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NOTES

SUBVERTING RULE 56? MCDONNELL DOUGLAS, WHITE V. BAXTER HEALTHCARE CORP., AND THE MESS OF SUMMARY JUDGMENT IN MIXED-MOTIVE CASES

TABLE OF CONTENTS

INTRODUCTION ..................................................................................................................... 140
I. TITLE VII TO DESERT PALACE: EMPLOYMENT
   DISCRIMINATION IN BRIEF ........................................................... 142
   A. Title VII of the Civil Rights Act of 1964 .................................................. 142
   B. McDonnell Douglas and Burdine .......................................................... 143
   C. Price Waterhouse and Congress’s Response ....................................... 145
      2. Congress Passes the 1991 Civil Rights Act ................................... 147
   D. Desert Palace: The Death of McDonnell Douglas? .................... 148
II. SUMMARY JUDGMENT IN EMPLOYMENT
   DISCRIMINATION CASES ........................................................................ 150
III. BAXTER AND MCDONNELL DOUGLAS:
    RUNNING ROUGHSHD OVER RULE 56 ........................................... 153
    A. Baxter and the Effective Elimination of Summary Judgment .... 154
    B. McDonnell Douglas: Raising the Standard
       of Summary Judgment ............................................................................. 159
       1. The Failings of McDonnell Douglas
          at Summary Judgment ............................................................................... 159
       2. Two McDonnell Douglas Groups Violate Rule 56 .............. 163
       3. A Necessary Defense of McDonnell Douglas .................... 166
CONCLUSION ..................................................................................................................... 168
INTRODUCTION

Summary judgment is often the make-or-break setting for plaintiffs alleging illegal employment discrimination. For most plaintiffs, a motion for summary judgment will end their case. Plaintiffs are losing most of the cases they file because they are frequently unable to meet the burdens imposed by an employer's motion for summary judgment.¹

Summary judgment in employment discrimination cases poses an especially burdensome request on plaintiffs who often must rely on circumstantial evidence to prove illegal discrimination. The seminal Supreme Court case *McDonnell Douglas v. Green* intended to pave the way for plaintiffs to seek redress for discrimination.² In reality, *McDonnell Douglas* has become a gatekeeper barring legitimate plaintiffs from reaching the jury. *McDonnell Douglas*'s notoriety is well established; few other Supreme Court cases draw nearly as much ire amongst academics and the courts.³

The state of summary judgment jurisprudence in mixed-motive employment discrimination cases is best described as fractured.⁴ Although the Supreme Court has never required that *McDonnell Douglas* be applied at summary judgment, several courts of appeals have extended the use of *McDonnell Douglas*, or a modified *McDonnell Douglas* standard, to summary judgment.⁵ The rigidity of the *McDonnell Douglas* framework has caused many plaintiffs to fall short of meeting their burden at summary judgment.⁶ Current summary judgment standards impose burdens not mandated by, and therefore, in violation of Rule 56⁷ of the Federal Rules of Civil Procedure (FRCP).⁸ As a result, plaintiffs have been forced to meet a heightened burden because of the use of *McDonnell

². 411 U.S. 792 (1973); McGinley, supra note 1, at 212-13.
⁴. See infra Part III.B.2.
⁶. See infra Part I.B.
⁷. FED. R. CIV. P. 56. Under Rule 56, a motion for summary judgment should be granted if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” *Id.*
⁸. See infra Parts II, III.
Douglas at summary judgment. The burden is so high that, as already mentioned, most plaintiffs are losing their cases.

That result may be about to change if the Sixth Circuit’s ruling in White v. Baxter Healthcare Corp. gains traction and swings the pendulum from a defendant-friendly summary judgment standard to a plaintiff-friendly summary judgment standard. While McDonnell Douglas creates a heightened burden for plaintiffs to meet at summary judgment, Baxter effectively removes any burden on a plaintiff necessary to survive an employer’s summary judgment motion. This news will inevitably please the many critics of McDonnell Douglas and those who advocate against the use of a traditional summary judgment standard in employment discrimination cases. For these people, Baxter may be the panacea for the problems facing plaintiffs alleging illegal discrimination. But before other jurisdictions begin to see Baxter as the light at the end of the dark tunnel that is McDonnell Douglas, this Note asks whether Baxter has swung the pendulum too far in the opposite direction as a response to McDonnell Douglas. This Note argues that Baxter violates Rule 56 and has gone too far in response to McDonnell Douglas. While Rule 56 has long been a victim of McDonnell Douglas, it appears that Baxter has no intention of resuscitating Rule 56. Baxter does not fix the summary judgment problems that McDonnell Douglas created; it merely shifts the benefit from employers to employees. It is now necessary to revitalize Rule 56 and ensure that all summary judgment standards meet the requirements set out in the language of Rule 56.

This Note proceeds in three parts. Part I of this Note briefly sketches out the landscape of disparate treatment law from Title VII through the Supreme Court’s 2003 Desert Palace, Inc. v. Costa decision. Part II

9. 533 F.3d 381 (6th Cir. 2008).
10. See infra Part III.A.
discusses the evolution of summary judgment in employment discrimination cases. Part III explores the circuit split that has developed among courts of appeals and analyzes how each circuit handles summary judgment in mixed-motive cases with particular attention being paid to the Sixth Circuit’s decision in Baxter v. Healthcare Corp. This Note will then argue that both the Baxter and McDonnell Douglas standards infringe on a plaintiff’s and defendant’s right to summary judgment under Rule 56 and should be replaced by a standard that is not only fair to both parties, but faithful to Rule 56.

I. TITLE VII TO DESERT PALACE:
EMPLOYMENT DISCRIMINATION IN BRIEF

A. Title VII of the Civil Rights Act of 1964

On July 2, 1964, after twelve months of work and a debate dubbed “the longest debate,” Congress passed the Civil Rights Act of 1964. The Act aimed to “guarante[e] equal political, social, and economic rights to all Americans,” but Congress recognized that “holding out the right to a better life for minorities does not guarantee attainment of that better life.” One of the goals of Title VII of the 1964 Civil Rights Act is to help bring that better life to minorities. Under Title VII, employers may not discriminate on the basis of an individual’s “race, color, religion, sex or national origin.”

12. Whalen & Whalen, supra note 3.
13. Id.; see also Charles A. Sullivan, Disparate Impact: Looking Past the Desert Palace Mirage, 47 WM. & MARY L. REV. 911, 956 (2005) (stating Congress’s objective in passing the Act was to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees”).

It shall be unlawful employment practice for an employer—
(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate 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
In *McDonnell Douglas v. Green*, the Supreme Court noted that there is a "broad, overriding interest, shared by employer, employee, and consumer, of efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." Title VII thus "tolerates no racial discrimination, subtle or otherwise."

**B. McDonnell Douglas and Burdine**

Establishing the proper standard for summary judgment in mixed-motive employment discrimination cases requires an inquiry into the seminal 1973 Supreme Court case of *McDonnell Douglas v. Green*. The primary issue before the Court in *McDonnell Douglas* was the proper "order and allocation of proof in a private, non-class action challenging employment discrimination." The Court laid out a tripartite burden-shifting framework to rectify the "notable lack of harmony" that existed between the courts of appeals on "the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case." The tripartite burden-shifting scheme was instituted to "make it easier for an employee to prove an employer's discriminatory state of mind.

The *McDonnell Douglas* burden-shifting test is simple on its face. First, an employee must establish a prima facie case of employment discrimination. The *McDonnell Douglas* Court said:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons for the complainant's qualifications.

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17. *Id.*
18. *Id.* at 800.
19. *Id.* at 801.
22. *Id.* The Supreme Court stressed that "facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at n.13.
Once an employee has established a prima facie case, the burden then shifts from the employee to the employer to articulate "some legitimate, nondiscriminatory reason for the employee's rejection." The inquiry does not end if an employer can articulate a legitimate reason for making an adverse employment decision. The burden shifts back to the employee who is then given the opportunity to show that the employer's legitimate reason is really pretext for a discriminatory action. The courts have used the McDonnell Douglas burden-shifting scheme as the dominant tool both at summary judgment and at trial when dealing with employment discrimination cases.

Ten years later in *Texas Department of Community Affairs v. Burdine*, the Supreme Court sought to clarify the lingering question from *McDonnell Douglas* of "whether employers have the ultimate burden of disproving discrimination or whether employees have the obligation to prove bias." The Court responded by saying that there are ultimate and intermediate burdens that the plaintiff must meet to successfully prove a case of illegal discrimination. The ultimate burden "remains at all times with the plaintiff" to prove that the defendant illegally discriminated against him. The *McDonnell Douglas* framework creates an intermediate burden on the plaintiff to establish a prima facie case, which "in effect creates a presumption that the employer unlawfully discriminated against the employee." The defendant then has the burden to rebut the presumption of discrimination by producing evidence of a legal, non-discriminatory reason for making an adverse employment decision. If the defendant can successfully rebut the presumption, the burden of production returns to the plaintiff and merges with his ultimate burden of

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23. *Id.* at 802.
24. *Id.* at 804.
27. Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383, 386 (2004). The Court framed the question as "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." *Burdine*, 450 U.S. at 250.
29. *Id.*
30. *Id.* at 254.
31. *Id.*
persuasion that he is a victim of discrimination.  

_McDonnell Douglas_ established a burden-shifting framework to evaluate discrimination cases. _Burdine_ answered a lingering question from _McDonnell Douglas_ about whether the ultimate burden of proof shifted from plaintiff (employee) to defendant (employer) to disprove illegal discrimination by declaring that the ultimate burden at all times remains with the plaintiff.  

C. Price Waterhouse and Congress’s Response

1. Price Waterhouse: the Birth of the Mixed-Motive Case

In 1989, the Supreme Court decided _Price Waterhouse v. Hopkins_. Ann Hopkins was a manager at the accounting firm Price Waterhouse and a candidate for partnership. Hopkins was the only female out of 88 individuals being reviewed for partnership. Price Waterhouse solicited its partners for their input on whether a candidate should be admitted into partnership. When the comments came back from the partners, many, including those who supported her bid for partnership, said that she needed to work on her “interpersonal skills.” Accompanying these legitimate concerns about Hopkins were negative comments stemming from the fact that Hopkins was a female. Hopkins was described as “macho” and that she “overcompensated for being a woman;” she was told to take “a course at charm school;” and, in the “coup de grace” comment, Hopkins was told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Because Hopkins’s evaluations were filled with both legitimate and illegitimate criticisms, the traditional analysis under _McDonnell Douglas_
was inappropriate. In "pretext cases" or single motive cases, the question is "whether the unlawful consideration or legitimate consideration was actually the basis for the action." In mixed-motive cases, such as Price Waterhouse, both legitimate and illegitimate considerations are actually the basis for the adverse employment action. The plurality in Price Waterhouse held that if Hopkins's gender (the illegitimate consideration) was a motivating factor for an adverse employment action, Price Waterhouse could only avoid liability by showing it would have made the same decision despite considering Hopkins's gender. Justice Brennan stated that a factor is a motivating factor "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."

Justice O'Connor's concurrence in Price Waterhouse has been "treated as the operative holding of the Court." O'Connor argued that a "disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." This heightened evidentiary requirement "introduced the concept of a mandatory McDonnell Douglas." O'Connor worried that most plaintiffs would pick the Price Waterhouse framework over the McDonnell Douglas framework. The direct evidence requirement acts as a guardian, allowing only individuals with direct evidence the opportunity to proceed with the easier mixed-motive, as opposed to the pretext, framework.

There are several differences between the McDonnell Douglas pretext framework and the Price Waterhouse mixed-motive framework. The mixed-motive framework shifts the burden of persuasion to the defendant

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41. Montgomery v. John Deere & Co., 169 F.3d 556, 562 (8th Cir. 1999) (Lay, J., concurring) ("In such cases ... [the] McDonnell Douglas disparate treatment analysis is inappropriate.").
43. Price Waterhouse, 490 U.S. at 244-45.
44. Id. at 250.
46. Prenkert, supra note 25, at 532.
47. Price Waterhouse, 490 U.S. at 276.
49. Id.
50. Id.
51. Giles, supra note 42, at 820.
once the plaintiff shows that an impermissible factor was a motivating factor in an adverse employment decision. A plaintiff would prefer to bring a mixed-motive claim as opposed to a pretext claim because a mixed-motive plaintiff is only required to show that an impermissible factor motivated an employer instead of having to prove that all legitimate, nondiscriminatory reasons proffered by a defendant are pretextual. Because employers were able to avoid liability in mixed-motive cases by showing that they would have taken the same action despite being motivated by an impermissible reason, Price Waterhouse “allowed employers to escape liability in mixed motive discrimination cases” because “the legitimate motive served to defeat the plaintiff’s claim.”

2. Congress Passes the 1991 Civil Rights Act

Price Waterhouse limited the liability of employers who were able to show that they would have nevertheless made the same employment decision regardless of any impermissible factor coloring their decision. Congress, partly in response to Price Waterhouse, passed the Civil Rights Act of 1991. The Act amended Title VII to add 42 U.S.C. § 2000e-2(m), codifying the motivating factor standard from Price Waterhouse. Now, “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.”

Under Price Waterhouse, the employer could completely avoid liability. Now, the employer can only reduce the scope of remedies available to a successful plaintiff and not avoid liability. An employer who successfully shows that it would have taken the same action regardless of an impermissible factor is only subject to “declaratory relief, injunctive relief, and attorney’s fees; but may not be awarded damages or

52. Id.
53. Id.
54. Id.
55. See supra Part I.C.1.
58. Id.
59. Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (“We conclude that the preservation of [freedom of choice] means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.”).
60. Giles, supra note 42, at 821.
an order requiring admission, reinstatement, promotion, or payment.”

Price Waterhouse’s mixed-motive standard created a second way to evaluate employment discrimination cases. For many plaintiffs, the mixed-motive method was preferable to McDonnell Douglas. It is not surprising then, in the wake of Price Waterhouse and the Civil Rights Act of 1991, that the “Courts of Appeals have divided over whether a plaintiff must prove by direct evidence that an impermissible consideration was a ‘motivating factor’ in an adverse employment action.” The Supreme Court would answer that question in 2003 with its decision in Desert Palace, Inc. v. Costa.

D. Desert Palace: The Death of McDonnell Douglas?

In 2003, the Supreme Court ruled that a Title VII disparate treatment plaintiff no longer needed to produce direct evidence to receive a mixed-motive jury instruction. The Court’s deceptively simple decision in Desert Palace sent lawyers, judges, and professors scrambling to determine whether McDonnell Douglas was alive or dead. One

61. Id.
64. Id. at 100.
65. Id. at 101.
66. See Matthew R. Scott & Russell D. Chapman, Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Discrimination Cases to Mixed-Motive, 36 St. Mary’s L.J. 395, 396-97 (2005) (“Simply looking to the Supreme Court’s statement of the case should dispel the notion that Desert Palace banished McDonnell Douglas to the history books … [t]hus, Desert Palace is not the torch of McDonnell Douglas’s funeral pyre.”); see also Hedican et al., supra note 27, at 384 (concurring with Scott by stating “[t]he numerous Supreme Court decisions interpreting and applying McDonnell Douglas, and the decision in Costa itself amply demonstrate that McDonnell Douglas is alive and well”).
commentator said, "[n]o issue is more crucial to the litigation of intentional discrimination cases than determining" whether the Desert Palace decision "unceremoniously toppled McDonnell Douglas without even bothering to mention the case by name."68

In a short, eight-page opinion, Justice Thomas made it clear from the plain language of 42 U.S.C. § 2000e-2(m) that direct evidence is not required for a plaintiff to receive a mixed-motive jury instruction.69 Justice Thomas noted, "[O]n its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."70 Under 42 U.S.C. § 2000e-2(m) a plaintiff must "demonstrate[] that race, color, religion, sex, or national origin was a motivating factor for any employment practice."71 Congress defined the word "demonstrates" as "meets the burdens of production and persuasion."72 If Congress intended a heightened evidentiary burden, as required by Justice O'Connor's concurrence in Price Waterhouse, "it could have made that intent clear by including language to that effect."73

Despite Justice Thomas plainly stating that the question before the Court was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under 42 U.S.C. § 2000e-2(m)" and never mentioning McDonnell Douglas in his opinion, many believed that Desert Palace ended McDonnell Douglas's reign.74 The Supreme Court in Raytheon Co. v. Hernandez dispelled the myth that McDonnell Douglas had been toppled by Desert Palace.75 In Raytheon Co. v. Hernandez, a post Desert Palace case, the Supreme Court applied the McDonnell Douglas analysis to an American with Disabilities Act disparate treatment case.76 Further, Justice Thomas made no mention of Desert Palace in the Raytheon opinion and, by applying the supposedly toppled McDonnell Douglas analysis, confirmed what many Title VII plaintiffs know: McDonnell Douglas is alive and well.77

70. Id. at 98-99.
73. Desert Palace, 539 U.S. at 99.
74. See supra notes 66-67.
75. See Prenkert, supra note 25, at 554.
76. 540 U.S. 44, 53 (2003). The Desert Palace decision came on June 9th and the Raytheon decision followed on December 2nd. Id. at 44.
77. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 n.5 (4th Cir. 2005) ("[S]ince deciding Desert Palace, the Supreme Court has continued to invoke the burden-shifting framework in pretext cases.").
Before *Price Waterhouse*, employment discrimination cases were analyzed using the *McDonnell Douglas* burden-shifting scheme.\(^78\) This proved to be inadequate because *McDonnell Douglas* was not designed to deal with employers who considered both legitimate and illegitimate motives when making an adverse employment decision.\(^79\) *Price Waterhouse* created the mixed-motive case to rectify situations where an employer was motivated by permissible and impermissible factors.\(^80\) The Supreme Court instituted a motivating factor test to handle such cases. Part II of this Note will discuss the current state of summary judgment law in light of the 1986 trilogy of summary judgment decisions and how those cases affect summary judgment in employment discrimination cases.

### II. SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

For most plaintiffs alleging illegal discrimination, a defendant’s motion for summary judgment will result in the plaintiff’s claims being dismissed. Professor Charles Sullivan summed up the state of employment discrimination practice by saying “plaintiffs are losing almost all of the cases they file.”\(^81\) To properly assess the correct standard for summary judgment in mixed-motive employment discrimination cases, it is necessary to briefly cover current summary judgment jurisprudence and Rule 56 of the FRCP.

Rule 56 allows a plaintiff or defendant to move for summary judgment and quickly bring litigation to an end.\(^82\) A motion for summary judgment

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78. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261 (1989) (O’Connor, J., concurring) (“The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established by our unanimous decision in *McDonnell Douglas*.”).

79. Id. at 247 (“Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was ‘the true reason’ ... for the decision—which is the question asked by *Burdine*.”); Linda H. Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV 1161, 1179 (1995) (“Within the pretext paradigm, it is simply not possible for an employment decision to be both motivated by the employer’s articulated reasons and tainted by intergroup bias; the trier of fact must decide between the two.”).

80. *Price Waterhouse*, 490 U.S. at 244 (“[W]hile an employer may not take gender into account in making an employment decision ... it is free to decide against a woman for other reasons.”).


82. FED. R. CIV. P. 56(c).
is appropriate when "there is no genuine issue as to any material fact" and when "the movant is entitled to judgment as a matter of law." Many critics believe summary judgment deprives litigants of their day in court; proponents believe summary judgment serves the important function of keeping court dockets clear of meritless cases. Judge Selya of the First Circuit has said that "summary judgment has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways."  

In 1986, the Supreme Court's rulings in three summary judgment cases, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *Anderson v. Liberty Lobby*, and *Celotex v. Catrett*, completely changed the landscape in employment discrimination summary judgment proceedings. This trilogy of summary judgment proceedings has made it "easier for defendants to obtain summary judgment in cases of at least arguable discrimination." This was a stark change from the prior use of summary judgment. Courts are no longer reluctant to grant summary judgment in cases where "there exist questions of fact concerning the employer's motive, thereby denying to employment discrimination plaintiffs their 'day in court' historically promised by the American model of litigation."  

In *Anderson*, a libel case, the Court was asked whether a court ruling on summary judgment must consider the evidentiary standard when making its decision. The Court ruled in the affirmative, saying that a "judge must view the evidence presented through the prism of the substantive evidentiary burden." Therefore, in employment discrimination cases, the judge will undoubtedly use the *McDonnell Douglas* framework to make summary judgment determinations.  

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83. *Id.*  
86. 475 U.S. 574 (1986).  
90. *Id.*  
91. *Id.* at 207.  
92. *Anderson*, 477 U.S. at 244.  
93. *Id.* at 255.  
94. *See* McGinley, *supra* note 1, at 222. The Supreme Court originally adopted the *McDonnell Douglas* approach to ease the plaintiff's burden of proving a prima facie case,
Anderson decision means that “trial courts are obligated to determine not only whether there is a factual dispute, but whether the evidence identified in the summary judgment opposition would satisfy the plaintiff’s burden of proof at trial.” Courts now must evaluate a party’s evidence and determine its probative value at summary judgment. A nonmoving party cannot point to some “supporting evidence” to satisfy his burden of production “if it will not sustain the burden of proof on the merits.”

After Celotex v. Catrett, a defendant may successfully move for summary judgment merely by pointing out “that there is an absence of evidence to support the nonmoving party’s case.” In essence, the defendant only has to point out that the plaintiff has insufficient evidence to raise a “genuine issue as to any material fact.” Summary judgment post-Celotex has loosened the burden on the defendant to prove an absence of any genuine issue of material fact and requires the plaintiff to affirmatively show that such an issue exists. In the employment discrimination context, this requires the plaintiff to “meet the ultimate burden of proof at the summary judgment stage” instead of at trial.

The decision in Matsushita Electric Industrial Co. v. Zenith Radio Corp. suggests that “issues such as intent and motive may be appropriate for determination by a motion for summary judgment.”

but the McDonnell Douglas standard is now being used to defeat a plaintiff’s claim. Id. at 229. Professor McGinley notes that “there is a growing trend toward placing a much higher burden on the plaintiff to meet the ‘qualified’ prong of the prima facie case.” Id. Courts originally looked at objective evidence, an employee’s education and experience, to determine whether a person was qualified, but now plaintiffs are being forced to “rebut” the employer’s defense that the employee is not qualified by proving that they are qualified. Id. at 230. This “perversion” of the McDonnell Douglas framework compounds the problems that a disparate treatment plaintiff has making a claim to courts that typically are hostile. Id. at 231 (“Courts believe defendants when they articulate their non-discriminatory reasons for the employment decision and disbelieve plaintiffs when they attempt to prove that the defendants’ articulated reasons are pretextual.”).

96. Id.
97. Id.
99. Id. (“[T]he burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.”).
100. McGinley, supra note 1, at 241-42.
broadly, *Matsushita* instructs trial judges to “weigh the evidence and to decide which inference was more reasonable in light of the evidence.”\(^{103}\) This role is typically reserved for the jury.\(^{104}\) Like *Anderson*, *Matsushita* “urged trial judges to evaluate the probative value of evidence at the summary judgment stage.”\(^{105}\) In addition to the *Anderson* requirement that judges evaluate the probative value of evidence, if there is a question of plausibility on the theory of liability, more evidence is necessary to avert summary judgment.\(^{106}\)

The trilogy of summary judgment cases decided in 1986 have made obtaining summary judgment much easier.\(^{107}\) Subsequently, courts have taken these decisions and applied them in employment discrimination cases with greater frequency.\(^{108}\) Not surprisingly, the courts of appeals disagree on the proper standard for summary judgment in mixed-motive cases. Part III of this Note will discuss how both the *McDonnell Douglas* burden-shifting test and the motivating factor test from *Price Waterhouse* are used by courts in making determinations of summary judgment in mixed-motive employment discrimination cases. This Note posits that both the *McDonnell Douglas* and mixed-motive summary judgment standards violate Rule 56.

III. *BAXTER AND MCDONNELL DOUGLAS*: RUNNING ROUGHSHOD OVER RULE 56

The federal courts of appeals’ approaches to summary judgment in mixed-motive cases can be broken into four distinct groups: three groups applying a variation of the *McDonnell Douglas* standard and the recently devised Sixth Circuit standard.\(^{109}\) Five circuits have made no decision or have refrained from deciding the appropriate standard for summary judgment in a mixed-motive case.\(^{110}\) Summary judgment in mixed-motive

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103. McGinley, *supra* note 1, at 227.
104. *Id*.
105. Ware, *supra* note 95, at 48.
106. *Id.* at 48-49.
108. Ware, *supra* note 95, at 49.
109. See infra Parts III.A and B.
110. White v. Baxter Healthcare Corp., 533 F.3d 381, 399 (6th Cir. 2008). The Second and Seventh Circuits have not considered the issue, and the First, Third, and Tenth
cases is in need of a uniform standard that not only adequately balances the rights of plaintiffs and defendants, but also is consistent with the language of Rule 56 of the FRCP. Because "there is no separate rule of civil procedure governing summary judgment in employment discrimination cases," all the circuits’ approaches must abide by Rule 56 of the FRCP.111

As discussed above,112 a moving party is entitled to summary judgment when there is "no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law."113 The Sixth Circuit’s ruling in Baxter appears to drop this already low bar to a level that effectively removes summary judgment from the equation in mixed-motive disparate treatment cases. Conversely, the McDonnell Douglas framework has raised the bar plaintiffs must meet to survive a motion for summary judgment. These standards must be remedied to be consistent and faithful with Rule 56.

A. Baxter and the Effective Elimination of Summary Judgment

The Sixth Circuit in White v. Baxter Healthcare Corp. declined to extend the McDonnell Douglas burden-shifting framework to summary judgment in mixed-motive cases.114 The Baxter court’s holding "that the McDonnell Douglas/Burdine burden-shifting framework does not apply to the summary judgment analysis of Title VII mixed-motive claims"115 creates an official circuit split and makes the Sixth Circuit the first circuit to repudiate the use of the McDonnell Douglas standard in mixed-motive cases at the summary judgment stage.116

To survive the motion for summary judgment, a plaintiff "asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) ‘race, color, religion, sex, or national origin was a motivating factor’ for the defendant’s adverse employment action."117 The

Circuits have refrained from making a decision. Id.

111. Beiner, supra note 102, at 96 (quoting Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997)).
112. See supra Part II.
113. FED. R. CIV. P. 56(c)(2).
114. Baxter, 533 F.3d at 400.
115. Id. (emphasis in original).
116. Id. at 398-99.
117. Id. at 400 (quoting 42 U.S.C. § 2000e-2(m)) (emphasis in original). The court relied on Judge Moore’s concurrence in Wright v. Murray Guard, Inc., 455 F.3d 702, 716
burden on the plaintiff is not onerous and “should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff’s claim.” 

Because of the Supreme Court's decision in Desert Palace, the Sixth Circuit held that the new summary judgment analysis will govern all Title VII mixed-motive cases “regardless of the type of proof presented by the plaintiff.”

In explaining why the court declined to extend McDonnell Douglas to the summary judgment analysis, the Sixth Circuit believed McDonnell Douglas is “not needed when assessing whether trial is warranted in the mixed-motive context.” The McDonnell Douglas analysis is effective for single-motive cases because it effectively “smoke[s] out the single ultimate reason for the adverse employment decision.”

A plaintiff in a mixed-motive case needs only to show that the defendant impossibly relied on a protected characteristic and that the protected characteristic “was a motivating factor for any employment practice, even though other factors also motivated the practice.”

Thus, to survive a summary judgment motion, a plaintiff need only establish that a discriminatory animus played a part in the employment decision and not rebut all legitimate reasons offered by the defendant.

The question for the court is whether the plaintiff is able to produce sufficient evidence that his protected status played a motivating role in a defendant’s employment decision. A court making a summary judgment determination must ask not

whether the plaintiff has produced sufficient evidence to survive the McDonnell Douglas/Burdine shifting burdens, but rather whether there are any genuine issues of material fact concerning the defendant’s motivation for its adverse employment decision, and, if none are present, whether the law—42 U.S.C. § 2000e-2(m)—supports a

(6th Cir. 2006). (“[A]n employee raising a mixed-motive claim can defeat an employer’s motion for summary judgment by presenting evidence—either direct or circumstantial—to ‘demonstrate’ that a protected characteristic ‘was a motivating factor for an employment practice, even though other factors also motivated the practice.’” (quoting 42 U.S.C. § 2000e-2(m)).

118. Id.

119. Id.

120. Id. at 401.

121. Id. at 400 (quoting Wright v. Murray Guard, Inc., 455 F.3d 702, 720 (6th Cir. 2006) (Moore, J., concurring)).

122. Id. at 401 (quoting 42 U.S.C. § 2000e-2(m)) (emphasis in original).

123. Id.

124. Id.
Summary judgment is not appropriate once a prima facie case has been established either through the introduction of actual evidence or the McDonnell Douglas presumption because "the crux of a Title VII dispute is the 'elusive factual question of intentional discrimination.'"\textsuperscript{126} Summary judgment motions are not ideal in employment discrimination cases because discerning an employer's true motive requires "a searching inquiry into these motives, those [acting for impermissible motives] could easily mask their behavior behind a complex web of post hoc rationalizations."\textsuperscript{127} A plaintiff "will necessarily have raised a genuine issue of material fact" when he establishes a prima facie case making out a case of intentional discrimination against his employer.\textsuperscript{128}

Normally, a defendant is entitled to summary judgment if the plaintiff has failed to raise a "genuine issue as to any material fact ... and is entitled to a judgment as a matter of law."\textsuperscript{129} Under Baxter, the "sufficient evidence" requirement for a plaintiff to survive summary judgment militates only enough evidence for the record not to be "devoid" of evidence.\textsuperscript{130} For the Baxter standard and the Rule 56 requirement to be squared, "devoid of evidence" must be evaluated the same as a "no genuine issue as to any material fact."\textsuperscript{131} Thus, if a plaintiff can put forth any evidence that could reasonably be construed to support his claim, he has created a genuine issue of material fact. In a system where any evidence becomes genuine, a nongenuine issue cannot exist. After Baxter, a plaintiff need only show enough evidence, seemingly any evidence, to avoid a trial judge finding the record to be "devoid of evidence."\textsuperscript{132} The Baxter court has circumvented Rule 56 with its lower standard by mandating that any evidence will create a genuine issue of material fact.

\textsuperscript{125} Id. at 402. The Baxter court was uncomfortable with applying summary judgment to employment discrimination cases because juries are better equipped to handle fact intensive inquires. \textit{Id.} ("'[I]nquiries regarding what actually motivated an employer’s decision are very fact intensive' and 'will generally be difficult to determine at the summary judgment stage.'" (quoting Wright v. Murray Guard, Inc., 455 F.3d 702, 721 (6th Cir. 2006) (Moore, J., concurring))).

\textsuperscript{126} Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir.1985).

\textsuperscript{127} \textit{Id.} (citing Peacock v. DuVal, 694 F.2d 644, 646 (9th Cir. 1982)).

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} FED. R. CIV. P. 56(c)(2).

\textsuperscript{130} Baxter, 533 F.3d at 400.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.}
The *Baxter* standard seems to return to the pre-1986 standard for summary judgment "when a mere scintilla of evidence supporting the nonmovant's case, or the slightest doubt as to the facts, was considered cause for denying a motion."\(^{133}\) The *Celotex* line of cases departed from that standard to a test of "whether a reasonable jury could find for the nonmovant."\(^{134}\) Basically, to avoid summary judgment, a plaintiff's evidence must be "sufficient to survive a motion for a directed verdict or a judgment notwithstanding the verdict."\(^{135}\) If it cannot, "a trial would be pointless."\(^{136}\) *Baxter*’s standard, however, does not require that the plaintiff's evidence be sufficient to survive a motion for a directed verdict or a judgment notwithstanding the verdict. Instead, the plaintiff need only produce enough evidence so the record is not "devoid of evidence" that can be reasonably construed to support the plaintiff's claim.\(^{137}\)

Several problems arise with effectively removing summary judgment from mixed-motive cases. First, the Supreme Court, the drafter of the FRCP, has not stated that employment discrimination cases are to be treated differently from other types of cases when deciding the sufficiency of a summary judgment motion.\(^{138}\) *Baxter* seeks to classify mixed-motive disparate treatment cases as a special category worthy of a different summary judgment standard. The standard laid out in *Baxter* does not require plaintiffs to show that a "genuine issue as to any material fact" exists, but instead to meet a standard that is less burdensome than Rule 56 currently prescribes to survive summary judgment.\(^{139}\) If employment discrimination cases are unique and worthy of a special summary judgment standard, the Supreme Court should then promulgate rules explicitly making employment discrimination cases unique. This would create uniformity across the circuits.

Another problem that occurs from lowering the standard to survive summary judgment is the inevitable increase in legal fees. Put simply,
more cases will survive summary judgment and proceed to trial. The increased legal work necessitates that higher fees will be charged because of the extra work involved in trying a case as opposed to disposing of it at the summary judgment stage. Legitimate claims should not be discouraged because of an increase in legal fees, but at the same time, Rule 56 is useful in pointing out which cases should not proceed to trial because the law does not provide a remedy.\(^{140}\) Baxter's standard will not be as effective at pointing out those cases for which the law does not provide a remedy because cases without a "genuine issue as to any material fact" will survive summary judgment. Those cases will proceed to trial and ultimately fail because the plaintiff is unable to meet his burden.

Rule 56 was designed to avoid cases going to trial that are based on insufficient claims.\(^{141}\) Summary judgment is meant to "strip away the underbrush and lay bare the heart of the controversy between the parties."\(^{142}\) Essential to a proper summary judgment standard is the balance between the rights of both parties. When a plaintiff brings a case based on an insufficient claim, the employer's rights are infringed because it is forced to pay legal costs for cases that would otherwise be disposed of at summary judgment. When cases survive summary judgment despite lacking a genuine issue of material fact, the equities between the parties are not properly balanced. The rights of the plaintiff will be discussed further in the next section, but needless to say, the Supreme Court has found that the proper balance for summary judgment is a standard requiring a genuine issue of a material fact.\(^{143}\)

Rule 56 is undoubtedly a "powerful docket-clearing device essential to overburdened courts."\(^{144}\) If the Baxter standard gains more traction, courts will inevitably face an upswing in employment discrimination cases that would typically get settled at the summary judgment stage. By gutting the power of Rule 56, the Baxter court has essentially removed all the benefits of Rule 56, leaving a hollow shell which will bar only cases "devoid of evidence" and send to trial cases which would not survive a standard summary judgment motion.\(^{145}\)

Critics may argue that the Baxter standard does not require a lower standard than Rule 56 mandates. When courts apply the Baxter standard, judges can make their determinations of judgment based on whether any

\(^{141}\) Schwarzer et al., supra note 84, at 451.
\(^{142}\) Id.
\(^{143}\) Id.
\(^{144}\) Id. at 445.
\(^{145}\) White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008).
issue of genuine fact exists. However, the Baxter court made it clear that courts “should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff’s claim.” In many cases, the courts will have evidence that will raise an issue of genuine fact. But when there is evidence that does not raise an issue of genuine fact, courts are instructed to send the case to the jury because the record is “not devoid of evidence.” It is in those instances, where the Baxter standard lowers the bar and is unfaithful to Rule 56.

B. McDonnell Douglas: Raising the Standard of Summary Judgment

1. The Failings of McDonnell Douglas at Summary Judgment

While the Baxter standard sets the bar too low for summary judgment, McDonnell Douglas goes too far in the opposite direction and bars cases which should survive summary judgment. As discussed previously, the McDonnell Douglas framework “serves to bring the litigants and the court expeditiously and fairly” to the ultimate question of discrimination. Despite the original intent of the McDonnell Douglas Court, the McDonnell Douglas analysis has acted steadfastly as a bulwark for employers, disallowing legitimate plaintiffs to have their day in court. Put bluntly, “plaintiffs are losing almost all of the cases they file.”

Plaintiffs are losing employment discrimination cases because of the problems of proving pretext under the third prong of the McDonnell Douglas analysis. As discussed above, a plaintiff must first establish a prima facie case. Typically this was a mere formality for most plaintiffs who could objectively show that they met the qualifications. Now “there is a growing trend toward placing a much higher burden on the plaintiff to meet the ‘qualified’ prong of the prima facie case.” Some courts have “imposed a higher burden on plaintiffs” to prove that they are qualified by

146. Id.
147. Id.
149. McGinley, supra note 1, at 229. Interestingly, McGinley believes that McDonnell Douglas is the proper standard for summary judgment, but she believes that the standard has been misapplied after the summary judgment trilogy of cases. Id. at 221.
150. Sullivan, supra note 13, at 912.
151. See McGinley, supra note 1, at 208-09.
152. See supra Part I.B.
153. McGinley, supra note 1, at 229.
rebutting a defendant’s argument that they are not. This puts a plaintiff in the summary judgment stage at a disadvantage because he does not have the benefit of a cross-examination to rebut the defendant’s claim that he is not qualified.

If the plaintiff is able to make out a prima facie case and raise an inference of illegal discrimination, the burden then shifts to the defendant to prove a legitimate, nondiscriminatory reason. Professor Jeffrey Van Detta believes the only purpose of requiring a defendant to establish a legitimate, nondiscriminatory reason is to force the plaintiff to “tackle a whole new obstacle of tearing down the [legitimate, nondiscriminatory reason] even though it may not really be the employer’s motivation at all!” This shifts the burden in summary judgment from the defendant, the typical moving party, who must prove that there is “no genuine issue as to any material fact,” to the plaintiff, the typical nonmoving party, “to prove not only a prima facie case, but to effectively start over again by mounting evidence to attack an assertion—not a fact that will necessarily be proven at trial—that is the employer’s mere articulation.” In most summary judgment cases, the evidence is viewed in the light most favorable to the nonmoving party, but under the McDonnell Douglas analysis, the court “must effectively ignore the admonition to draw all inferences in the plaintiff’s (nonmoving party’s) favor.”

When the defendant articulates a legitimate, nondiscriminatory reason, which it must to avoid liability, the plaintiff then has the arduous task of proving that the case is pretext. A plaintiff seeking to prove pretext “must produce evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons.” The pretext inquiry “is necessarily a motive inquiry,” aiming to determine whether the employer honestly believed the legitimate, nondiscriminatory

154. Id. at 230-31.
155. Id. at 231.
156. For a discussion on the McDonnell Douglas burden-shifting scheme, see supra Part I.B.
157. Van Detta, supra note 11, at 101.
158. Id.
159. Id.
161. See Tymkovich, supra note 5, at 504 (quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)).
Forcing a plaintiff to prove pretext at the summary judgment stage requires the plaintiff to prove the ultimate issue of the case without the fact-finding benefits that a trial has to offer. The pretext step is “nothing more than a second injection of the inappropriate burden to prove intent.” The burden on the plaintiff then, is to produce circumstantial evidence to create a prima facie case, and then upon an employer’s articulation of a legitimate, nondiscriminatory reason, produce “more and different evidence of intent” to survive summary judgment and a directed verdict.

When the plaintiff produces the “more and different” evidence to prove pretext, there is a tendency for judges to pick apart the plaintiff’s evidence and consider each piece individually. It is the job of the fact-finder to look at all of the evidence and determine whether it is more likely than not that an impermissible factor motivated an adverse employment decision. When a judge looks at each piece of evidence individually, he effectively “undercuts the plaintiff’s case.” If all the evidence is not considered together, it is easy for the courts to look at each piece of evidence individually and determine that each piece, standing alone, does not sufficiently discredit the defendant’s legitimate, nondiscriminatory reason. In doing so, the courts “have improperly drawn inferences against the plaintiff on the question of whether the plaintiff created a genuine issue of material fact as to the veracity of the [legitimate, nondiscriminatory reason].” The burden on the plaintiffs then is not only to raise a genuine issue of any material fact, the standard Rule 56 requirement, “but to do so ‘with great specificity’ targeted precisely at the factual basis of the [legitimate, nondiscriminatory reason].”

Under Rule 56, a moving party must show that there is “no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law” to have his motion granted.

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162. Id. at 504.
163. Van Detta, supra note 11, at 102.
164. Id.
165. Id. at 104; see also McGinley, supra note 1, at 233-34.
166. McGinley, supra note 1, at 233.
167. Id.
168. Van Detta, supra note 11, at 105.
169. Id.
170. Id.
171. FED. R. CIV. P. 56.
discrimination, the proper Rule 56 inquiry is "whether the defendant has demonstrated that there are insufficient facts from which a jury could reasonably conclude that the defendant discriminated against the plaintiff." Instead, many post-Celotex courts have shifted the burden from the defendant to the plaintiff to prove at the summary judgment stage that he was discriminated against. The plaintiff then bears the ultimate burden of proving illegal discrimination at summary judgment instead.

The role of the McDonnell Douglas standard, especially post-Celotex, has been one of a gatekeeper. Rule 56 was intended only to kick out cases when there is "no genuine issue as to any material fact." Under the McDonnell Douglas analysis, the plaintiff must successfully navigate challenges at every step of the analysis before dealing with the largest hurdle: proving pretext. Proving pretext is necessarily an inquiry into motive. An inquiry of motive should not be done at the summary judgment stage because "an employer's true motivations are particularly difficult to ascertain." This is because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." To uncover an employer's true motivations requires factual determinations that are typically "unsuitable for disposition at the summary judgment stage."

The proper question at summary judgment, as Professor Ann McGinley has pointed out, is "whether the defendant has demonstrated that there are insufficient facts from which a jury could reasonably conclude that the defendant discriminated against the plaintiff." Courts that have required plaintiffs to prove the ultimate issue at the summary judgment proceeding have foisted a higher burden on plaintiffs than Rule 56 mandates. The plaintiff retains the ultimate burden of proving that illegal discrimination occurred, but that burden is meant to be proved at trial and not at the summary judgment stage. Both Baxter and

172. McGinley, supra note 1, at 241.
173. Id. at 241-42.
174. Id.
175. FED. R. CIV. P. 56.
179. Id. (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).
180. McGinley, supra note 1, at 241.
181. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1983) ("[T]he plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination.").
McDonnell Douglas run roughshod over Rule 56, impermissibly tilting the balance towards plaintiffs and employers, respectively, without balancing the rights of both plaintiffs and employers, which is the intent behind Rule 56.

However, there are two main arguments for why McDonnell Douglas does not violate Rule 56. The first argument rests on the assumption that McDonnell Douglas is the appropriate standard because it has been the law since 1972. This argument does not address the issue, but instead posits that McDonnell Douglas is valid merely because it has not been overruled. The second and stronger argument is based on the belief that McDonnell Douglas does not create a heightened burden for the plaintiff. And if the plaintiff is unable to prove pretext at summary judgment, he should not be entitled to have his case sent to the jury. This argument misses the point. The question at the summary judgment stage is whether there is any genuine issue of material fact. It is not proper for the plaintiff to be forced to meet his ultimate burden at summary judgment. Because McDonnell Douglas forces the plaintiff to rebut the defendant’s legitimate, nondiscriminatory reason for taking an adverse employment action with evidence of pretext, the plaintiff must meet its ultimate burden. That is, a plaintiff must not only prove that a genuine issue of fact exists, but he also must prove the intentional discrimination at the summary judgment stage. Rule 56 does not require the heightened burden that McDonnell Douglas places on summary judgment.

When McDonnell Douglas is applied at summary judgment it negatively affects plaintiffs’ rights. There are three distinct groups of circuit courts that follow either McDonnell Douglas or a variation of McDonnell Douglas when deciding summary judgment motions.182 For clarity, this Note will refer to the three different groups as the McDonnell Douglas Group, the Modified McDonnell Douglas Group, and McDonnell Douglas or Motivating Factor Group. Only one of these standards, McDonnell Douglas or Motivating Factor Group, is faithful and consistent with Rule 56.

2. Two McDonnell Douglas Groups Violate Rule 56

This Note argues that the McDonnell Douglas and Modified McDonnell Douglas Groups’ standards are unfaithful to Rule 56 because they force plaintiffs to proceed completely or at least partially under the McDonnell Douglas rubric. The McDonnell Douglas or Motivating Factor

182. See infra Part III.B.2.
Group standard is faithful and consistent with Rule 56, even though a plaintiff may use the *McDonnell Douglas* standard, because he also has the option of proceeding under the motivating factor standard. The standard used by the *McDonnell Douglas* or Motivating Factor Group should be the preferred test for summary judgment in mixed-motive employment discrimination cases.

The Eighth and Eleventh Circuits comprise the *McDonnell Douglas* Group, and they have concluded that *Desert Palace* has not changed the appropriate standard for summary judgment in mixed-motive cases. In *Griffith v. City of Des Moines*, the Eighth Circuit held that a plaintiff can survive summary judgment in one of two ways. First, a plaintiff can show proof of “direct evidence of discrimination.” If a plaintiff is able to produce direct evidence, which creates an inference of illegal discrimination, he is able to survive a defendant’s motion for summary judgment. Alternatively, if the plaintiff is unable to produce direct evidence and create an inference of illegal discrimination, he must attempt to create that inference through the tripartite *McDonnell Douglas* burden-shifting analysis.

The Fifth Circuit is the only circuit in the Modified *McDonnell Douglas* Group. In reaction to *Desert Palace*, the Fifth Circuit has modified the traditional *McDonnell Douglas/Burdine* analysis. This modified standard approach starts the same as the traditional *McDonnell Douglas* analysis.

183. *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (“[W]e conclude that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions.”).

184. *Cooper v. S. Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004). The court was reluctant to hold that *Desert Palace* overruled *McDonnell Douglas* because *McDonnell Douglas* was never mentioned in the *Desert Palace* opinion. *Id.*

185. *Griffith*, 387 F.3d at 736.

186. *Id.* Evidence is direct when it “show[s] a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated” the employer in making an adverse employment decision. *Id.* (quoting *Thomas v. First Nat’l Bank of Wynne*, 111 F.3d 64, 66, (8th Cir. 1997)). Direct evidence “is not the converse of circumstantial evidence” but refers to the “causal strength of the proof.” *Id.*

187. *Id.* (“A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer’s adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury.”).

188. *Id.*

189. *See Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004). This new standard was created “because the direct evidence requirement has been removed from mixed-motive cases, it is now harder to draw a distinction between *McDonnell Douglas* and mixed-motive cases.” *Id.* at 310 (quoting *Louis v. E. Baton Rouge Parish Sch. Bd.*, 303 F. Supp. 2d 799, 803 (M.D. La. 2003)).
Douglas analysis. First, a plaintiff must establish a prima facie case of discrimination and create an inference of illegal discrimination. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for making an adverse employment decision. Once the defendant rebuts the inference of illegal discrimination, the burden shifts back to the plaintiff to produce 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)." If a plaintiff is able to show that his protected characteristic was a motivating factor in the employer’s adverse employment decision, the employer must prove that it would have made the same decision regardless of the discriminatory factor. The Modified McDonnell Douglas Group standard represents a merging of McDonnell Douglas and the Price Waterhouse approach to proving discrimination.

The McDonnell Douglas or Motivating Factor Group is a middle-of-the-road approach. In Diamond v. Colonial Life & Accident Insurance Co., the Fourth Circuit held that a plaintiff may survive summary judgment by using the traditional McDonnell Douglas burden-shifting analysis. Alternatively, a plaintiff can “present[] direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer’s adverse employment decision.” Under 42 U.S.C. § 2000e-2(m), the impermissible factor does not have to be the sole factor, but it must have been a

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190. Id. at 312.
191. Id.
193. Id.
194. The D.C. and Ninth Circuits are also part of McDonnell Douglas Group Three. See Fogg v. Gonzales, 492 F.3d 447, 451 & n* (D.C. Cir. 2007) (holding that “a plaintiff can establish an unlawful employment practice by showing that discrimination or retaliation played a motivating part or was a substantial factor in the employment decision” or by using the McDonnell Douglas analysis) (internal quotations omitted); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004) (holding that a plaintiff “may proceed by using the McDonnell Douglas framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated” the employer).
195. 416 F.3d 310, 318 (4th Cir. 2005).
196. Id.
motivating factor. If so, the plaintiff has a claim for an unlawful employment practice.

The McDonnell Douglas or Motivating Factor Group, which allows the plaintiff to use either the McDonnell Douglas or the motivating factor standard, is the most faithful to Rule 56. By proceeding under the motivating factor standard, a plaintiff must “present[] direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor, such as race, motivated the employer’s adverse employment decision.” This tracks the language of Rule 56, which says that a motion for summary judgment will be granted when there is “no genuine issue as to any material fact.” Unlike proceeding under the Baxter standard, employers will be able to dismiss plaintiffs that are unable to raise a genuine issue of material fact and will be forced to defend against only those who are capable of meeting such a burden. Unlike under the McDonnell Douglas Group standard, plaintiffs will be able to survive summary judgment when they can raise a genuine issue of material fact and will not be dismissed because they are unable to meet their ultimate burden at summary judgment. Because of this, the McDonnell Douglas or Motivating Factor Group standard is the most faithful to Rule 56.


The McDonnell Douglas or Motivating Factor Group standard is not only a superior summary judgment standard to its alternatives because it is faithful to and consistent with Rule 56, but also because the standard offers the plaintiff the opportunity to use the McDonnell Douglas method. Although McDonnell Douglas has been criticized throughout this Note, it is necessary to briefly defend McDonnell Douglas because it has a very useful purpose: as a method for the plaintiff to prove discrimination through circumstantial evidence. Professor Martin Katz argues that McDonnell Douglas should be a nonmandatory tool, and he believes that the problems with McDonnell Douglas have resulted because McDonnell Douglas has been treated as mandatory. There are only a few ways for a

197. Id.
198. Id.
199. Id.
200. FED. R. CIV. P. 56.
201. Katz, supra note 48, at 144.
202. See generally id. at 110-44. Katz argues that McDonnell Douglas “should never be required.” Id. at 116. According to Professor Katz, McDonnell Douglas should only be
plaintiff to prove discrimination and all are fraught with their own problems. A plaintiff can prove discrimination through a defendant’s admission, which is extremely rare, or through statements that prove a tendency to discriminate, which has become increasingly infrequent because employers have “become more litigation-seasoned.” Also, a plaintiff can attempt to prove discrimination through the use of statistics, but the use of statistics is limited because “this type of proof requires a large number of decisions by the decisionmaker in order to be useful—which is unlikely in most workplaces.”

The use of comparative evidence has also been used to prove discrimination. If a black employee was fired when a white employee was only reprimanded for the same conduct, that evidence can be used to show that the employer has a tendency to discriminate. But because two individuals’ situations are rarely similar, this type of evidence is easily distinguishable.

McDonnell Douglas provides a plaintiff the opportunity to present pretext evidence to the court. Unlike other types of evidence offered to show discrimination, McDonnell Douglas pretext evidence does not depend on the fortuity of an admission, an overheard statement, or differently treated coworkers as comparators. It does not depend on there being a large number of decisions by the decisionmaker, as statistical evidence does. And it is relatively inexpensive to put on, as it requires little discovery and no experts.

Likely, McDonnell Douglas pretext evidence is the only evidence available to a plaintiff. Many plaintiffs would be unable to prove discrimination if the McDonnell Douglas framework was not available to prove pretext. McDonnell Douglas works very well to deduce evidence of illegal discrimination for some plaintiffs, and it should be a tool available to plaintiffs who cannot otherwise create any inference of illegal discrimination, but it is not designed for every plaintiff pleading an

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203. Id. at 182.
204. Id.
205. Id.
206. Id.
207. Id. at 182-83.
210. Id.
211. Id.
employment discrimination case.

The *McDonnell Douglas* or Motivating Factor Group standard for summary judgment in mixed-motive discrimination cases is superior to the other standards because it is the most faithful to Rule 56. This standard allows a plaintiff to survive summary judgment by showing either that an illegal reason was a motivating factor or by using the *McDonnell Douglas* analysis to prove pretext, and it permits the plaintiff to take full advantage of all available methods to prove discrimination while remaining faithful to employers' rights under Rule 56 to seek summary judgment for a meritless claim.

**CONCLUSION**

The current standards of summary judgment that are used in mixed-motive employment discrimination cases are unfaithful to Rule 56. The new standard established by the Sixth Circuit's decision in *White v. Baxter Healthcare Corp.* impermissibly allows claims to survive summary judgment that should be dismissed under Rule 56.\textsuperscript{212} Beyond the Sixth Circuit standard, the remaining courts of appeals are broken into three groups that apply a version of *McDonnell Douglas* at the summary judgment stage. This is problematic because it forces the plaintiff to prove its ultimate burden at the summary judgment stage. The current four-way circuit split should be rectified to create some uniformity throughout the federal courts of appeals. The standard applied by the *McDonnell Douglas* or Motivating Factor Group is the most faithful to Rule 56 because a court will grant summary judgment only when there is "no genuine issue as to any material fact."\textsuperscript{213} That is the appropriate standard under Rule 56. Requiring the plaintiff to prove more, or the defendant to prove less, at summary judgment violates Rule 56.

*Christopher J. Emden*

\textsuperscript{212} See supra Part III.A.

\textsuperscript{213} FED. R. CIV. P. 56.

\* J.D. Candidate 2010, William & Mary School of Law; B.A. 2006, New York University. I would like to extend my sincerest thanks to Liz for her love and support while I wrote this Note. I would also like to thank my mother, Karen (J.D. 1976, William & Mary School of Law), for making all things possible. This Note is dedicated to my grandfather, John A. Gallucci, who is the best example of a Citizen Lawyer that I know.