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## Subverting Rule 56? McDonnell Douglas, *White v. Baxter Healthcare Corp.*, and the Mess of Summary Judgement in Mixed-Motive Cases

Christopher J. Emden

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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

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## 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

The state of summary judgment jurisprudence in mixed-motive employment discrimination cases is best described as fractured.<sup>4</sup> 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.<sup>5</sup> The rigidity of the *McDonnell Douglas* framework has caused many plaintiffs to fall short of meeting their burden at summary judgment.<sup>6</sup> Current summary judgment standards impose burdens not mandated by, and therefore, in violation of Rule 56<sup>7</sup> of the Federal Rules of Civil Procedure (FRCP).<sup>8</sup> As a result, plaintiffs have been forced to meet a heightened burden because of the use of *McDonnell*

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1. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 208-09 (1993).

2. 411 U.S. 792 (1973); McGinley, *supra* note 1, at 212-13.

3. CHARLES W. WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 237 (1985).

4. *See infra* Part III.B.2.

5. *See, e.g., White v. Baxter Healthcare Corp.*, 533 F.3d 381, 388-89 (6th Cir. 2008); *see also Timothy M. Tymkovich, The Problem with Pretext*, 85 DENV. U. L. REV. 503, 526 (2008).

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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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

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9. 533 F.3d 381 (6th Cir. 2008).

10. See *infra* Part III.A.

11. See, e.g., Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 671 (1998) (arguing that "[*McDonnell Douglas*] does not address or help resolve the question of whether the plaintiff has met her or his burden of proving that the adverse employment decision was motivated...by an 'impermissible reason'"); Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas Is Not Justified By Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 745-46 (2006) ("McDonnell Douglas has proven unsatisfactory in analyzing discrimination claims."); Jeffrey A. Van Detta, "Le roi est mort; vive le roi!": *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation on Every Title VII Case After Desert Palace, Inc. v. Costa Into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003) ("*McDonnell Douglas v. Green* is dead.... And this report of its death is neither 'greatly exaggerated' nor a loss deserving of our mourning.").

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.<sup>12</sup> 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."<sup>13</sup> One of the goals of Title VII of the 1964 Civil Rights Act is to help bring that better life to minorities.<sup>14</sup> Under Title VII, employers may not discriminate on the basis of an individual's "race, color, religion, sex or national origin."<sup>15</sup>

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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").

14. The Dirksen Congressional Center, Major Features of the Civil Rights Act of 1964, [http://www.congresslink.org/print\\_basics\\_histmats\\_civilrights64text.htm](http://www.congresslink.org/print_basics_histmats_civilrights64text.htm).

15. 42 U.S.C. § 2000e-2(a)(1) (2006). Subsections 2000e-2(a)(1) and (a)(2) state in full that:

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, i[n] efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”<sup>16</sup> Title VII thus “tolerates no racial discrimination, subtle or otherwise.”<sup>17</sup>

### 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.”<sup>18</sup> 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.”<sup>19</sup> The tripartite burden-shifting scheme was instituted to “make it easier for an employee to prove an employer’s discriminatory state of mind.”<sup>20</sup>

The *McDonnell Douglas* burden-shifting test is simple on its face. First, an employee must establish a prima facie case of employment discrimination.<sup>21</sup> 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.<sup>22</sup>

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his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

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

17. *Id.*

18. *Id.* at 800.

19. *Id.* at 801.

20. Ezra S. Greenberg, Note, *Stray Remarks and Mixed-Motive Cases After Desert Palace v. Costa: A Proximity Test for Determining Minimal Causation*, 29 CARDOZO L. REV. 1795, 1800 (2008).

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

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.”<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

Ten years later in *Texas Department of Community Affairs v. Burdine*,<sup>26</sup> 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.”<sup>27</sup> 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.<sup>28</sup> The ultimate burden “remains at all times with the plaintiff” to prove that the defendant illegally discriminated against him.<sup>29</sup> 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.”<sup>30</sup> 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.<sup>31</sup> 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.

25. Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas’s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 519 (2008).

26. 450 U.S. 248 (1983).

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.

28. *Burdine*, 450 U.S. at 253.

29. *Id.*

30. *Id.* at 254.

31. *Id.*

persuasion that he is a victim of discrimination.<sup>32</sup>

*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.<sup>33</sup>

### 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*.<sup>34</sup> Ann Hopkins was a manager at the accounting firm Price Waterhouse and a candidate for partnership.<sup>35</sup> Hopkins was the only female out of 88 individuals being reviewed for partnership.<sup>36</sup> Price Waterhouse solicited its partners for their input on whether a candidate should be admitted into partnership.<sup>37</sup> 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."<sup>38</sup> Accompanying these legitimate concerns about Hopkins were negative comments stemming from the fact that Hopkins was a female.<sup>39</sup> 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."<sup>40</sup>

Because Hopkins's evaluations were filled with both legitimate and illegitimate criticisms, the traditional analysis under *McDonnell Douglas*

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32. *Id.* at 256.

33. *See supra* notes 26-32.

34. 490 U.S. 228 (1989).

35. *Id.* at 233.

36. *Id.*

37. *Id.* Candidates could be either admitted into partnership, have their candidacy placed on hold, or have their candidacy rejected. *Id.*

38. *Id.* at 234-35. The Court noted that "[l]ong before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members." *Id.* at 234. Apparently, Hopkins was "aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1113 (1985)).

39. *Id.* at 235.

40. *Id.*

was inappropriate.<sup>41</sup> In “pretext cases” or single motive cases, the question is “whether the unlawful consideration or legitimate consideration was actually the basis for the action.”<sup>42</sup> In mixed-motive cases, such as *Price Waterhouse*, both legitimate and illegitimate considerations are actually the basis for the adverse employment action.<sup>43</sup> 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.<sup>44</sup> 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.”<sup>45</sup>

Justice O’Connor’s concurrence in *Price Waterhouse* has been “treated as the operative holding of the Court.”<sup>46</sup> O’Connor argued that a “disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.”<sup>47</sup> This heightened evidentiary requirement “introduced the concept of a mandatory *McDonnell Douglas*.”<sup>48</sup> O’Connor worried that most plaintiffs would pick the *Price Waterhouse* framework over the *McDonnell Douglas* framework.<sup>49</sup> 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.<sup>50</sup>

There are several differences between the *McDonnell Douglas* pretext framework and the *Price Waterhouse* mixed-motive framework.<sup>51</sup> 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.”).

42. Cassandra A. Giles, Note, *Shaking Price Waterhouse: Suggestions for a More Workable Approach to Title VII Mixed Motive Disparate Treatment Discrimination Claims*, 37 IND. L. REV. 815, 819 (2004).

43. *Id.*

44. *Price Waterhouse*, 490 U.S. at 244–45.

45. *Id.* at 250.

46. Prenkert, *supra* note 25, at 532.

47. *Price Waterhouse*, 490 U.S. at 276.

48. Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 118 (2007).

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.<sup>52</sup> 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.<sup>53</sup>

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.”<sup>54</sup>

## 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.<sup>55</sup> Congress, partly in response to *Price Waterhouse*, passed the Civil Rights Act of 1991.<sup>56</sup> The Act amended Title VII to add 42 U.S.C. § 2000e-2(m), codifying the motivating factor standard from *Price Waterhouse*.<sup>57</sup> 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.”<sup>58</sup>

Under *Price Waterhouse*, the employer could completely avoid liability.<sup>59</sup> Now, the employer can only reduce the scope of remedies available to a successful plaintiff and not avoid liability.<sup>60</sup> 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

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52. *Id.*

53. *Id.*

54. *Id.*

55. *See supra* Part I.C.1.

56. Giles, *supra* note 42, at 820-21.

57. 42 U.S.C. § 2000e-2(m) (2006).

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.”<sup>61</sup>

*Price Waterhouse*’s mixed-motive standard created a second way to evaluate employment discrimination cases.<sup>62</sup> 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.”<sup>63</sup> The Supreme Court would answer that question in 2003 with its decision in *Desert Palace, Inc. v. Costa*.<sup>64</sup>

#### 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.<sup>65</sup> The Court’s deceptively simple decision in *Desert Palace* sent lawyers, judges, and professors scrambling to determine whether *McDonnell Douglas* was alive<sup>66</sup> or dead.<sup>67</sup> One

61. *Id.*

62. See *supra* Parts I.B and I.C.1 for an explanation of the *McDonnell Douglas* burden-shifting analysis and the mixed-motive analysis under *Price Waterhouse*.

63. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).

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”).

67. See William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 Hous. L. REV. 1549, 1562 (2005) [hereinafter Corbett, *An Allegory of the Cave*] (“From what the Court said, it necessarily follows that *McDonnell Douglas* is gone.”); William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200 (2003) (“Make no mistake about it, for Title VII claims at least, the old *McDonnell Douglas* proof structure is as dead as a doornail.”); Van Detta, *supra* note 11, at 72 (“*McDonnell Douglas v. Green* is dead. With apologies to Dickens, it is ‘dead as a doornail’—along with its traveling companion, *Texas Department of Community Affairs v. Burdine*. And this report is neither ‘greatly exaggerated’ nor a loss deserving of our mourning.”).

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.”<sup>68</sup>

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.<sup>69</sup> 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.”<sup>70</sup> 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.”<sup>71</sup> Congress defined the word “demonstrates” as “meets the burdens of production and persuasion.”<sup>72</sup> 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.”<sup>73</sup>

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.<sup>74</sup> The Supreme Court in *Raytheon Co. v. Hernandez* dispelled the myth that *McDonnell Douglas* had been toppled by *Desert Palace*.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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68. Corbett, *An Allegory of the Cave*, *supra* note 67, at 1550.

69. *Desert Palace*, 539 U.S. at 101.

70. *Id.* at 98-99.

71. 42 U.S.C. § 2000e-2(m) (2006).

72. 42 U.S.C. § 2000e(m) (2006).

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.<sup>78</sup> 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.<sup>79</sup> *Price Waterhouse* created the mixed-motive case to rectify situations where an employer was motivated by permissible and impermissible factors.<sup>80</sup> 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."<sup>81</sup> 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.<sup>82</sup> 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.").

81. Sullivan, *supra* note 13, at 912.

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.”<sup>83</sup> 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.<sup>84</sup> 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.”<sup>85</sup>

In 1986, the Supreme Court’s rulings in three summary judgment cases, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>86</sup> *Anderson v. Liberty Lobby*,<sup>87</sup> and *Celotex v. Catrett*,<sup>88</sup> completely changed the landscape in employment discrimination summary judgment proceedings.<sup>89</sup> This trilogy of summary judgment proceedings has made it “easier for defendants to obtain summary judgment in cases of at least arguable discrimination.”<sup>90</sup> 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.”<sup>91</sup>

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.<sup>92</sup> The Court ruled in the affirmative, saying that a “judge must view the evidence presented through the prism of the substantive evidentiary burden.”<sup>93</sup> Therefore, in employment discrimination cases, the judge will undoubtedly use the *McDonnell Douglas* framework to make summary judgment determinations.<sup>94</sup> The

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83. *Id.*

84. William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 451 (1991).

85. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991).

86. 475 U.S. 574 (1986).

87. 477 U.S. 242 (1986).

88. 477 U.S. 317 (1986).

89. McGinley, *supra* note 1, at 206 (1993).

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.”<sup>95</sup> Courts now must evaluate a party’s evidence and determine its probative value at summary judgment.<sup>96</sup> 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.”<sup>97</sup>

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.”<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup>

The decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>101</sup> suggests that “issues such as intent and motive may be appropriate for determination by a motion for summary judgment.”<sup>102</sup> Read

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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.”).

95. Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL’Y J. 37, 47 (2000).

96. *Id.*

97. *Id.*

98. *Celotex Corp. v. Catrett*, 447 U.S. 317, 325 (1986) (emphasis in original).

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.

101. 475 U.S. 574 (1986).

102. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment*

broadly, *Matsushita* instructs trial judges to “weigh the evidence and to decide which inference was more reasonable in light of the evidence.”<sup>103</sup> This role is typically reserved for the jury.<sup>104</sup> Like *Anderson*, *Matshushita* “urged trial judges to evaluate the probative value of evidence at the summary judgment stage.”<sup>105</sup> 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.<sup>106</sup>

The trilogy of summary judgment cases decided in 1986 have made obtaining summary judgment much easier.<sup>107</sup> Subsequently, courts have taken these decisions and applied them in employment discrimination cases with greater frequency.<sup>108</sup> 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.<sup>109</sup> Five circuits have made no decision or have refrained from deciding the appropriate standard for summary judgment in a mixed-motive case.<sup>110</sup> Summary judgment in mixed-motive

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Cases, 34 WAKE FOREST L. REV. 71, 93 (1999).

103. McGinley, *supra* note 1, at 227.

104. *Id.*

105. Ware, *supra* note 95, at 48.

106. *Id.* at 48-49.

107. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1041-44 (2003) (“On a practical level, the three decisions collectively forge a new, stronger role for [summary judgment].”).

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.<sup>111</sup>

As discussed above,<sup>112</sup> 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.”<sup>113</sup> 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.<sup>114</sup> 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”<sup>115</sup> 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.<sup>116</sup>

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.”<sup>117</sup> The

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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.”<sup>118</sup> 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.”<sup>119</sup>

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.”<sup>120</sup> The *McDonnell Douglas* analysis is effective for single-motive cases because it effectively “smok[es] out the single ultimate reason for the adverse employment decision.”<sup>121</sup> A plaintiff in a mixed-motive case needs only to show that the defendant impermissibly 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*.”<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup> 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

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(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.*

judgment in favor of the moving party on the basis of undisputed facts.<sup>125</sup>

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.’”<sup>126</sup> 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.”<sup>127</sup> 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.<sup>128</sup>

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.”<sup>129</sup> 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.<sup>130</sup> 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.”<sup>131</sup> 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.”<sup>132</sup> The *Baxter* court has circumvented Rule 56 with its lower standard by mandating that any evidence will create a genuine issue of material fact.

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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 inquiries. *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))).

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

127. *Id.* (citing *Peacock v. DuVal*, 694 F.2d 644, 646 (9th Cir. 1982)).

128. *Id.*

129. FED. R. CIV. P. 56(c)(2).

130. *Baxter*, 533 F.3d at 400.

131. *Id.*

132. *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.”<sup>133</sup> The *Celotex* line of cases departed from that standard to a test of “whether a reasonable jury could find for the nonmovant.”<sup>134</sup> 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.”<sup>135</sup> If it cannot, “a trial would be pointless.”<sup>136</sup> *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.<sup>137</sup>

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.<sup>138</sup> *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.<sup>139</sup> 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,

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133. Schwarzer et al., *supra* note 84, at 477.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See supra* note 130.

138. Beiner, *supra* note 102, at 96 (quoting *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997)); *see also* FED. R. CIV. P. 56.

139. *Compare* FED. R. CIV. P. 56 (“The Judgment sought should be rendered if ... there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law.”), *with* *White v. Baxter Healthcare Corp.*, 433 F.3d 381, 400 (6th Cir. 2008) (“This burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff’s claim.”).

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.<sup>140</sup> *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.<sup>141</sup> Summary judgment is meant to "strip away the underbrush and lay bare the heart of the controversy between the parties."<sup>142</sup> 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.<sup>143</sup>

Rule 56 is undoubtedly a "powerful docket-clearing device essential to overburdened courts."<sup>144</sup> 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.<sup>145</sup>

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

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140. See *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991).

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.”<sup>146</sup> 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.”<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> Put bluntly, “plaintiffs are losing almost all of the cases they file.”<sup>150</sup>

Plaintiffs are losing employment discrimination cases because of the problems of proving pretext under the third prong of the *McDonnell Douglas* analysis.<sup>151</sup> As discussed above,<sup>152</sup> 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.”<sup>153</sup> Some courts have “imposed a higher burden on plaintiffs” to prove that they are qualified by

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146. *Id.*

147. *Id.*

148. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1983).

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.<sup>154</sup> 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.<sup>155</sup>

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.<sup>156</sup> 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!"<sup>157</sup> 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."<sup>158</sup> 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."<sup>159</sup>

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.<sup>160</sup> 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."<sup>161</sup> The pretext inquiry "is necessarily a motive inquiry," aiming to determine whether the employer honestly believed the legitimate, nondiscriminatory

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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.*

160. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

161. See Tymkovich, *supra* note 5, at 504 (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)).

reason it articulated and whether it truly acted upon that reason or upon an impermissible factor.<sup>162</sup>

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.”<sup>163</sup> 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.<sup>164</sup>

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.<sup>165</sup> 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.<sup>166</sup> When a judge looks at each piece of evidence individually, he effectively “undercuts the plaintiff’s case.”<sup>167</sup> 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.<sup>168</sup> 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].”<sup>169</sup> 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].”<sup>170</sup>

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.<sup>171</sup> In employment

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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.”<sup>172</sup> 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.<sup>173</sup> The plaintiff then bears the ultimate burden of proving illegal discrimination at summary judgment instead.<sup>174</sup>

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.”<sup>175</sup> 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.<sup>176</sup> 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.”<sup>177</sup> This is because “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”<sup>178</sup> To uncover an employer’s true motivations requires factual determinations that are typically “unsuitable for disposition at the summary judgment stage.”<sup>179</sup>

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.”<sup>180</sup> 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.<sup>181</sup> Both *Baxter* and

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172. McGinley, *supra* note 1, at 241.

173. *Id.* at 241-42.

174. *Id.*

175. FED. R. CIV. P. 56.

176. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

177. *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004).

178. *Id.* (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

179. *Id.*

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.<sup>182</sup> 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

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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<sup>183</sup> and Eleventh<sup>184</sup> 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.<sup>185</sup> First, a plaintiff can show proof of “direct evidence of discrimination.”<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup>

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.<sup>189</sup> This modified standard approach starts the same as the traditional *McDonnell*

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.<sup>190</sup> The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for making an adverse employment decision.<sup>191</sup> 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).”<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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.”<sup>196</sup> 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.*

192. *Id.* (quoting *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)).

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.<sup>197</sup> If so, the plaintiff has a claim for an unlawful employment practice.<sup>198</sup>

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.”<sup>199</sup> 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.”<sup>200</sup> 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.

### 3. *A Necessary Defense of McDonnell Douglas.*

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.<sup>201</sup> 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.<sup>202</sup> There are only a few ways for a

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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.<sup>203</sup> 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."<sup>204</sup> 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."<sup>205</sup> The use of comparative evidence has also been used to prove discrimination.<sup>206</sup> 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.<sup>207</sup>

*McDonnell Douglas* provides a plaintiff the opportunity to present pretext evidence to the court.<sup>208</sup> 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.<sup>209</sup>

Likely, *McDonnell Douglas* pretext evidence is the only evidence available to a plaintiff.<sup>210</sup> Many plaintiffs would be unable to prove discrimination if the *McDonnell Douglas* framework was not available to prove pretext.<sup>211</sup> *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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mandatory if it proved "but-for" causation. *Id.* at 120. Instead, it proves only "motivating factor" causation. *Id.* at 136.

203. *Id.* at 182.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 182-83.

208. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

209. Katz, *supra* note 48, at 183.

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.<sup>212</sup> 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."<sup>213</sup> 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\*

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212. See *supra* Part III.A.

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.