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CASENOTE

PRICE WATERHOUSE V. HOPKINS: BALANCING EMPLOYEES' RIGHTS AND EMPLOYERS' PREROGATIVES: ALLOCATION OF THE BURDENS OF PROOF IN A TITLE VII MIXED-MOTIVE CASE

In August of 1982, Ann Hopkins, a senior manager in the Washington D.C. office of Price Waterhouse,¹ was nominated for partnership in the firm.² As part of its formal partnership admissions process, Price Waterhouse invited all partners in the firm to submit written evaluations on each proposed candidate and to recommend whether the candidate should be admitted to partnership, rejected, or placed on hold for possible reconsideration at a later time. The comments submitted to the Admissions Committee included complaints about Hopkins' lack of interpersonal skills and her abrasiveness in dealing with her staff.³ These perceived shortcomings in Hopkins' professional skills ultimately prompted the Admissions Committee to recommend that the Policy Board place her candidacy for partnership on hold.⁴

1. Price Waterhouse is a nationwide professional accounting firm that specializes in providing auditing, tax, and management consulting services primarily to corporations and government agencies. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 461 (D.C. Cir. 1987).

2. Each year partners are selected from the firm's senior managers through a process of nomination, review, and election by all partners in the firm. In support of Hopkins' nomination, the partners in the Washington D.C. office submitted a highly complimentary appraisal of Hopkins, praising her outstanding performance and strongly urging her admission to partnership. The district court found that Hopkins had played a substantial role in securing a multi-million dollar contract with the State Department and that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112 (D.D.C. 1985). Price Waterhouse conceded from the beginning that Hopkins met the qualifications to be considered for partnership. *Id.* at 1113.

3. The district court found that both "[s]upporters and opponents of her candidacy indicated that [Hopkins] was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.*

4. Thirteen of the thirty-two partners who submitted comments on Hopkins supported her candidacy, eight recommended that her candidacy be rejected, three recommended placing it on hold, and eight indicated they lacked sufficient information to form an opinion. *Id.* Hopkins was the only woman among eighty-eight senior managers nominated for partnership that year. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1781, 104 L. Ed. 2d 268, 277 (1989).

Several of the comments submitted by the partners, however, referred to Hopkins in gender-based terms. The comments characterized her as macho, masculine, and in need of a course at charm school.⁵ In addition, the partner responsible for explaining the Policy Board's decision advised her that to improve her chances for partnership she needed "to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁶ In January of 1984 Hopkins resigned from Price Waterhouse⁷ and brought suit under Title VII⁸ of the Civil Rights Act of 1964, alleging that the Policy Board's decision to place her candidacy on hold amounted to unlawful sex discrimination.⁹

The district court found that although Price Waterhouse had legitimately considered interpersonal skills in its partnership selection process, the firm had done nothing to disavow its reliance on the partners' stereotyped comments about Hopkins.¹⁰ Consequently, the district court found that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex.¹¹ The district court also held, however, that Price Waterhouse could avoid the imposition of equitable relief by proving by clear and convincing evidence that the Policy Board would have decided to place her candidacy on hold even if discrimination had played no part in the decision.¹² Price Waterhouse failed to meet this burden.¹³ The court of appeals affirmed the district court's holding that once a plaintiff proves that gender played a substantial role in the employment decision, the burden shifts to the employer to prove by clear and convincing evidence that the decision would have been the same in the absence of discrimination.¹⁴ The court of appeals held that if the employer meets this burden, however, he may avoid liability entirely.¹⁵ The United States Supreme Court granted certiorari. *Held, reversed and remanded*: When a plaintiff proves that sex played a motivating part in an employment decision, the defendant may avoid liability only if it proves by a preponderance of the evidence that the decision would have been the same

5. *Price Waterhouse*, 825 F.2d at 463.

6. *Price Waterhouse*, 618 F. Supp. at 1117.

7. Hopkins' office decided against reconsidering her for partnership the following year after two of its partners withdrew their support. The court of appeals found that this refusal amounted to constructive discharge, an issue not appealed to the Supreme Court. *Price Waterhouse*, 825 F.2d at 473.

8. 42 U.S.C. § 2000e (1988).

9. The Supreme Court in *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984), held that Title VII requires an employer to consider an associate for partnership without regard to sex. Title VII does not, however, prevent an employer from considering subjective criteria such as interpersonal skills, particularly in upper level positions. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 973-78 (1982).

10. *Price Waterhouse*, 618 F. Supp. at 1120.

11. *Id.* The district court, however, refused to award relief to Hopkins because it failed to find that she was constructively discharged. *Id.* at 1121. The D.C. Circuit reversed the district court on this point. *Price Waterhouse*, 825 F.2d at 473; see *supra* note 7 and accompanying text.

12. *Price Waterhouse*, 618 F. Supp. at 1120.

13. *Id.*

14. *Price Waterhouse*, 825 F.2d at 471.

15. *Id.* at 472.

even if no discrimination had taken place. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 104 L. Ed. 2d 269 (1989).

I. DEVELOPMENT OF THE BURDENS OF PROOF UNDER TITLE VII

A. Legislative Background

The passage of the Civil Rights Act of 1964 marked the culmination of years of struggle to eliminate racial inequality in the United States.¹⁶ The Act was designed to eliminate discrimination and to integrate excluded minorities into the "mainstream of American society."¹⁷ The legislative history of Title VII indicates that Congress realized that without equal employment opportunities, the other provisions of the Act would never become a reality.¹⁸ Consequently, Congress designed Title VII to guarantee equal employment opportunities¹⁹ and to discourage discrimination in the workplace²⁰ by prohibiting employment decisions based on race, color, religion, sex, or national origin.²¹

16. In addition to Title VII, the Civil Rights Act of 1964 includes provisions prohibiting racial discrimination in voting (Title I) 42 U.S.C. § 1973 (1988), public accommodations (Title II) 42 U.S.C. § 2000a (1988), public schools (Title III) 42 U.S.C. § 2000c (1988) and federally funded programs (Title VI) 42 U.S.C. § 2000d (1988). For a general discussion of the legislative history of Title VII and the Civil Rights Act of 1964, see Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 294-99 (1982).

17. *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979).

18. During the legislative debate on the passage of Title VII, Senator Humphrey stated: Fair treatment in employment is as important as any other area of civil rights. What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? . . . How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?

110 CONG. REC. S6547 (daily ed. March 30, 1964) (remarks of Sen. Humphrey). See also *Weber*, 443 U.S. at 202-04 (goal of Act to reverse trend of discriminatory treatment of black workers in American society); Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971) (primary motive in enacting Title VII was to improve social and economic well-being of black citizens).

19. Equal employment opportunity means that employers may not base employment decisions on any of the forbidden factors listed in Title VII, but it does not require that preferential treatment be given to members of a protected group. *McDonnell Douglas v. Green*, 411 U.S. 792, 800-01 (1973). The *McDonnell Douglas* Court stated:

Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications. In short, the Act [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

20. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (primary objective of Title VII was to "provide[] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history") (quoting *United States v. N.L. Indust., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

21. Section 2000e-2 of Title VII provides in pertinent part:

It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual or otherwise to dis-

B. *The Single-Motive Cases*

Since the enactment of Title VII, the United States Supreme Court has defined two separate types of employment discrimination claims, disparate impact²² and disparate treatment.²³ The Court has also allocated the burdens of proof for each of the two types of claims.²⁴ In *McDonnell Douglas v. Green*²⁵ the Supreme Court enunciated the disparate treatment theory of discrimination under Title VII.²⁶ The Court announced a three-step formula for allocating the burden of proof in this type of case: (1) the employee must establish a prima facie case of discrimination;²⁷ (2) the em-

criminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a) (1988).

22. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971). In *Griggs* the Supreme Court, in its first major Title VII case, established the disparate impact theory of discrimination. The Court held that Title VII prohibits an employment practice that, although neutral on its face, has a disproportionately adverse impact on a protected group and cannot be justified as a business necessity or as related to job performance. *Id.* In *Griggs* the Court implied that a plaintiff may establish a prima facie case of discrimination by demonstrating that the employer's practices cause a statistically disparate impact on a protected group. *Id.* The burden of proof then shifts to the defendant to show that the practice is justified as a business necessity or related to the performance of the job in question. *Id.*; but see *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115, 2126, 104 L. Ed. 2d 733, 753 (1989) (employer must only produce evidence of business justification, which need not be "essential" or "indispensable" to the employer's business).

23. Disparate treatment occurs when an employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Proof of the employer's discriminatory motive is required, but may be inferred through differences in treatment. *Id.* ("undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII"); see also B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW*, 15 (1976) ("discrimination is making differences and distinctions" in a form that is "constitutionally or statutorily forbidden").

24. The phrase "burden of proof" includes several different concepts. The burden of pleading refers to the burden on a party to raise an issue in the first place. J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2486 (Chadbourn Rev. 1981) [J. WIGMORE]. If neither party raises an issue, the party with the burden of pleading obviously loses on the issue not raised. The burden of production refers to the burden on a party to come forward with enough evidence to support a finding in his favor. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 7.6 (3d ed. 1985). Finally, the burden of persuasion refers to the degree to which a party must persuade the trier of fact that a particular fact is more likely true than not. *Id.* § 7.7. In the typical civil case, the preponderance of the evidence standard governs the degree to which a party with the burden of proof must persuade the trier of fact. See *Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 *STAN L. REV.* 1129, 1129 n.3 (1980). Unless otherwise indicated, this Note uses burden of proof to mean burden of persuasion.

25. 411 U.S. 792 (1973).

26. *Id.* at 792.

27. *Id.* at 802. The Court held that the plaintiff may establish a prima facie case by showing that (i) "he belongs to a racial minority"; (ii) "he applied and was qualified for a job for which the employer was seeking applicants"; (iii) "despite his qualification, he was rejected"; and (iv) "after his rejection, the position remained open and the employer continued to seek applicants [sic] from persons [with the] complainant's qualifications." *Id.* See also *Furnco*

ployer must articulate a legitimate, nondiscriminatory reason for the employee's rejection to rebut the prima facie case;²⁸ and (3) the employee must then have an opportunity to prove that the employer's reason amounted to a pretext to conceal actual discrimination.²⁹

In subsequent cases, however, the lower courts confused the Supreme Court's language regarding the nature of the defendant's burden in step two of the *McDonnell Douglas* formula. Some courts required that the defendant merely state an explanation for its action,³⁰ while other courts required that the defendant prove its reason by a preponderance of the evidence.³¹ The Supreme Court resolved this confusion in *Texas Department of Community Affairs v. Burdine*³² by holding that if the plaintiff establishes a prima facie case of discrimination, the burden that shifts to the defendant merely requires the production of evidence showing a legitimate, nondiscriminatory reason for its actions.³³ Although the defendant's explanation must be reasonably specific³⁴ and involve the introduction of legally sufficient, admissible evidence,³⁵ the defendant does not have the burden of persuading the court that it had been "actually motivated by the proffered reason."³⁶ The Court held that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."³⁷ *McDonnell Douglas* arguably favored plaintiffs by allowing them to raise an inference of discrimination through circumstantial evidence which, if not rebutted, resulted in a verdict in their favor. In

Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978) (prima facie case raises inference of discrimination only because these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors).

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

29. *Id.* at 802-04.

30. See, e.g., *Barnes v. St. Catherine's Hosp.*, 563 F.2d 324, 329 (7th Cir. 1977) (defendant met burden by introducing competent evidence to show nondiscriminatory motive); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 348 (10th Cir. 1975) (defendant may rebut prima facie discrimination case by producing evidence of objective business reasons or necessity for its actions); *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 411 (8th Cir. 1975) (if plaintiff proves discrimination, burden shifts to defendant "to present acceptable and legitimate business reasons" for its actions).

31. See *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 177 (1st Cir. 1978) (defendant must prove that nondiscriminatory reason accounts for employment decision), *vacated*, 439 U.S. 24 (1978); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977) (employer bears burden of proving nondiscriminatory motives by preponderance of the evidence).

32. 450 U.S. 248 (1981).

33. *Id.* at 254-55. The Court held that:

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Id. (citation omitted).

34. *Id.* at 258.

35. *Id.* at 255.

36. *Id.* at 254.

37. *Id.* at 253. See generally J. WIGMORE, *supra* note 24, § 2489 (burden of persuasion "never shifts" to defendant).

contrast, *Burdine* clearly favored defendants by allowing them to rebut a plaintiff's prima facie case merely by stating a legitimate, nondiscriminatory reason, which need not have actually motivated them.³⁸

C. The Mixed-Motive Cases

The Supreme Court predicated the evidentiary formula developed in the *McDonnell Douglas* and *Burdine* decisions on the premise that the employer based his employment decision either on a legitimate or an illegitimate reason, but not both.³⁹ The relatively light burden imposed on defendants to articulate a legitimate reason for their actions resulted from judicial reluctance to find an employer liable under Title VII on the basis of an inferential or circumstantial showing of discrimination.⁴⁰ Where, however, the plaintiff presents direct evidence of a discriminatory motive and the defendant presents a second, nondiscriminatory justification, a case involving mixed motives arises.⁴¹

Mixed-motive discrimination cases have arisen previously outside of the Title VII context. In *Mt. Healthy City School District Board of Education v. Doyle*,⁴² a suit brought under the First and Fourteenth Amendments, the Court devised a two-step approach to determine whether the employee was the victim of an unlawful employment decision resulting from mixed motives. First, the plaintiff must show that his conduct was constitutionally protected and that this conduct was a substantial factor or a motivating factor for the decision.⁴³ Second, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have reached the same deci-

38. Commentators have expressed the view that few employers today would fail to find some legitimate reason to justify their actions. See Note, *Title VII Mixed-Motive Cases: The Eighth Circuit Adds a Second Track of Liability and Remedy*, 36 *DRAKE L. REV.* 155, 160-61 n.25 (1986-87) ("it is highly improbable that any defendant-employer would ever appear in court without being able to articulate a lawful basis for its action or decision"). Professor Brodin states:

"[P]lausible justification [for adverse personnel action] can frequently be advanced whether or not it actually played any part in the formulation of the decision under contest," . . . employers "who receive adequate legal advice and know how to create a personnel file . . . will find rare the occasions on which they are found liable."

Brodin, *supra* note 16, at 321 (citations omitted).

39. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788-89, 104 L.Ed.2d 268, 285-86 (1989).

40. *Id.* at 1801, 104 L. Ed.2d at 300-01 (O'Connor, J., concurring).

41. A mixed-motive case has been generally defined as one in which an employer's action results from two or more reasons, one of which is unlawful. See Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 *MICH. L. REV.* 863, 863-64 n.7 (1989).

42. 429 U.S. 274 (1987). In *Mt. Healthy* a public school teacher was discharged following several incidents of unprofessional conduct, including the use of obscene gestures to students and the notification of a radio station about a school memorandum regarding a faculty dress code. The teacher sued on the ground that the discharge violated his constitutionally protected right of free speech. The Court noted that if the school board discharged the teacher based solely on his exercise of his right of free speech, the discharge would be unlawful. *Id.* at 283-84. The Court found, however, that the school board had sufficient reason not to extend tenure independent of any First Amendment rights. *Id.* at 285-86.

43. *Id.* at 287 (footnote omitted).

sion regardless of the protected conduct.⁴⁴ If the defendant meets this burden, he may avoid liability.⁴⁵

The same decision test enunciated in *Mt. Healthy* reflects the Court's attempt to attain results consistent with its view of the policies underlying Title VII and other statutorily protected conduct, that is, to impose a sanction on an employer who has engaged in wrongdoing without providing a windfall of relief to the victimized plaintiff.⁴⁶ The Court had applied this analysis to other mixed-motive discrimination cases⁴⁷ but had yet to do so in mixed-motive cases arising under Title VII. Consequently, the lower courts adopted divergent standards for allocating the burdens of proof in Title VII mixed-motive cases.⁴⁸

Some circuits followed the *Mt. Healthy* standard in Title VII cases and held that once the plaintiff had shown that a discriminatory motive was a substantial or motivating factor in an employment decision, the burden of proof shifted to the defendant to prove by a preponderance of the evidence that the same decision would have resulted in the absence of discrimination.⁴⁹ The D.C. circuit adopted the motivating factor standard but required the employer to meet the same decision test by clear and convincing evidence.⁵⁰ Other circuits distinguished between the liability and the remedy phases of the Title VII case and, after a finding of liability, allowed the defendant to prove that the same decision would have occurred only for the purpose of determining the appropriate remedy.⁵¹ Finally, the remaining circuits applied a but for standard of causation and required a plaintiff to prove that but for an illegitimate motive, the employment decision would

44. *Id.*

45. *Id.* at 285-86.

46. *Id.* at 286. Justice Rehnquist expressed the fear that without this two-step test, an employee who engaged in constitutionally protected conduct may be given greater protection than an employee who did not:

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record

Id.

47. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (applying *Mt. Healthy* standard in case invalidating section of state constitution disenfranchising certain persons convicted of crimes when purpose of statute was racial discrimination); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (applying *Mt. Healthy* standard to mixed-motive labor practice case under National Labor Relations Act, 29 U.S.C. §§ 158 (a) (1),(3) (1988)); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (applying *Mt. Healthy* standard in racially motivated municipal rezoning case).

48. See cases cited *infra* notes 49-51, 52.

49. See *Berl v. County of Westchester*, 849 F.2d 712, 714 (2d Cir. 1988); *Fields v. Clark Univ.*, 817 F.2d 931, 937 (1st Cir. 1987); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875-76 (11th Cir. 1985); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985); *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1557 (11th Cir. 1983).

50. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 471 (D.C. Cir. 1987); *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983).

51. See *Bibbs v. Block*, 778 F.2d 1318, 1324 (8th Cir. 1985); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984); accord *Nanty v. Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981).

have favored the plaintiff.⁵² These conflicting lines of authority following the *Burdine* and *Mt. Healthy* decisions set the stage for *Price Waterhouse v. Hopkins*.

II. PRICE WATERHOUSE V. HOPKINS

A. Plurality Opinion

In *Price Waterhouse v. Hopkins*⁵³ the Supreme Court clarified the allocation of the burdens of proof and reaffirmed the rationale of *Mt. Healthy* and its progeny as applied to mixed-motive cases under Title VII.⁵⁴ The plurality opinion, written by Justice Brennan, recognized the dual nature of Title VII, which balances employee rights and employer prerogatives, as decisive in allocating the burdens of proof.⁵⁵ The plurality concluded that when the plaintiff demonstrates that an employer has actually relied on an impermissible motive in making an employment decision, the burden of persuasion appropriately shifts to the defendant to show that a legitimate motive, standing alone, would have induced it to make the same decision.⁵⁶

The Court began its analysis by emphasizing that although Title VII eliminates certain bases for distinguishing among employees, the statute preserves an employer's freedom to decide the other qualities it will consider in making employment decisions.⁵⁷ The Court then reasoned that the prohibition against an employment decision made because of a person's sex is not limited to situations in which discrimination is shown to be the but for cause of the decision.⁵⁸ Title VII also prohibits an employment decision in which an employer relied on sex as simply one factor in the decision.⁵⁹ To give effect to second aim of Title VII, the preservation of the employer's remaining freedom of choice, the Court concluded that an employer incurs no Title VII liability if it can prove that it would have reached the same decision in the absence of discrimination.⁶⁰ To support its position, the Court emphasized its earlier efforts to strike the same balance between employee rights and employer prerogatives⁶¹ by recognizing the defenses of business necessity in disparate impact cases and legitimate, nondiscriminatory reasons in disparate treatment cases.⁶²

52. See *Peters v. City of Shreveport*, 818 F.2d 1148, 1161 (5th Cir. 1987); *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985); *Bellissimo v. Westinghouse Elec. Corp.* 764 F.2d 175, 180 (3d Cir. 1985).

53. 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

54. *Id.* at 1789-90, 104 L. Ed. 2d at 287.

55. *Id.* at 1784-85, 104 L. Ed. 2d at 280-81.

56. *Id.* at 1789-92, 104 L. Ed. 2d at 287-89.

57. *Id.* at 1784-85, 104 L. Ed. 2d at 280-81.

58. *Id.*

59. *Id.*

60. *Id.* at 1786, 104 L. Ed. 2d at 282-83.

61. *Id.*

62. *Id.* See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (disparate impact case recognizing business necessity defense); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (disparate treatment case recognizing legitimate, non-discriminatory reason defense); *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) (disparate

The Court distinguished *Burdine*, in which it had held that the burden of persuasion did not shift to the employer to prove that its stated explanation was the true reason for its action.⁶³ The Court reasoned that in a situation in which the decision resulted from a mixture of both legitimate and illegitimate motives, the *Burdine* framework was inapplicable because it attempted to determine whether the decision derived from a single motive.⁶⁴ Since the plaintiff retained the burden to prove that discrimination played a part in a mixed-motive decision, the Court concluded that the employer's burden to prove that it would have taken the same action if no discrimination had occurred constituted an affirmative defense to a Title VII claim.⁶⁵ The Court then noted that its analysis coincided with its prior decisions in *Mt. Healthy* and other mixed-motive cases.⁶⁶

The Court next addressed the type and degree of proof required of the plaintiff and the defendant. First, the plaintiff must show that the employer actually relied on sex in making its decision.⁶⁷ Stereotyped remarks, although not dispositive on the sex discrimination issue, can constitute evidence of an impermissible motive.⁶⁸ Second, the Court stated that the employer, in most cases, can present objective evidence of its probable decision in the absence of discrimination.⁶⁹ Third, the employer cannot prevail sim-

treatment case recognizing legitimate, nondiscriminatory reason defense); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (disparate impact case recognizing business necessity defense).

63. *Price Waterhouse*, 109 S. Ct. at 1788-89, 104 L. Ed. 2d at 285-86.

64. *Id.* at 1790, 104 L. Ed. 2d at 287.

65. *Id.*

66. *Id.* at 1789-90, 104 L. Ed. 2d at 286-87 (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 417 (1979); *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 270-71 n.21 (1977)). The Court also relied on its reasoning in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (employer is wrongdoer and should bear risk that influence of legal and illegal motives cannot be separated).

67. *Price Waterhouse*, 109 S. Ct. at 1791, 104 L. Ed. 2d at 288. Justice Brennan found that Hopkins had met this burden and noted: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of job if they behave aggressively and out of a job if they don't. Title VII lifts women out of this bind." *Id.*

68. *Id.* The Supreme Court previously addressed the issue of sex stereotyping functioning as sex discrimination in *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707-11 (1978). In that case an employer justified larger pension fund contributions by female employees on the basis of the "unquestionably true" generalization that women live longer than men. *Id.* at 707. In addressing this issue, the Court quoted a Seventh Circuit case stating:

In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) [of Title VII] subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.

Id. at 707 n.13 (quoting *Sprogis v. United Van Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

69. *Price Waterhouse*, 109 S. Ct. at 1791, 104 L. Ed. 2d at 289. Presumably, Title VII requires the employer to document in writing all performance appraisals and personnel actions to support the employment decision at the time it was made. See Cohen, *Price Waterhouse v. Hopkins: Mixed Motive Discrimination Cases, the Shifting Burden of Proof, and Sexual Stereotyping*, 40 LAB. L.J. 723, 726 (1989).

ply by showing that a legitimate motive played a part in the decision. Instead, the Court declared that the employer must demonstrate that its legitimate reason alone would have caused it to make the same decision.⁷⁰ Finally, the Court noted that conventional rules of civil litigation apply in Title VII cases.⁷¹ The defendant, therefore, may prove its case by a preponderance of the evidence rather than by the clear and convincing standard required by the lower court's ruling.⁷² Consequently, the Court reversed the court of appeals and remanded the case for a determination of whether Price Waterhouse had met this burden.⁷³

B. *White's Concurrence*

Justice White concurred separately in the judgement, but his analysis differed from the plurality's approach in two respects. First, White would require the employee to show that sex was a substantial rather than merely a motivating factor in the employment decision.⁷⁴ Second, he criticized the plurality's requirement that the employer must meet its burden by objective evidence.⁷⁵ White reasoned that credible testimony by the employer as to what its decision would have been can constitute adequate proof of a legitimate motive for taking the action.⁷⁶

C. *O'Connor's Concurrence*

Justice O'Connor also concurred separately but considered the burden shifting test adopted by the plurality a supplement to the *McDonnell Douglas-Burdine* analysis for use in cases like *Price Waterhouse* in which the em-

70. *Price Waterhouse*, 109 S. Ct. at 1791-92, 104 L. Ed. 2d at 289.

71. *Id.* at 1792, 104 L. Ed. 2d at 289.

72. *Id.* at 1792-93, 104 L. Ed. 2d at 289-90. The Court stated that it generally reserves exceptions to the lower standard of proof for cases in which the government attempts coercive action, such as the termination of parental rights, involuntary commitment, and deportation. *Id.* (citations omitted). In addition, the Court noted that the *Mt. Healthy* and *Transportation Management* cases, which closely resembled *Price Waterhouse*, both applied the lower standard of proof. *Id.* See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1987); *NLRB v Transportation Management Corp.*, 462 U.S. 393, 400 (1983). The Court concluded:

We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

Price Waterhouse, 109 S. Ct. at 1793, 104 L. Ed. 2d at 290.

73. *Price Waterhouse*, 109 S. Ct. at 1793, 104 L. Ed. 2d at 291.

74. *Id.* at 1795, 104 L. Ed. 2d at 293-94. Although Justice White did not provide a definition of substantial factor, the plurality defined motivating factor:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id. at 1790, 104 L. Ed. 2d at 287-88.

75. *Id.* at 1796, 104 L. Ed. 2d at 294-95.

76. *Id.* The plurality found this suggestion puzzling because at that stage of the trial, the court already would have found that an illegitimate motive played a part in the employment decision. *Id.* at 1791 n.14, 104 L. Ed. 2d at 289 n.14.

ployer created confusion concerning its motive in an employment decision by consciously giving substantial weight to a prohibited factor.⁷⁷ She justified the departure from the *McDonnell Douglas* and *Burdine* burden of proof framework on two grounds. First, O'Connor noted that in *McDonnell Douglas*, the plaintiff's prima facie case presented only inferential proof that the employer relied on an impermissible factor in making an adverse employment decision.⁷⁸ Therefore, the plaintiff only had a burden of production.⁷⁹ When direct evidence exists, however, that the employer substantially relied on factors forbidden by Title VII, Justice O'Connor would not entitle the employer to the same presumption of good faith.⁸⁰ Second, Justice O'Connor contended that the new evidentiary standard she proposed was necessary to fulfill the goal of *McDonnell Douglas* that Title VII prohibit all discrimination.⁸¹ Once a plaintiff has shown that an impermissible factor substantially motivated an employer's decision, O'Connor did not think that the Court should penalize plaintiffs under Title VII by requiring them to identify the precise cause of the adverse treatment.⁸²

In addition, O'Connor contended that a substantive violation of Title VII occurs only when an impermissible motive is the but for cause of an adverse employment decision.⁸³ Like White, she would also require a plaintiff to show that sex played a substantial role in the decision.⁸⁴ She noted, however, that when a plaintiff proves that an impermissible motive was a substantial factor, "a reasonable factfinder could conclude that absent further explanation, the employer's discriminatory motive 'caused' the employment decision."⁸⁵

D. Kennedy's Dissent

Justice Kennedy argued in dissent that regardless of who bears the burden of proof, Title VII requires a finding that an impermissible motive is the but

77. *Id.* at 1796, 104 L. Ed. 2d at 295.

78. *Id.* at 1801, 104 L. Ed. 2d at 300-01.

79. *Id.*

80. *Id.* Justice O'Connor noted:

[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination.

Id. at 1801-02, 104 L. Ed. 2d at 301 (emphasis in original).

81. *Id.*, 104 L. Ed. 2d at 301-02.

82. *Id.* at 1802-03, 104 L. Ed. at 301-03. Justice O'Connor observed:

Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff [employee] to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions.

Id. at 1803, 104 L. Ed. 2d at 303 (emphasis in original).

83. *Id.* at 1797, 104 L. Ed. 2d at 295.

84. *Id.* at 1798, 104 L. Ed. 2d at 297.

85. *Id.*

for cause of an adverse employment decision.⁸⁶ According to Kennedy, because the district court did not find that the Policy Board would have elected Hopkins to the partnership absent impermissible, gender-based motives, Hopkins failed to prove but for causation.⁸⁷ Consequently, he concluded that the Court should render judgement for Price Waterhouse.⁸⁸

Justice Kennedy also argued that *McDonnell Douglas* and *Burdine* provide the appropriate order of proof for all individual disparate treatment cases under Title VII.⁸⁹ He maintained that the *Burdine* framework specifically allowed the plaintiff to prove its case either by direct proof of discriminatory motive or by indirect proof that the employer's justification was a pretext.⁹⁰ Justice Kennedy thus asserted that the Court should continue to apply the *Burdine* framework to govern the order of proof in Title VII disparate treatment cases.⁹¹

III. CONCLUSION

In *Price Waterhouse v. Hopkins*⁹² the Supreme Court clarified the applicable burdens of proof for a mixed-motive discrimination case under Title VII. The Court based its findings on the twin aims of Title VII to protect an employee from discriminatory employment decisions, while preserving an employer's freedom to make decisions on other grounds. Although a majority of the Court agreed that the defendant has the burden of proving by a preponderance of the evidence that the same employment decision would have occurred in the absence of a discriminatory motive, the Court split on the requirement for showing but for causation. The plurality found no ambiguity, however, in the statute or its legislative history, firmly holding that Title VII condemns even those decisions based on a mixture of legitimate and illegitimate motives.

By applying the *Mt. Healthy* standard in *Price Waterhouse*, the Court expanded the ways in which a plaintiff can challenge employment discrimination under Title VII—disparate impact, disparate treatment, and now mixed motives. The Court, in rejecting the *Burdine* formula, demonstrated that mixed-motive cases are distinct from pretext cases, even though the issue of a legitimate business reason may arise in both. In the Court's view, the introduction of direct evidence of discriminatory motive in an employment decision warrants a shifting of the burden of proof to the employer. If the employer, however, proves by a preponderance of the evidence that a legiti-

86. *Id.* at 1807, 104 L. Ed. 2d at 307. Justice Kennedy described the plurality's holding on causation not as a rule requiring the plaintiff to prove the presence of causation but as a rule requiring the defendant to prove its absence. *Id.* at 1809, 104 L. Ed. 2d at 311. Kennedy maintained that this approach will cause confusion in the lower courts because it in theory rejects but for causation for liability under Title VII but in practice adopts the standard when the burden of proof shifts to the employer. *Id.* at 1807, 104 L. Ed. 2d at 307.

87. *Id.* at 1814, 104 L. Ed. 2d at 317.

88. *Id.*

89. *Id.* at 1809, 104 L. Ed. 2d at 311.

90. *Id.* at 1810, 104 L. Ed. 2d at 311-12.

91. *Id.* at 1813, 104 L. Ed. 2d at 315.

92. 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

mate reason by itself caused the employment decision, the dual nature of Title VII insulates the employer from liability. The Court found this result necessary to protect both the employee's rights and the employer's prerogatives under Title VII.

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