burden of production, the plaintiff's prima facie case of discrimination is rebutted and the burden then shifts back to the plaintiff to demonstrate that the defendant's proffered reason for making the decision is merely a pretext for discrimination.[26] The plaintiff may satisfy this third and final step of the pretext analysis by showing either that the discriminatory reason was more likely than not to have motivated the employment decision, or that the allegedly legitimate reason for the employment decision offered by the defendant is merely a pretext for discrimination.[27]

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[20] *Id.*

[21] *Burdine*, 450 U.S. 248, 253-54 (1981). For instance, if a plaintiff cannot show that she was even qualified for the position, there is theoretically no basis for her to argue that the employer was discriminatory. Furthermore, if the employer did not hire anyone at all for the position, there is likewise theoretically no basis for an employment discrimination claim. *But see infra* Part IV of this note for a rejection of this notion.

[22] *Burdine*, 450 U.S. at 254. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[23] *Burdine*, 450 U.S. at 254-56.

[24] *Id.* Note that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253.

[25] *Id.* at 255. Placing this burden of production on the defendant serves both "to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56. "The *McDonnell Douglas* framework simplified the plaintiff's task of proving racial discrimination by requiring the defendant to focus the issue. A plaintiff, who might otherwise flounder trying to come up with facts to support his case, will prevail by disproving the defendant's articulated reason." Davis, *supra* note 15, at 867.

[26] *Burdine*, 450 U.S. at 256. "This burden [of the third step] now merges with the ultimate burden of persuading the court that [plaintiff] has been the victim of intentional discrimination." *Id.*

[27] *See id.* But note that in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), a conservative majority of the Supreme Court ruled that even if a plaintiff disproves the defendant's articulated legitimate reasons for the employment decision, the plaintiff might still lose the case. As one scholar has pointed out, such a formulation of *McDonnell Douglas* creates a situation where the plaintiff's disproval of the defendant's reasons merely creates an issue of fact and does not entitle the plaintiff to judgment as a matter of law. *See* Davis, *supra* note 15, at 868. "If this was all *McDonnell Douglas* stood for, it was hardly worth the time and effort expended to create the baroque three-tiered framework." *Id. McDonnell Douglas* was undercut even further by *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), where the Supreme Court held that even if the plaintiff disproves the

The *McDonnell Douglas* pretext analysis lays out a complex but specific procedure for proving employment discrimination in Title VII claims. However, the approach rests on the often erroneous assumption that one single reason motivated the employer's decision: either the discriminatory reason established by the plaintiff or the nondiscriminatory reason offered by the defendant. This analysis leaves unanswered the pressing question of what to do when both legitimate *and* illegitimate reasons play a part in an employment decision, as demonstrated in the hypothetical in the introduction to this note. In other words, because that employee would not be able to disprove her tardiness, the employer would not be liable under Title VII even though it is highly likely that the employer also considered the employee's gender in making its decision to terminate her.

B. Price Waterhouse v. Hopkins *and the Birth of the Mixed-Motive Analysis*

During the 1980s, trial courts wrestled with the issue of causation where both legitimate and illegitimate reasons may have played a part in an employment decision at issue.[28] In *Price Waterhouse,*[29] the Supreme Court found an opportunity to address the issue of the so-called mixed-motive case.[30] The plaintiff, Ann Hopkins, was a female senior manager at Price Waterhouse who was being considered for partnership.[31] Her candidacy was initially held for reconsideration the following year, but she was refused reconsideration when two previously-supportive partners withdrew their support for her.[32] Although Hopkins had "played a key role" in Price Waterhouse's success in securing a multi-million dollar contract with the Department of State, and partners and clients alike praised her character and accomplishments, many Price Waterhouse partners had legitimate concerns that her interpersonal skills were lacking.[33] However, there were also "clear signs . . . that some of the partners reacted negatively to [plaintiff's] personality because she was a woman."[34] In other words, the decision to refuse reconsideration of Hopkins' for partnership seemed to be a classic case of mixed motives.

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defendant's articulated reasons, the defendant may still be entitled to judgment as a matter of law in certain cases. *See Id.* at 148.

[28] *See* Brian W. McKay, *Mixed Motive Mix-Up: The Ninth Circuit Evades the Direct Evidence Requirement in Disparate Treatment Cases*, 31 TULSA L. REV. 503, 507 (2003) (citing *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985)).

[29] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[30] *See id.* at 241-47.

[31] *See id.* at 231.

[32] *See id.* at 233 note 1.

[33] *See id.* at 233-35. Plaintiff was considered "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.* at 235.

[34] *Id.* at 236. One partner described Hopkins as "macho," one suggested that she "overcompensated for being a woman," and another advised her to take "a course at charm school." Furthermore, the man responsible for explaining to Hopkins the reasons for the decision to put her candidacy on hold asserted that in order for her to increase her chances of making partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse,* 490 U.S. at 236.

Price Waterhouse was a plurality opinion of four Justices, two Justices separately concurring in the judgment, and three dissenting Justices.[35] The plurality held that Price Waterhouse's decision not to reconsider Hopkins for partnership was motivated, at least in part, by illegitimate reasons.[36] Based on this consideration, the plurality held that once a plaintiff like Hopkins could prove discriminatory animus played a "motivating part" in the employment decision, her initial burden of proof was satisfied.[37] If a plaintiff can satisfy this initial burden, the defendant can then attempt to avoid liability by asserting the so-called "same decision" defense.[38] In other words, the employer may avoid liability if it can prove by a preponderance of the evidence that its proffered legitimate reason alone would have led it to make the same decision.[39] Thus, the Supreme Court remanded the case for a determination by the trial court of whether Price Waterhouse "would have made the same decision [to not reconsider the plaintiff for partnership] even if it had not taken the plaintiff's gender into account."[40]

In her concurring opinion, which caused a great deal of confusion among the circuits, Justice O'Connor agreed with the need for a mixed-motive analysis as proposed by the plurality.[41] However, in such a case, she would require a plaintiff to prove by "direct evidence"[42] that the illegitimate reason played a "substantial factor"[43] in the employer's decision. Therefore, Justice O'Connor's opinion raised the bar for the plaintiff by requiring direct evidence instead of circumstantial and by increasing the level of influence that the illegitimate reason had in the employment decision from a substantial factor to a motivating factor. Justice O'Connor favored higher standards because she viewed a significant difference between cases like *Price Waterhouse* where there is direct evidence that an illegitimate reason played a role in the decision, and cases resting on statistical evidence where the court may shift the burden of proof to the defendant. [44]

Because Justice O'Connor's opinion was arguably the "narrowest ground" for the *Price Waterhouse* decision,[45] many lower courts considered her opinion to be the holding of the case and consequently required a plaintiff in a Title VII claim to provide direct evidence before shifting the burden to the defendant.[46] However,

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[35] *Id.* at 228 (plurality); *id.* at 259 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment); *id.* at 270 (Kennedy, J., dissenting).

[36] *Id.* at 255.

[37] *Price Waterhouse,* 490 U.S. at 258.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 261-62.

[42] *Id.* at 277.

[43] *Price Waterhouse,* 490 U.S. at 265 (O'Connor, J., concurring in the judgment).

[44] *Id.* at 275.

[45] *See, e.g.,* Marks v. U. S., 430 U.S. 188, 193 (1977).

[46] 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).

applying this approach was problematic because Justice O'Connor's opinion lacked any clear definition of "direct evidence" in the context of a Title VII employment discrimination claim.[47] Part of the problem was that Justice O'Connor believed that Hopkins had indeed offered sufficient evidence to shift the burden to the employer, making it difficult to determine what she would not consider direct evidence.[48] However, Justice O'Connor deemed certain types of evidence insufficient to shift the burden to the defendant, implying a negative definition of "direct evidence."[49]

C. 1991 Civil Rights Act

Congress passed the 1991 Civil Rights Act (1991 Act) in response to a series of Supreme Court decisions that required the court to interpret the Civil Rights Acts of 1866 and 1964.[50] Section 107 of the 1991 Act[51] responded specifically to *Price Waterhouse* with two new provisions applicable to mixed-motive cases.[52] The first provision states that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, *even though other factors also motivated the practice.*"[53] The second provision states that "with respect to a violation under the above provision, the employer has a limited affirmative defense that serves to restrict the remedies available to the plaintiff to include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs."[54] In order to avail itself of this affirmative defense, the employer "must demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor."[55] While the 1991 Act explicitly codified the "motivating factor" test and a modified version of the same-decision defense from the plurality in *Price Waterhouse*,[56] it was silent as to the type of evidence required in order for a plaintiff to obtain a mixed-motive jury instruction.

The history surrounding the 1991 Act is inconclusive as to whether Congress agreed or disagreed with the direct evidence requirement set forth in Justice

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47 *See Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring); Kelly Pierce, *A Fire Without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in Costa v. Desert Palace*, 87 MINN. L. REV. 2173, 2185-90 (2003) (discussing the differing interpretations of direct evidence among the circuits).

48 *Price Waterhouse*, 490 U.S. at 261.

49 *Id.* at 277. According to Justice O'Connor, the types of evidence insufficient to shift the burden to the defendant were stray remarks in the workplace, statements by non-decisionmakers, statements by decisionmakers unrelated to the decisional process itself, and statistical testimony standing alone. *Id.*

50 *Desert Palace*, 539 U.S. at 94 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994)).

51 Section 107 of the 1991 Act is embodied in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B).

52 *Desert Palace*, 539 U.S. at 94 (quoting *Landgraf*, 511 U.S. 244)).

53 42 U.S.C. § 2000e-2(m) (emphases added).

54 42 U.S.C. § 2000e-5(g)(2)(B).

55 *Id.*

56 490 U.S. at 258.

O'Connor's *Price Waterhouse* opinion.[57] The concept of direct evidence appears only once in the record of Senate hearings on this matter, in comments made by a Georgetown University law professor.[58] Indeed, "combing the legislative history to discern Congress' intent regarding direct evidence becomes largely a task of inference from silence."[59] While some commentators suggest that Congress may have intended to codify the direct evidence requirement,[60] others argue that Congress' silence suggests that the text of Title VII alone should guide the courts in determining this problem.[61] Hence, after the 1991 Act, it was still far from clear as to what type of evidence was required in order for a plaintiff to obtain a mixed-motive jury instruction in a Title VII employment discrimination claim.

While the 1991 Act did little to elucidate whether direct evidence was required in order for a plaintiff to obtain a mixed-motive jury instruction, it did serve to fill in a "liability loophole"[62] that resulted from the same-decision defense as proposed in *Price Waterhouse*. Under *Price Waterhouse's* version of the same-decision defense, an employer that could prove it would have made the same decision was free from all liability, even if it was evident that a discriminatory reason had also factored into the decision. In other words, if the employer in the hypothetical could prove that it would have terminated the employee because of her tardiness alone, the discriminatory employer would come out scot-free from all liability. Therefore, a liability loophole was created whereby employers who were practically admittedly discriminating against their employees in contravention of Title VII were not held liable for their actions. But under the 1991 Act, once a plaintiff has proved by a preponderance of the evidence that the impermissible criterion played a motivating factor in the employment decision, she has proved her case and the defendant is held liable for its actions. The "same-decision defense" that had served to limit employer liability in *Price Waterhouse* was codified in the 1991 Act instead as merely a limitation on the damages available to the plaintiff. Such a solution seemed to reconcile both worlds by holding an employer

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[57] *See* Pierce, *supra* note 47, at 2184 (citing 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); Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 256 (2001)).

[58] *See* Civil Rights Act of 1991: Hearings on S. 2104 Before the Senate Comm. On Labor and Human. Res., 101st Cong. 171 (1990) (claiming that mere thoughts were insufficient to prove that discrimination was a motivating factor behind the employment decision and that instead, a plaintiff must have "direct evidence of a motivating factor"). *See* Mizer, *supra* note 56, at 258; Pierce, *supra* note 47, at 2184.

[59] Pierce, *supra* note 47, at 2184 (quoting Mizer, *supra* note 57, at 257).

[60] *See* Mizer, *supra* note 57, at 257; Pierce, *supra* note 47, at 2185.

[61] *See* Mizer, *supra* note 57, at 262 (arguing that the "courts should turn to the text of the statute as their touchstone in resolving the considerable confusion surrounding individual employment discrimination claims"). *See also* Pierce, *supra* note 47, at 2185.

[62] *See* Cassandra A. Giles, Note, *Shaking Price Waterhouse: Suggestions for a More Workable Approach to Title VII Mixed Motive Disparate Treatment Discrimination Claims*, 37 IND. L. REV. 815, 816 (2004).

accountable for discrimination, while simultaneously limiting the recovery of a plaintiff who in effect, had not suffered any damages based on this discrimination.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *COSTA V. DESERT PALACE, INC.*

A. The Circumstances Leading to Costa's Claim against Her Employer

Desert Palace employed Catharina Costa as a warehouse worker and heavy equipment operator from 1987 to 1994 at Caesar's Palace, a well-known hotel and casino in Las Vegas.[63] Costa was the only female warehouse worker and the only female employee in the bargaining unit covered by a collective bargaining agreement between Caesar's and Teamsters Local 995.[64] While Costa's supervisor considered her performance to be "good" or "excellent,"[65] she nonetheless experienced considerable problems with management and her co-workers.[66] Costa's initial reaction to these problems was to try to focus primarily on her job performance, but over time she began to feel that she was being treated differently because she was a woman.[67] Her concerns of disparate treatment were not addressed and she felt that she began to be treated as an outcast.[68] Costa was frequently subjected to informal rebukes, denials of privileges that the male employees enjoyed and suspension.[69] Ultimately, she was terminated.[70] Eventually, such disparate treatment led Costa to complain to the human resources department, which declined to intervene in the situation.[71]

In describing the discrimination she was subjected to, Costa claimed that when male employees were late to work or missed work for medical reasons, they were often given overtime to make up for the lost hours.[72] By contrast, Costa was reprimanded in the same or similar situations.[73] Evidence of other episodes of disparate treatment by her employer was corroborated by other Desert Palace employees.[74] Costa presented extensive evidence that she was subject to harsher

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63 *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 844 (9th Cir. 2002). Costa's job included operating the forklifts and pallet jacks in order to retrieve food and beverage orders. *Id.*

64 *Id.* (describing Costa as a "trailblazer" since she worked most of her life in the male-dominated practices of driving trucks and operating heavy equipment).

65 *Id.* Costa's supervisor explained that she "knew when [Costa] was out there the job would get done." *Id.*

66 *Id.*

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

68 *Id.*

69 *Id.*

70 *Id.* at 845.

71 *Id.*

72 *Id.*

73 *Costa*, 299 F.3d at 845. Indeed on one occasion, Costa was suspended because she had missed work in order to undergo surgery to remove a tumor. *Id.* The suspension was lifted only when the human resources department intervened. *Id.*

74 *Id.* For example, Costa claimed that when she and several workers were in the office eating soup on a cold day, a supervisor walked in, looked directly at only Costa, none of the other men, and asked her: "Don't you have work to do?" *Id.* Also, another supervisor followed her around the warehouse,

discipline than the male employees and received less preferential treatment in the allotment of overtime hours.[75] Costa also presented evidence that she was punished for failing to conform to certain gender stereotypes,[76] and that supervisors "frequently used or tolerated verbal slurs that were sex-based or tinged with sexual overtones."[77]

Desert Palace ultimately terminated Costa in 1994 after she and another Teamsters member, Herb Gerber, engaged in a physical altercation in a warehouse elevator.[78] Gerber admitted that he sought out Costa on the belief that she had filed a report about his unauthorized lunch breaks.[79] Gerber trapped Costa in an elevator, shoving her against the wall and bruising her arm in the process.[80] Though Costa immediately told her supervisor who informed her that he would investigate the matter, Costa was approached again by Gerber when she returned to work.[81] Eventually, both employees were disciplined: Gerber was suspended for five days and Costa was terminated.[82] Costa filed a grievance in accordance with the bargaining agreement, but her termination was upheld by an arbitrator who found that her employer had just cause to terminate her.[83]

B. Costa v. Desert Palace, Inc.

Costa filed an action in the United States District Court for the District of Nevada, alleging gender discrimination in the course of her employment and termination at Caesar's Palace, in violation of Title VII of the Civil Rights Act.[84]

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and although other Teamsters had complained about this supervisor before, three witnesses testified that he particularly singled out Costa. *Id.*

[75] *Costa*, 299 F.3d at 845. Costa was warned and sometimes disciplined for using profanity and for the hazardous use of equipment. *Id.* However, other Teamsters guilty of the same conduct went unpunished. *Id.* One suspension was voided when it was discovered that a charge against Costa had been fabricated. *Id.* Supervisors allegedly began to "stack" Costa's record—one supervisor issued several warnings in one day including a warning for a medical absence that had occurred over eights months prior. *Id.* Additionally, Costa received only two of the 95.5 hours of overtime allotted to eight Teamsters. *Id.* Costa was said to have "refused" overtime when she was actually on vacation, and she was sometimes offered overtime when it was too late and impractical for her to accept. *Costa*, 299 F.3d at 845. When Costa asked her supervisor why another Teamster was favored over her in the allotment of overtime, her supervisor responded that he "has a family to support." *Id.*

[76] *Id.* Despite testimony at trial that Costa got along with most people, her employer continued to describe her as "strong willed," "opinionated," "confrontational," and "bossy." Furthermore, the supervisor who had signed Costa's termination order stated her intent to "get rid of that bitch." *Id.*

[77] *Id.* at 846. For example, one co-worker called Costa a "fucking cunt." When Costa wrote a letter to express her concern, she received a three-day suspension in response. *Id.* Even though the other employee admitted saying it, Costa was nonetheless faulted for "engaging in verbal confrontation with co-worker in the warehouse resulting in use of profane and vulgar language by other employee." *Costa*, 299 F.3d at 845.

[78] *Id.* at 846.

[79] *Id.*

[80] *Id.*

[81] *Id.* While Costa's account of the incidents was corroborated by immediate and detailed reports to Union officials, photographs of bruises, and by a witness who saw Gerber block the elevator door, Gerber's account was uncorroborated and he could provide very few details of what had happened. *Id.*

[82] *Costa*, 299 F.3d at 846.

[83] *Id.*

[84] *Costa*, 238 F.3d 1058 (9th Cir. 2000).

While Caesar's maintained that Costa was terminated due to her past disciplinary problems and her altercations with Gerber, Costa claimed that sex was a motivating factor in her termination.[85] The jury returned a verdict for Costa in the amount of $64,377.74 for financial loss (back pay), $200,000 in compensatory damages, and $100,000 in punitive damages.[86] Desert Palace appealed the judgment; their principal contention was that the district court judge erred in giving the jury a mixed-motive instruction rather than a pretext instruction.[87]

C. The Ninth Circuit Steps In . . . Twice

On appeal by Desert Palace of the District Court of Nevada's holding, a three-member panel of the Ninth Circuit Court of Appeals held that giving the jury a mixed-motive instruction was reversible error in the "absence of *substantial evidence* of conduct or statements by the employer *directly* reflecting discriminatory animus."[88] Because the Ninth Circuit had never before squarely addressed the issue of the direct evidence requirement, the court reviewed the decisions of other circuits and determined that each court had previously concluded "that evidence that merely raises an inference of discrimination from differential treatment is not sufficient to shift the burden to the defendant."[89] Even if Costa's evidence of disparate treatment were to raise an inference of discrimination, such an inference would not prove that gender was a motivating factor, since Costa had failed to produce direct and substantial evidence of discriminatory animus.[90]

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[85] *Costa*, 299 F.3d at 845.

[86] *Id.* at 846. The district court judge did however grant remittitur, and Costa agreed to reduce her compensatory damages to $100,000. *Id.*

[87] The district court judge first instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence: 1. Costa suffered adverse work conditions; and 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female. If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

Id. at 858.

Then, the judge went on to give the following instruction, which was the central issue on appeal:

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

Id.

[88] *Costa*, 268 F.3d at 884 (emphases added).

[89] *Id.* at 886.

[90] *Id.*

By a five to four split, the Ninth Circuit en banc reversed the panel's decision, holding that the 1991 Act overruled *Price Waterhouse* and thus also had overruled any direct evidence requirement, had there even been one.[91] Acknowledging that its determination was a departure from other circuits' decisions on the matter, the Ninth Circuit determined that there was no heightened evidentiary standard for plaintiffs in mixed-motive cases.[92] The court based its determination on a straightforward reading and interpretation of the 1991 Act, as opposed to other circuit courts that were focusing primarily on O'Connor's *Price Waterhouse* concurring opinion.[93] The court asserted that "the legislative history evinces a clear intent to overrule Price Waterhouse" and that consequently, the 1991 Act had "wholly abrogated" Justice O'Connor's direct evidence requirement.[94]

Since the "same decision" defense under the 1991 Act only serves to limit the damages available to a plaintiff rather than limit the defendant's liability, the court no longer saw a purpose in requiring a special evidentiary scheme or heightened standard of proof.[95] Hence, the Ninth Circuit held that "the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played a 'motivating factor.'. . ."in the employment decision.[96]

III. THE SUPREME COURT REVISITS AND REJECTS THE DIRECT EVIDENCE REQUIREMENT

In *Desert Palace*, the Supreme Court revisited the matter of the direct evidence requirement that had been the subject of much confusion since *Price Waterhouse*.[97] In a concise and narrowly-tailored opinion, the Supreme Court affirmed the Ninth Circuit's en banc holding that direct evidence is not required in order for a plaintiff to obtain a mixed-motive jury instruction.[98] In delivering the opinion for a unanimous Court, Justice Thomas focused on a strict reading of the text of the Civil Rights Act itself, making it unnecessary for the Court to address the issue of which was the prevailing opinion in *Price Waterhouse*.[97]

This case offered the Supreme Court its first chance to weigh in on the effects of the 1991 Act on mixed-motive claims.[99] More specifically, the Court had to decide whether a plaintiff is required to present direct evidence of discrimination by the employer in order to obtain a mixed-motive instruction under 42 U.S.C. §

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91 *Costa*, 299 F.3d at 850-51.
92 *Id.*
93 *Id.*
94 *Id.* at 847-50.
95 *Id.* at 851.
96 *Costa*, 299 F.3d at 853-54.
97 *See Desert Palace*, 539 U.S. at 95.
98 *See id.* at 101-02.
99 *Id.* at 98.

2000e-2(m).[100] Desert Palace argued that: 1) Justice O'Connor's *Price Waterhouse* concurring opinion was the actual holding of the case; 2) Justice O'Connor's *Price Waterhouse* opinion requires direct evidence of discrimination before a mixed-motive instruction can be given to the jury; and 3) the 1991 Act did nothing to abrogate that holding.[101] The Court focused its inquiry solely on the third claim, or more specifically, on whether Desert Palace's argument was flawed simply because it was inconsistent with a proper reading of the 1991 Act.[102]

Justice Thomas begins the opinion, as precedent dictates, with a proper reading of the statutory text of the 1991 Act.[103] Where the words of the statute are unambiguous, as the Court felt they were here, the judicial inquiry is complete and no other ancillary issues need be addressed.[104] Section 2000e-2(m) does not even mention, much less require, that a plaintiff in a mixed-motive case sustain a heightened burden of proof by presenting direct evidence.[105] In fact, the Court points out that Desert Palace itself conceded as much at oral argument.[106] Title VII defines the term "demonstrates" as to "meet the burdens of production and persuasion."[107] Had Congress intended to require direct evidence in mixed-motive cases, it would have made this intent clear through specific language, since such a requirement would have been a departure from its previous definition of the term "demonstrates."[108]

The key point in the Court's statutory analysis is that "Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42."[109] This leads to a presumption that Congress would have been just as unequivocal in the setting of mixed-motive employment discrimination claims had it intended a heightened standard for the plaintiff. Congress' silence as to the type of evidence required suggests that the

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100 *See id.* at 98.

101 *See id.*

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

103 *Id.* (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).

104 *Id.* at 90. (quoting Rubin v. United States, 449 U.S. 424, 430 (1991)).

105 *Id.* at 98-99.

106 *Id.* at 98.

107 *Id.* at 99 (quoting 42 U.S.C. § 2000e-2(m)).

108 *Desert Palace*, 539 U.S. at 99.

109 *Id.* at 99 (citing 8 U.S.C. § 1158(a)(2)(b), which states that an asylum application may not be filed unless an alien "demonstrates by clear and convincing evidence" that the application was filed within one year of the alien's arrival in the U.S). Indeed, as discussed at oral argument, when choosing to apply a heightened standard, it is virtually unheard of to distinguish between direct and circumstantial evidence. It is far more typical and sensible to raise the standard by requiring that a plaintiff "demonstrate by clear and convincing evidence" rather than "by a preponderance of the evidence." *See* Petitioners Oral Argument at *13, Desert Palace v. Costa, 2003 WL 2011040 (April 21, 2003) (No. 02-679):

> Question: [I]f an elevated proof is wanted, then courts not uncommonly will say, we will require you to prove something by more than a mere preponderance. We will require you to prove this by clear and convincing evidence. Then I can understand. But a line between direct evidence and circumstantial evidence—is there any other area where direct evidence counts for more than substantial evidence just by virtue of being direct?

[Answer]: I have not uncovered ones, Your Honor.

Court should not stray from the conventional standard and analysis in other Title VII cases, in which a heightened standard has never been required.[110] The standard in such instances has always been by a "preponderance of the evidence," which can be demonstrated by either direct or circumstantial evidence, with no distinction made between the two.[111] Treating direct and circumstantial evidence with equal regard "is both clear and deep-rooted" in the Court's precedent.[112] The Supreme Court has "often acknowledged the utility of circumstantial evidence in discrimination cases."[113] This is because "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[114]

The sufficiency of circumstantial evidence is recognized even in criminal cases, where the Court has never questioned the sufficiency of circumstantial evidence to support a criminal conviction, even though the requirement is proof beyond a reasonable doubt.[115] Juries are routinely instructed by judges that the law makes no distinction between the weight and value given to direct and circumstantial evidence.[116] Therefore, the Supreme Court concludes that it is not surprising that neither Desert Palace nor its amicus curiae can locate any other circumstance in which the Supreme Court has chosen to restrict a litigant to the presentation of direct evidence when nothing in the statute at issue calls for such a heightened standard.[117]

Finally, Justice Thomas addresses the use of the term "demonstrates" in other Title VII provisions to further illustrate that the use of the term in § 2000e-2(m) sets forth no requirement of a heightened standard.[118] For instance, he states that § 2000e-5(g)(2)(b) requires an employer to "*demonstrate* that it would have taken the same action in the absence of the impermissible motivating factor" in order to take

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[110] *Desert Palace*, 539 U.S. at 99.

[111] *Id.* (citing Postal Serv. Bd. of Governors v. Aiken, 460 U.S. 711, 714 n.3 (1983)).

[112] *Desert Palace*, 539 U.S. at 100.

[113] *Id.* (citing *Reeves*, 530 U.S. 133 (recognizing "that evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of circumstantial evidence that is probative of intentional discrimination'")).

[114] *Desert Palace*, 539 U.S. at 100. (quoting Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 508 n.17 (1957)).

[115] *See Desert Palace*, 539 U.S. at 100 (citing Holland v. United States, 348 U.S. 121, 140 (1954) (observing that, in criminal cases, circumstantial evidence is 'intrinsically no different from testimonial evidence.'")).

[116] *See Desert Palace*, 539 U.S. at 100 (quoting 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 12.04 (5th Ed. 2000) (additional citations omitted)).

[117] *See id.* at 100. *See* Petitioners Oral Argument at *8, Desert Palace v. Costa, 2003 WL 2011040 (April 21, 2003) (No. 02-679):

> Question: Well, the question whether there is, you would be suggesting a rule that, as far as I know, is alien to our law, that is, to make a distinction between direct evidence and circumstantial evidence. You can have direct evidence by a liar and you can have highly convincing circumstantial evidence. So why should the law in this one area make a distinction that, as far as I know, is not made elsewhere?

[118] *Desert Palace*, 539 U.S. at 100.

advantage of the partial affirmative defense.[119] The similarity between these two sections of the same act leads the Court to state that it would only be logical to assert the same definition of the same word in both provisions.[120] Absent any indication whatsoever that Congress's intent was otherwise, the Court declines "to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue."[121]

Thus, the Court affirmed the Ninth Circuit's decision that no heightened evidentiary showing is required under § 2000e-2(m).[122] In light of the conclusion that direct evidence is not required in mixed-motive employment discrimination claims, the Supreme Court found it unnecessary to address or decide the second question on which they granted certiorari, which concerned the appropriate standards for lower courts to follow in making a direct evidence determination in mixed-motive cases under Title VII.[123]

In summation, the Court holds that in order to obtain an instruction under § 2000e-2(m), "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[124] Because direct evidence of employment discrimination is not required in mixed-motive cases, the Supreme Court held the Ninth Circuit Court of Appeals to have correctly concluded that the District Court did not abuse its discretion in giving a *Price Waterhouse* mixed-motive instruction to the jury.[125] Accordingly, the judgment of the Ninth Circuit was affirmed.[126]

In a short concurring opinion, Justice O'Connor briefly addressed her concurring opinion in *Price Waterhouse*, though the commentary lacks excitement and depth for an issue that raised considerable debate. In her view, prior to the 1991 Act, "the evidentiary rule [the Court] developed to shift the burden of persuasion in mixed-motive cases was appropriately applied only where a disparate treatment plaintiff 'demonstrated by direct evidence that an illegitimate factor played a substantial role' in an adverse employment decision."[127] This showing

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[119] *Id.* at 100-01 (emphasis added).

[120] *Id.* at 101.

[121] *Id. See also* Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'")); Petitioners Oral Argument at *7, Desert Palace v. Costa, 2003 WL 2011040 (April 21, 2003) (No. 02-679):

> Question: Mr. Ricciardi, would that demonstration [in proving the same-decision defense] by the defendant also have to be made by direct evidence? The words Congress used is [sic] the same. One is respondent demonstrates, and the other is the plaintiff demonstrates.

[122] *See Desert Palace*, 539 U.S. at 101.

[123] *See id.* at 101 n.3.

[124] *Id.* at 101.

[125] *Id.* at 101-02.

[126] *Id.* at 102.

[127] *Desert Palace*, 539 U.S. at 101 (quoting *Price Waterhouse*, 490 U.S. at 228).

would then trigger the "deterrent purpose of the statute" and permit a reasonable factfinder to conclude that "absent further explanation, the employer's discriminatory motivation caused the employment decision."[128] But Justice O'Connor ultimately agrees that under the 1991 Act, Congress codified a new evidentiary rule for mixed-motive cases arising under Title VII.[129]

IV. AN EXAMPLE OF WHY THE SUPREME COURT SHOULD HAVE EXPLICITLY OVERRULED MCDONNELL DOUGLAS WHEN IT ABANDONED THE DIRECT EVIDENCE REQUIREMENT

By abandoning the direct evidence requirement, *Desert Palace* "eliminated a trap that has scuttled arguably meritorious claims."[130] While a plaintiff might not have had sufficient direct evidence to qualify for a *Price Waterhouse* charge, or sufficient evidence to prove pretext under *McDonnell Douglas*, the plaintiff may have had enough circumstantial evidence of discrimination to persuade a jury that she was unlawfully discriminated against.[131] Accordingly, a considerable amount of scholarship has focused on the first footnote of the *Desert Palace* opinion.[132] The Supreme Court sidestepped the rather pertinent question of whether permitting circumstantial evidence in § 2000e-2(m) claims effectively collapses any vestige of a distinction between mixed-motive and pretext claims. The effect of *Desert Palace* is best examined in light of a recent Second Circuit opinion, *Sanders v. New York City Human Resources Administration*,[133] where a plaintiff with circumstantial evidence was unable to prove a prima facie case under *McDonnell Douglas* despite the fact that the employer had practically admitted that it had retaliated against her for complaining of gender and racial discrimination.[134] This note will argue that the plaintiff in that case was entitled to a mixed-motive jury instruction, and that had she obtained one the employer should have been held liable for its wrongful actions. Because the *McDonnell Douglas* pretext analysis improperly knocks down certain legitimate employment discrimination claims, the Supreme Court should explicitly overrule *McDonnell Douglas*, as it did implicitly by abandoning the direct evidence requirement.

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128 *Id.* at 101.

129 *Id.*

130 Davis, *supra* note 15, at 886 & n.164 (for a description of several cases whereby a plaintiff with a seemingly meritorious claim failed due to a lack of direct evidence and the failure to prove a prima face case).

131 *Id.*

132 *Desert Palace*, 539 U.S. at 94 n.1 ("This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context.").

133 361 F.3d 749 (2d Cir. 2004).

134 *Id.* at 754, 757.

A. Sanders' Story

Evelyn Sanders, an African-American female, was employed by the New York City Human Resources Administration (Human Resources).[135] Sanders began working for Human Resources in 1984 as a caseworker and was eventually promoted to the role of Supervisor II in 1993.[136] Human Resources appointed Sanders to a probationary position in this role at the cost containment section of the Manhattan-based medical assistance program.[137] The director of this program was John Milioti.[138] A troubled rapport eventually developed between Sanders and Milioti, which led to the filing of this lawsuit.

Sanders' job description initially called for the supervision of four separate units.[139] But when Sanders reported to her new position, Milioti requested that she permit another lower-ranking employee to supervise one of her units.[140] Sanders felt pressured into complying with her new boss's request and agreed to give up one of her units.[141] While Milioti claimed that he had valid reasons for this request,[142] Sanders believed that Milioti wanted the other employee to supervise the unit because he was a white male and Sanders was a black female.[143] Sanders' belief was not altogether unreasonable, as Milioti had previously filed a lawsuit complaining that minority and female Human Resources employees were promoted before he was.[144]

Sanders also alleged that Milioti had held meetings with exclusively male staff members between June and September 1993.[145] In denying any discriminatory animus on his part, Milioti testified that although indeed he had held meetings with three male staff members in order to discuss a certain computerized record-keeping system, "the participants were chosen based on their expertise in that field and also on office functions, not on their gender."[146]

Based on these events, Sanders filed a complaint with Human Resources' in-house office of Equal Employment Opportunity (EEO).[147] Although EEO's investigation failed to turn up sufficient evidence to substantiate Sanders' claims of

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135 *Id.* at 752.

136 *Id.* at 753.

137 *Id.*

138 *Id.* at 753.

139 *Sanders*, 361 F.3d at 753.

140 *Id.*

141 *Id.* Sanders eventually became the supervisor of a fourth and fifth unit. *Id.*

142 The lower-level employee assigned to the unit had apparently been working in the cost containment section since it was created. As such, Milioti apparently believed that he had better qualifications to supervise the unit. *Id.*

143 *Id.* at 753-54.

144 *Sanders*, 361 F.3d at 754. Sanders made the rather plausible assertion that the filing of a lawsuit based on these circumstances "provides a glimpse into [Milioti's] motives for discriminating against her." *Id.*

145 *Id.*

146 *Id.* Milioti also testified that he continued to hold regular meetings that included Sanders and other female employees. *Id.*

147 *Id.*

discrimination, the in-house EEO told one of Milioti's supervisors that his "management style had created a perception of race and gender discrimination that needed to be addressed."[148] Based on her filing of the complaint and EEO's actions in response, Sanders believed that Milioti began to retaliate against her.[149]

Sanders first saw Milioti's retaliation come to fruition in a negative evaluation of her job performance.[150] In her first year as a probationary supervisor, Sanders was subjected to quarterly job-performance evaluations.[151] Sanders' immediate supervisor first evaluated her performance in January 1994.[152] She was the only probationary employee in the cost containment section who was evaluated at that time.[153] While her supervisor gave her performance a generally favorable review, Milioti took it upon himself to attach two pages as an addendum to the evaluation wherein he inaccurately criticized Sanders' performance.[154]

As a result of this unwarranted and inaccurate addendum to her evaluation, Sanders again complained to the in-house EEO.[155] After conducting an investigation, the EEO determined that Milioti had indeed submitted the evaluation in retaliation for Sanders' previous complaint to the EEO.[156] Based on this determination, the evaluation along with Milioti's addendum were rescinded, and all copies were destroyed – other than the one on file with the EEO.[157]

The second instance of alleged retaliation occurred in September 1994, when Sanders was transferred from the Manhattan-based cost containment section into a medical review team located in Brooklyn.[158] Although plaintiff's status as Supervisor II was not demoted as a part of the transfer, she went from having her own office to having to share an office with six other people in what she asserted was a "run-down, vermin-infested building."[159] Also, as a result of the transfer, Sanders' commute to work increased by more than 30 minutes each day.[160]

After exhausting all of her administrative remedies, plaintiff filed an action under Title VII for employment discrimination in the United States District Court for the Southern District of New York on May 13, 1998.[161] After a five-day jury trial before Judge Victor Marrero, the jury, which had been given a *McDonnell*

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148 *Sanders*, 361 F.3d at 754.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Sanders*, 361 F.3d at 754. Even her immediate supervisor, who was also newly appointed and presumably subject to the same quarterly reviews, was not evaluated. *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* According to Milioti, the effect of having no evaluation was that Sanders' performance was presumed to be satisfactory. As evidence of this, the court pointed out that plaintiff's probationary supervisor position was made permanent after she completed her first year. *Id.*

158 *Sanders*, 361 F.3d at 754.

159 *Id.*

160 *Id.*

161 *Id.*

Douglas instruction, found against Sanders on all claims and judgment was entered for Human Resources.[162] Sanders, who had previously moved for judgment as a matter of law, renewed her motion and also moved for a new trial in the alternative.[163] Judge Marrero denied both motions in an order dated September 6, 2002.[164] This order formed the basis of Sanders' appeal to the Second Circuit.

B. The Second Circuit Reviews the Application of McDonnell Douglas

Sanders filed her complaint in 1998, more than five years before the Supreme Court held that direct evidence was not required in order to obtain a mixed-motive jury instruction.[165] At least as late as 2001, the Second Circuit required a plaintiff wishing to obtain a mixed-motive jury instruction to "provide[] sufficiently direct evidence of discriminatory animus."[166] Therefore, when Sanders filed her claim in the Southern District of New York in 1998, it was clear that unless she could offer "sufficiently direct evidence" of discrimination, she would be forced to proceed under the complex *McDonnell Douglas* burden-shifting approach.

After quickly characterizing Sanders' evidence as circumstantial,[167] the Second Circuit explained that "an aggrieved party may use circumstantial evidence to assert a prima facie case of discrimination (or retaliation) by alleging: 1) [she] belonged to a protected class; 2) [she] was qualified for the position; 3) [she] suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent."[168] Clearly, the Second Circuit was utilizing the *McDonnell Douglas* pretext analysis, as it proceeded to explain that if the plaintiff could meet its burden in proving that his or her employer engaged in such conduct, the burden then shifts

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[162] *Id.*

[163] *Id.*

[164] *Sanders*, 361 F.3d at 754. *See* Sanders v. City of New York, 218 F. Supp. 2d 538, 544 (S.D.N.Y. 2002).

[165] *See Desert Palace*, 539 U.S. at 101.

[166] Rose v. New York City Bd. of Educ., 257 F.3d 156, 161, 163 (2d Cir. 2001) (stating that "evidence of a forbidden factor may be direct or circumstantial . . . [but] the latter must be tied directly to the alleged discriminatory animus") (citing Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992). This has been referred to as the "animus plus definition" of direct evidence, whereby courts adopting it require that the plaintiff "prove a particularly strong case—more than ordinarily would be required for an inference of discrimination to be permissible." Pierce, *supra* note 47, at 2187 (quoting Costa v. Desert Palace, Inc., 299 F.3d 838, 852 (9th Cir. 2002) (en banc)).

[167] *Sanders*, 361 F.3d at 755 (utilizing subheading "Requirements of Plaintiff's Proof Using Circumstantial Evidence"). On appeal, Sanders argued that indeed she had offered direct evidence of discrimination and that therefore, she was entitled to judgment as a matter of law. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). Sanders claimed that the written statements by in-house EEO employees concluding that Milioti's actions were retaliatory were admissions of discrimination by Human Resources. *Sanders*, 361 F.3d at 757. However, the Second Circuit characterized these statements as mere opinions based on circumstantial evidence that did not qualify as direct evidence such that she was entitled to judgment as a matter of law. *Id.* Note that plaintiff's argument that she possessed direct evidence was presumably not offered in order to obtain a mixed-motive jury instruction.

[168] *Sanders*, 361 F.3d at 755 (quoting Terry v. Ashcroft, 336 F.3d 128, 138, 141 (2d Cir. 2003)).

to the employer to offer legitimate and nondiscriminatory reasons for its actions.[169]

While Human Resources did not dispute either of the first two prongs of the prima facie case,[170] the third and fourth prongs would ultimately doom Sanders' appeal and may indeed have played a predominant role in the jury verdict.[171] The third and fourth prongs required Sanders to prove that she suffered an "adverse employment action." The Second Circuit defines an adverse employment action as a "'materially adverse change' in the terms and conditions of employment."[172] In order to be considered a "materially adverse change," the change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities."[173] Some examples of a "materially adverse change" include termination, a demotion in terms of wage or salary, a "less distinguished title," a material loss of employee benefits, and "significantly diminished material responsibilities."[174]

In applying its definition of "adverse employment action" to Sanders' complaint, the Second Circuit could not find that Sanders proved "an adverse employment action as a matter of law."[175] Sanders asserted that the adverse employment action in her case was the performance evaluation along with Milioti's addendum.[176] Because Sanders offered no proof that this evaluation had any effect on the terms and conditions of her employment since it was promptly removed from her file, the Second Circuit determined that a jury could reasonably have found that that this did not constitute an adverse employment action.[177] In arguing that the performance evaluation fit the definition of an adverse employment action, Sanders had relied primarily on opinions from the District of Columbia Circuit and the Ninth Circuit.[178] In distinguishing the cases cited by Sanders, the Court pointed out that those circuits reject the materially adverse standard adopted by the

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169 *Id.*

170 *See* Sanders v. City of New York, 200 F. Supp. 2d 404, 407 (the City never disputed the first two elements at trial: Sanders, as an African-American female fell within two protected classes of Title VII and her performance evaluations never indicated any "material deficiencies in her work performance."). *Id.*

171 *Sanders*, 361 F.3d at 756.

172 *Sanders*, 361 F.3d at 755 (citing Richardson v. New York State Dep't of Corr. Servs., 180 F.3d 426, 446 (2d Cir. 1999)).

173 *Sanders*, 361 F.3d at 755 (quoting *Terry*, 336 F.3d at 138).

174 *Sanders*, 361 F.3d at 755.

175 *Id.* at 756.

176 *Id.* While Sanders did not raise either on appeal, the Second Circuit also considered whether the male-only meetings held by Milioti and her transfer to Brooklyn could be considered an adverse employment decision. *Id.* at 756-57. The Second Circuit reasoned that while the exclusion of Sanders from "critical meetings over a three or four month period might well be materially adverse, a reasonable juror could have credited Milioti's testimony that he continued to include Sanders in operational meetings, and that the meetings that included only male participants were unrelated to her office duties." *Id.* at 756. Also, although the transfer to Brooklyn "might [have] come closer to material adversity," even if Sanders has raised it on appeal, "a reasonable juror need not have linked the transfer with Milioti's allegedly discriminatory or retaliatory motives." *Id.* at 757.

177 *Sanders*, 361 F.3d at 756. (citing Weeks v. New York State Div. of Parole, 273 F.3d 76, 86 (2d Cir. 2001) (holding that a "notice of discipline" and a "counseling memo" were insufficient to constitute an adverse employment action as a matter of law)).

178 *Sanders*, 361 F.3d at 756.

Second Circuit and favor a broader interpretation of adverse employment action.[179] Ultimately, because the Court determined that Sanders had not established her prima facie case of discrimination as a matter of law, it could not find that the district court erred in denying Sanders' motion for judgment as a matter of law.[180]

The Second Circuit went on to consider Sanders' assertion that she was at least entitled to a new trial based on several different factors,[181] most importantly because the trial judge improperly instructed the jury on a *McDonnell Douglas* standard.[182] The Court noted that Sanders correctly pointed out that the *McDonnell Douglas* standard should not have been charged to the jury.[183] As the Second Circuit has previously stressed, the *McDonnell Douglas* standard is merely a "blueprint to guide a district court in the conduct of a trial" and actually "explaining it to the jury in the charge... is more likely to confuse rather than enlighten the members of the jury."[184] However, because the Second Circuit "was not persuaded that the erroneous and superfluous" jury instructions influenced the jury's verdict, the error was held to be harmless, and therefore a new trial was deemed unnecessary.[185]

C. Sanders' Entitlement to a Mixed-Motive Jury Instruction

Sanders' inability to prove a *McDonnell Douglas* prima facie case begs the inquiry into what might have happened had Sanders sought and obtained a mixed-motive jury instruction.[186] Whether Sanders would now be entitled to proceed under § 2000e-2(m) turns on the very question raised, but never answered, in footnote one of *Desert Palace*: whether *Desert Palace* completely abrogated *McDonnell Douglas*. Recent scholarship and case law attempting to decipher the role of *McDonnell Douglas* after *Desert Palace* have produced primarily two different viewpoints:[187] Model A posits that *McDonnell Douglas* is dead in all

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179 *Id.*

180 *Id.* at 757.

181 *Id.* at 757. Plaintiff's challenges to the denial of her motion for a new trial included assertions that: 1) Judge Marrero repeatedly permitted defendant's counsel to lead non-hostile witnesses; and 2) Judge Marrero erroneously excluded from evidence the statement of the in-house EEO employee that Milioti's actions were retaliatory and prohibited by law. *Id.* at 758. The Court found neither of these assertions solid grounds for a new trial. *Id.*

182 *Sanders*, 361 F.3d at 757-58.

183 *Id.* at 758.

184 *Id.* (citing Gordon v. New York City Bd. of Educ., 232 F.3d 111, 118 (2d Cir. 2000))

185 *Sanders*, 361 F.3d at 758-59. The Court felt that the instructions could not have influenced the jury since the district court clearly explained to the jury that they ultimately "must decide is whether the plaintiff has proven by a preponderance of the evidence that the defendant discriminated against, disparately treated, or retaliated against the plaintiff." *Id.* Furthermore, the Second Circuit found it "hard to imagine how the jury could have come to any other conclusion given the dearth of proof supporting essential elements of [Sanders'] cause of action." *Id.*

186 The mixed-motive analysis does not appear in the record. But at the time the case was tried, the direct evidence requirement had not been completely abandoned and it is possible that Sanders' evidence would not have passed the "animus plus definition" of direct evidence followed by the Second Circuit. *See supra* note 166.

187 Indeed, two factions have been wrangling over which viewpoint is correct since *Desert Palace*

respects, while Model B sees *McDonnell Douglas* alive and well in every Title VII claim. While Model A would permit Sanders' claim to proceed to the jury, Model B should have doomed her claim on a motion for summary judgment.[188]

Under Model A, the Supreme Court's rejection of the direct evidence requirement effectively obliterated the *McDonnell Douglas*/pretext analysis,[189] whether it intended to or not.[190] Prior to *Desert Palace*, the last vestige of a distinction between mixed-motive and pretext claims was the type of evidence plaintiff had to offer. Once the direct evidence requirement was abandoned, any claim can now proceed under the more plaintiff-friendly § 2000e-2(m).[191] This is how Model A works, applied to the hypothetical: plaintiff claims that employer terminated her because she is a female, while employer claims plaintiff was fired because of her tardiness. Voila! Both legitimate and illegitimate reasons are on the table now. By virtue of defending itself, the employer has handed the employee an easier mixed-motive case for the employee, even if all the employee has to offer is a pile of circumstantial evidence.[192] Under Model A, the only case that would not fall under § 2000e-2(m) is one where the employer remains mute—when it simply cannot or chooses not to proffer a single legitimate reason for taking the allegedly

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was decided. *See* Van Detta, *supra* note 6; Jeffrey A. Van Detta, *Requiem for a Heavyweight: Costa as a Countermonument to McDonnell Douglas—A Countermemory Reply to Instrumentalism*, 67 ALB. L. REV. 965, 965 (2004) ("Recently . . . I wrote of the demise of McDonnell Douglas . . . . The position that I have taken has aroused a measure of controversy, as one might expect, including an opposing view expressed in another article . . . ."); Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383, 418 (2004) ("Professor Van Detta acknowledges that his 'tone . . . is not a neutral one,' and that is amply apparent").

188 The record does not indicate that Human Resources made a motion for summary judgment, despite the fact that the Second Circuit determined that Sanders was unable to prove the third and fourth factors of the prima facie case.

189 William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest In Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200, 214 ("Make no mistake about it, for Title VII claims at least, the old McDonnell Douglas proof structure is as dead as a doornail."). "Like a prizefighter who has lost his punch, McDonnell Douglas should retire and make a graceful retreat into history." Davis, *supra* note 15, at 907.

190 In footnote one of *Desert Palace*, the Supreme Court essentially "said it did not have to answer the question of whether mixed-motives has consumed McDonnell Douglas." Corbett, *supra* note 189, at 210.

191 "All cases now will be mixed motives because that structure has a lower standard of causation than the pretext but-for standard. Plaintiffs will object to any application of the higher but-for standard." *Id.* at 212. Indeed, this was the very reason that one amicus in *Desert Palace* argued that the direct evidence requirement should not be abandoned:

> The—the key point that you're missing there is that if you interpret 2000e-2(m) in that way, you would be rendering superfluous 2000e-2(a)(1) which requires but for cause by virtue of the because of language. And if—if under the—that's because in order to show a violation, a plaintiff would only have to show motivating factor, not but for cause. It would render—no plaintiff would ever seek to prove a 2000e-2(a) case. They'd always seek to prove a 2000e-2(m) case.

Oral argument of Irving L. Goldstein on Behalf of the United States as Amicus Curiae Supporting the Petitioner at *24-25, Desert Palace v. Costa, 2003 WL 2011040 (April 21, 2003) (No. 02-679).

192 "Once a defendant produces evidence of a legitimate, nondiscriminatory reason, the case has at least two motives at issue, and pretext analysis, with its higher standard of causation, is irrelevant." Corbett, *supra* note 189, at 213.

discriminatory action. This is unrealistic, and virtually never happens.[193] Therefore, according to Model A, *McDonnell Douglas* is dead.[194]

Under Model B, *McDonnell Douglas* did not follow the direct evidence requirement to the graveyard. Rather, it is apparently still alive and well in every Title VII claim.[195] According to Model B, every Title VII plaintiff must first succeed in proving a prima facie case based on the four *McDonnell Douglas* factors. If the plaintiff fails to prove these four factors, as did Sanders, the defendant then is entitled to summary judgment. However, if the plaintiff is successful in proving a prima facie case, the defendant then has the opportunity to offer legitimate nondiscriminatory reasons for its actions. At that point, the plaintiff must satisfy the third step of the *McDonnell Douglas* factors: the ultimate burden of proving, now by either circumstantial or direct evidence, that the defendant intentionally discriminated against her. Therefore, according to Model B, *Desert Palace* merely altered the third and fourth steps of the *McDonnell Douglas* approach by permitting a plaintiff with circumstantial rather than direct evidence to be entitled to a mixed-motive jury instruction. The rest of *McDonnell Douglas* remains perfectly intact.[196] Indeed this was the very reasoning adopted by the Ninth Circuit in its en banc *Costa* decision rejecting the direct evidence requirement.[197] Under Model B, "because McDonnell Douglas solely concerns the

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193 The oral argument in the Supreme Court correctly demonstrates that affirming the Ninth Circuit killed off McDonnell Douglas except for single-motive cases. As the justice questioning Costa's attorney recognized, such cases are only those in which the defendant offers no reason, thus putting no second motive at issue. A defendant loses a case under the McDonnell Douglas analysis if the plaintiff makes out a prima facie case and the defendant does not bear its burden of production at stage two to produce a legitimate nondiscriminatory reason. There are no such cases. *Id.* at 211.

194 "McDonnell Douglas v. Green is dead. With apologies to Dickens, it is 'dead as a doornail'—along with its traveling companion, Texas Department of Community Affairs v. Burdine. And this report of its death is neither 'greatly exaggerated' nor a loss deserving of our mourning." Van Detta, *supra* note 6, at 72 (internal citations omitted).

195 During the oral argument of *Desert Palace*, one Justice posited that *McDonnell Douglas* "[G]overns a circumstance where a plaintiff puts on a case, however he puts it on. Once you show the *McDonnell Douglas* factors, you can get to the jury unless, of course, the defendant puts something on. And once the defendant puts something on, *McDonnell Douglas* bursts and goes away." Petitioners Oral Argument at *10, Desert Palace v. Costa, 2003 WL 2011040 (April 21, 2003) (No. 02-679). Such a statement implies that this Justice viewed *McDonnell Douglas* as applying to every Title VII claim.

196 *See* Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1197-98 (N.D. Iowa 2003):

> Thus, the McDonnell Douglas burden-shifting paradigm must only be modified in light of Desert Palace, § 2000e-2(m), and only in its final stage, so that it is framed in terms of whether the plaintiff can meet his or her "ultimate burden" to prove intentional discrimination, rather than in terms of whether plaintiff can prove "pretext." Under such a modified framework, to prevail after the defendant produces a legitimate, non-discriminatory reason for its conduct, the plaintiff must prove by the preponderance of the evidence either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive alternative). The latter showing may be made with either "direct" or "circumstantial" evidence.

See also Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1008 (1999).

197 *See Costa*, 299 F.3d at 854-57.

plaintiff's burden and means of proving discrimination, [Desert Palace does] not affect it."[198] In sum, Model B sees *McDonnell Douglas* as a part of every Title VII claim.

Under Model A, Sanders was entitled to a mixed-motive jury instruction the moment that Human Resources refrained from staying mute: it offered legitimate and nondiscriminatory reasons to counter Sanders' assertion of discrimination,[199] thereby entitling Sanders to a mixed-motive jury instruction. By contrast, under Model B, Sanders would not have been entitled to mixed-motive instructions until she was able to first establish a prima facie case of discrimination through proof of the four factors of *McDonnell Douglas*. As the Second Circuit held on appeal, Sanders failed to prove the third and fourth prongs when she was unable to demonstrate that she had suffered an "adverse employment action" under the narrow definition that the Second Circuit applies to the term.[200] Therefore, according to Model B, Sanders' claim should not have survived a motion for summary judgment.

Applying Model B effectively permits Human Resources, who virtually admitted that Sanders' supervisor had retaliated against her,[201] to completely escape liability because of the plaintiff's failure to prove two of the rigid *McDonnell Douglas* factors. As one scholar, Kenneth Davis, has noted, the application of *McDonnell Douglas*'s four factors often leads to "focus[ing] on issues that may have only peripheral relevance in many discrimination cases... [and] may distract the factfinder from the contested issues or may even result in questionable dismissals."[202]

> An unqualified plaintiff can win under *Price Waterhouse* but not under *McDonnell Douglas*. Under *Price Waterhouse*, the defendant gets the opportunity to limit the remedy by proving the same-decision partial defense. It can establish the defense by showing that the plaintiff was unqualified just as it could establish the defense by showing incompetence,

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> McDonnell Douglas and "mixed-motive" are not two opposing types of cases. Rather, they are separate inquiries that occur at separate stages of the litigation. Nor are "single-motive" and "mixed-motive" cases fundamentally different categories of cases. Both require the employee to prove discrimination; they simply reflect the type of evidence offered. Where the employer asserts that, even if the factfinder determines that a discriminatory motive exists, the employer would in any event have taken the adverse employment action for other reasons, it may take advantage of the "same decision" affirmative defense. The remedies will differ if the employer prevails on that defense.

Id. at 857.

198 Hedican et al., *supra* note 187, at 400. In arguing their point, these authors mirror Justice Thomas' *Desert Palace* argument that silence cannot equal intent: "In [*Desert Palace*], Justice Thomas noted that if Congress wanted to require direct evidence to prove discrimination, it would have said so in the statute. Similarly, had the Supreme Court intended to overrule McDonnell Douglas, it would have said as much, especially given its use of the foregoing reason." *Id.* at 396.

199 *Sanders*, 361 F.3d at 756-57.

200 *Id.* at 755-56.

201 *Id.* at 754.

202 Davis, *supra* note 15, at 901.

> insubordination, or any other nondiscriminatory reason. The same reasoning applies regarding the fourth element of a refusal-to-hire prima facie case: that the employer continued to seek applicants. Even if the employer canceled the job opening, it might nevertheless have discriminated against an applicant in a protected group. If the applicant meets the motivating factor test, he wins, and the employer can then attempt to establish a partial defense by showing that it canceled the job for a business reason.[203]

Davis' astute reasoning applies equally as well to the concept of forcing a plaintiff like Sanders to prove an "adverse employment action" in order to demonstrate a prima facie case. It seems clear that Milioti's actions against Sanders were wrongful. In filing the addendum to Sanders' performance evaluation, he was found to be acting in retaliation to Sanders' prior complaints of discrimination.[204] The mere fact that the evaluation was removed from Sanders' record two weeks later simply could not undo Milioti's improper and reprehensible actions against Sanders; therefore, Human Resources should have been held liable for its violation of Title VII. While the evaluation may have been destroyed before it could have negatively impacted Sanders, this is precisely the sort of consideration relevant in establishing a partial defense in order to limit Sanders' damages, not as a bar to Human Resources' liability.

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[203] *Id.* at 902 (italics added).

[204] *Sanders*, 361 F.3d at 754.

V. CONCLUSION

The application of Model A, which is built on the presumption that *McDonnell Douglas* was overruled, would almost certainly have led to a more equitable result for Sanders. Although she inexplicably succeeded past the summary judgment stage, the jury was presumably forced to consider whether she suffered an "adverse employment action" within the narrow confines of the Second Circuit's definition of that term.[205] By contrast, § 2000e-2(m) makes it "an unlawful employment practice... when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for *any employment practice*."[206] Milioti's actions would most likely have been considered "any employment practice," and Sanders should have had the opportunity to prove to the jury that his actions were motivated in part by impermissible reasons. Given the opportunity to limit Sanders' damages in light of the fact that Human Resources had destroyed the negative performance evaluation, the jury might have felt more comfortable finding Human Resources liable for its actions in violation of Title VII.

For precisely the reasons pointed out in Kenneth Davis' article and made clear in the Second Circuit's opinion in *Sanders*, the *McDonnell Douglas* framework should be disregarded in favor of the more workable mixed-motive analysis under *Desert Palace* and § 2000e-2(m).[207] By permitting circumstantial evidence to suffice, while simultaneously offering a limitation on the plaintiff's damages in certain cases, this approach brings together the best of both worlds. It is high time for the Supreme Court to declare "out with the old and in with the new" by finally overruling *McDonnell Douglas.*

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[205] Sanders' inability to prove a *McDonnell Douglas* prima facie case of discrimination indicates that Human Resources presumably could have made a successful motion for summary judgment. The record does not reflect any such motion. *See supra* note 188.

[206] 42 U.S.C. § 2000e-2(m) (emphasis added).

[207] *Id.*