

1-1-2002

Smoking Guns, Stray Remarks, and Not Much in between: A Critical Analysis of the Federal Circuits' Inconsistent Application of the Direct Evidence Requirement in Mixed-Motive Employment Discrimination Cases

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Recommended Citation

7 Suffolk J. Trial & App. Advoc. 181 (2002)

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SMOKING GUNS, STRAY REMARKS, AND NOT MUCH IN BETWEEN: A CRITICAL ANALYSIS OF THE FEDERAL CIRCUITS' INCONSISTENT APPLICATION OF THE DIRECT EVIDENCE REQUIREMENT IN MIXED-MOTIVE EMPLOYMENT DISCRIMINATION CASES

I. INTRODUCTION

Upon resuming work on a construction project that had previously been suspended, Costa Brothers Masonry, Inc. chose not to rehire all of the workers it had laid off during the suspension.¹ All dark-skinned Cape Verdean workers, including Henry Fernandes, were among those that the company chose not to rehire.² Fernandes and his co-workers filed suit against Costa Brothers, claiming that the company refused to rehire them because of their nationality and skin color.³ The complaint alleged that only white and light-skinned Portuguese workers were rehired, while dark skinned Cape Verdeans were not.⁴ The plaintiffs further asserted that in refusing to rehire them, the employer stated: "I don't need minorities, I don't need no residents on this job," and "I don't have to hire you locals or

¹ Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 578 (1st Cir. 1999). Costa Brothers Masonry, Inc. was hired as a subcontractor for a publicly-funded construction project. *Id.* at 577. Because the project was publicly-funded, Costa Brothers had to conform to Equal Employment Opportunity standards in hiring its workers. *Id.* At the start of work, Costa Brothers hired employees of multiple nationalities and color. *Id.* at 578. Costa Brothers later suspended the project and laid off its workers due to a heating problem and winter weather conditions. *Id.* Subsequent to resuming work on the project, Costa Brothers called 18 laid-off workers back to work and hired 10 new workers. *Id.* All twenty-eight of these workers were white. *Id.*

² *Id.*

³ *Id.* at 577-79. Fernandes and his co-workers repeatedly returned to the construction site to request work. *Id.* at 578-79. Fernandes and his co-workers observed that no dark-skinned Cape Verdean men had returned to work, that none were newly hired, and only white workers and light-skinned Portuguese workers were on the job. *Id.* at 578-79.

⁴ *Id.* at 579. When Fernandes asked why he and his fellow Cape Verdean co-workers were not rehired, his former employer replied that the company "had only hired a few minorities because of local pressure." *Id.* at 578-59. Fernandes was eventually rehired after putting considerable pressure on Costa Brothers, but was fired again after being constantly harassed by his supervisor. *Id.* at 579.

Cape Verdean people.”⁵ Despite this strong evidence supporting a claim of employment discrimination, both the District Court and the Court of Appeals for the First Circuit found that there was insufficient evidence to warrant a finding for the plaintiffs.⁶ Holding for the defendant, both courts found that the plaintiffs could not prevail on their mixed-motive claim of employment discrimination because they did not produce direct evidence of the alleged discrimination.⁷

The plaintiffs in *Fernandes v. Costa Bros. Masonry, Inc.*⁸ stand among countless employment discrimination plaintiffs who have been denied relief because of the “direct evidence” requirement.⁹ This infamous concept, first developed by Justice O’Connor’s seminal concurrence in *Price Waterhouse v. Hopkins*,¹⁰ has not only proved to be a frustrating

⁵ *Id.* at 578-79.

⁶ *Fernandes*, 199 F.3d at 579, 583. The District Court, undertaking only a pretext analysis, did not consider the mixed-motive framework when granting the defendant’s motion for summary judgment. *Id.* at 579. The Court of Appeals for the First Circuit undertook both the mixed-motive and pretext analysis. *Id.* at 583. The court found that the evidence presented by the plaintiffs did not rise to direct evidence and, therefore, did not open the door to the mixed-motive framework. *Id.* The court did find, however, that sufficient evidence existed to enable the plaintiffs to proceed on their claim under the pretext analysis. *Id.* at 583. The court remanded for further proceedings and noted that it is possible that the plaintiffs could adduce additional evidence at trial which would allow the district court to conclude that a mixed-motive jury instruction is appropriate. *Id.*

⁷ *Id.* at 583-84 (finding biased statements made by employer did not directly reflect alleged animus).

⁸ 199 F.3d 572 (1st Cir. 1999).

⁹ See *Fernandes* 199 F.3d at 583 (finding no direct evidence); *Taylor v. Va. Union Univ.*, 193 F.3d 219 (4th Cir. 1999) (finding employer’s statement did not bear on contested employment decision, therefore did not constitute direct evidence); *Haas v. ADVO Systems, Inc.*, 168 F.3d 732 (5th Cir. 1999) (characterizing decisionmaker’s statements as indirect and inferential, therefore not direct evidence); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204 (10th Cir. 1999) (holding supervisor’s statements reflected personal bias, not direct evidence of discrimination); see also, *Carter v. Three Springs Resid. Treatment*, 132 F.3d 635 (11th Cir. 1998) (viewing decisionmaker’s statements as susceptible to more than one interpretation, therefore not constituting direct evidence); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997) (finding remarks by employees outside chain of decisionmakers, therefore not direct evidence); *Raskin v. Wyatt Co.*, 125 F.3d 55 (2d Cir. 1997) (holding plaintiff did not meet burden of showing protected classification played part in decisionmaking process); see also, *Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116 (2d Cir. 1997) (finding evidence offered by plaintiff did not tie directly to discriminatory animus); *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413 (1st Cir. 1996) (concluding evidence supported District Court finding that employer would have eliminated employee absent discriminatory motive); *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86 (1st Cir. 1996) (finding statements made by decisionmaker constitute stray remarks, not linked to adverse employment decision); see also, *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995) (holding plaintiff’s statistical evidence does not merit mixed-motive jury instruction); *Jackson v. Harvard Univ.*, 900 F.2d 464 (1st Cir. 1990) (finding plaintiff did not present direct evidence, therefore loses on mixed-motive claim).

¹⁰ 490 U.S. 228 (1989).

barrier to compensation for plaintiffs legitimately suffering from discriminatory treatment in the employment setting, but has also caused conflict among the courts as well.¹¹ Plaintiffs often find it difficult to meet the burden of proof required by the direct evidence standard, and courts have found that defining the evidentiary burden is a complicated and challenging task.¹²

This Note examines the division that has developed among the federal circuits over defining and applying the direct evidence requirement.¹³ Focusing on claims involving individual disparate treatment in the employment setting, this Note begins with an analysis of the frameworks available to plaintiffs alleging that they have suffered from employment discrimination.¹⁴ Using a scheme developed by Judge Selya of the First Circuit in *Fernandes*, this Note will examine how the circuit split has arisen in the wake of Justice O'Connor's call for a direct evidence requirement in mixed-motive cases.¹⁵ Part II discusses the individual disparate treatment claim, the mixed-motive framework, and the development of the direct evidence requirement.¹⁶ Part III examines the three approaches used by the federal circuits to interpret and enforce the direct evidence requirement¹⁷ and shows that, after careful consideration of the tremendous impact the direct evidence requirement has on employment discrimination plaintiffs, the First Circuit has found that a more relaxed approach is necessary.¹⁸ Arguing that the First Circuit's approach is a model under which the Supreme Court should unify the courts, Part IV presents a critical analysis of the strictest interpretations of direct evidence

¹¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261-79 (1989) (O'Connor, J., concurring) (establishing direct evidence requirement in mixed-motive cases); see also, *Fernandes*, 199 F.3d 572, 581-82 (discussing circuit conflict, difficulty in defining direct evidence, and effect of requirement on plaintiff's case).

¹² See *Fernandes*, 199 F.3d at 581-83 (detailing conflict, describing problems resulting from requirement).

¹³ See *id.* (enumerating differing positions taken by each circuit).

¹⁴ See *id.* (describing different approaches to legal frameworks in employment discrimination cases); MICHAEL J. ZIMMER, CHARLES A. SULLIVAN, RICHARD F. RICHARDS & DEBORAH A. CALLOWAY, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (Aspen Publishers, Inc., 5th ed. 2000) [hereinafter *CASES AND MATERIALS*] (describing and explaining various legal frameworks applied to employment discrimination claims).

¹⁵ See *Fernandes*, 199 F.3d at 581-83 (analyzing circuit split); see also, *Price Waterhouse*, 490 U.S. at 261-79 (O'Connor, J., concurring) (establishing direct evidence requirement).

¹⁶ See generally *CASES AND MATERIALS*, *supra* note 14.

¹⁷ See *Fernandes*, 199 F.3d at 579-84 (elucidating circuit positions).

¹⁸ Compare *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000) (rejecting narrow definitions of direct evidence, favoring more measured approach), with *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413 (1st Cir. 1996) (defining direct evidence narrowly), and *Jackson v. Harvard Univ.*, 900 F.2d 464 (1st Cir. 1990) (adopting strictest definition of direct evidence).

and concludes that the First Circuit offers a correctly measured approach to a poorly developed evidentiary requirement.¹⁹

II. THE INDIVIDUAL DISPARATE TREATMENT CLAIM, THE MIXED MOTIVES FRAMEWORK, AND THE DEVELOPMENT OF JUSTICE O'CONNOR'S DIRECT EVIDENCE REQUIREMENT

In Title VII of the Civil Rights Act of 1964,²⁰ Congress established that it is unlawful for employers to discriminate against employees or prospective employees based on "such individual's race, color, religion, sex, or national origin."²¹ Since the establishment of Title VII, Congress has enacted other statutes to protect people from employment discrimination based on their age and disability status and to establish the rights of all citizens to "make and enforce contracts," including the employment contract.²² These statutes have, in turn, spawned a substantial amount of case law that has set specific guidelines for a plaintiff bringing an employment discrimination claim under federal law.²³ Each of the employment discrimination statutes has recognized one or more of the various forms in which discrimination manifests, including: individual disparate treatment, which involves treating an individual differently based on a protected characteristic; systemic disparate treatment, which involves treating a group of people differently based on a shared protected characteristic; and systemic disparate impact, which involves an employer's policy or actions that, though not discriminatory on their face, have a discriminatory impact on a group of people with a shared protected characteristic.²⁴ Accordingly, a plaintiff bringing forth an employment discrimination case faces different methods and burdens of proof according to the type of discrimination that s/he has suffered from.²⁵

¹⁹ See *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000) (using several factors to take more measured approach toward direct evidence requirement).

²⁰ 42 U.S.C. § 2000e to 2000e-17 (1981).

²¹ *Id.*

²² See 29 U.S.C.A. §§ 631-634 (West 1985) (codifying Age Discrimination in Employment Act); 42 U.S.C.A. § 1981 (West 1994) (codifying Civil War Reconstruction Statute); 42 U.S.C.A. §§ 12111-12117, §§12131-12134 (West 1993) (codifying Americans with Disabilities Act of 1990).

²³ See generally CASES AND MATERIALS, *supra* note 14.

²⁴ See generally *id.*

²⁵ See generally *id.*

A. Individual Disparate Treatment Under the McDonnell Douglas²⁶
Framework

By the early 1980's, the Supreme Court settled the burden of proof required in individual disparate treatment employment discrimination cases with a clear and concise burden-shifting process developed in *McDonnell Douglas Corporation v. Green*.²⁷ In *McDonnell Douglas*, the Court held that even without direct evidence of discrimination, such as facially discriminatory policies or statements, a plaintiff can prove through inference that an employer has set up "artificial, arbitrary, and unnecessary barriers to employment."²⁸ The federal circuits have been unified in applying this approach to cases brought before them involving individual disparate treatment employment discrimination.²⁹ In 1989, however, *McDonnell Douglas* ceased to be the only approach to such cases when the Supreme Court delivered its opinion in *Price Waterhouse v. Hopkins*.³⁰

²⁶ See *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) (establishing framework for individual disparate treatment claim).

²⁷ *McDonnell Douglas*, 411 U.S. 792, 802 (1973). *McDonnell Douglas* established that, in order to establish a prima facie case, plaintiffs must show "(i) that [they] belong to a [protected class]; (ii) that [they] applied/[were fired] and [were] qualified for a job for which the employer was seeking/ [continued to seek for] applicants; (iii) that, despite [their] qualifications, they [were] rejected/[fired] and, after their rejection/ [termination], ...the employer continued to seek applicants... with [their] qualifications." *Id.* Once a plaintiff has established a prima facie case, the burden then shifts to the employer, who must present a legitimate non-discriminatory reason for rejecting or terminating the plaintiff. *Id.* If the employer can do this, the burden shifts back to the plaintiff, who must prove that the employer's reason is pretextual. *Id.*

²⁸ *Id.* at 801, 804-05. Under this precept, if the jury finds that plaintiffs have established both that the employer's stated legitimate reasons are pretextual and that the employer intentionally discriminated against them, the plaintiffs prevail on their claim. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508-12 (1993) (discussing pretext component of legal framework); *McDonnell Douglas*, 411 U.S. at 802 (detailing burden-shifting process). The jury must find for the plaintiff on both of those factors, otherwise the employer prevails. *Hicks*, 509 U.S. 502, 511. In *St. Mary's Honor Ctr. v. Hicks*, the Court explained that additional proof of discrimination is not required once the jury decides the defendant's proffered reasons were pretext. *Id.* at 511. However, the Court clarified that a finding of pretext does not *compel* a judgment for the plaintiff. *Id.* Instead, the *Hicks* Court emphasized that the ultimate burden of persuasion remains with the plaintiff and, therefore, intentional discrimination must be proven along with a finding of pretext. *Id.* Significantly, the Court also clarified that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* at 510-11.

²⁹ See *Fernandes*, 199 F.3d at 572, 580 (discussing application of individual disparate treatment framework by federal circuits). The *Fernandes* court stated that plaintiffs may use the *Price Waterhouse* framework if putting forth direct evidence, otherwise they must proceed under the *McDonnell Douglas*/pretext framework in all other cases. *Id.*

³⁰ 490 U.S. 228 (1989).

*B. Individual Disparate Treatment Under the Price Waterhouse³¹
Framework*

In 1982, the partners of Price Waterhouse, a professional accounting firm, submitted Anne Hopkins's name as a candidate for partnership.³² After interviewing other partners in the firm and reviewing the partners' comments submitted in favor of or against granting Hopkins partnership, the firm decided to place Hopkins's candidacy on hold to be reconsidered the following year.³³ After reconsideration, the decision was, again, to put Hopkins on hold.³⁴

The partner who delivered the news to Hopkins informed her that "in order to improve her chances for partnership, Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"³⁵ Hopkins sued Price Waterhouse under Title VII, charging that discriminatory animus based on her sex influenced the firm's adverse employment decision not to offer her the partnership position.³⁶ Following a close examination of the facts, the District Court found that "Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments resulting from sex stereotyping."³⁷ The Appeals Court affirmed but also added, "even if a plaintiff proves that

³¹ *Price Waterhouse*, 490 U.S. 228 (establishing framework different from previously established pretext framework).

³² *Id.* at 232.

³³ *Id.* at 233.

³⁴ *Id.*

³⁵ *Id.* at 235.

³⁶ *Price Waterhouse*, 490 U.S. at 232. Trial testimony revealed that, as part of the evaluation process, the firm relied on sexist and disparaging comments concerning Anne Hopkins's lack of femininity and aggressive personality. *Id.* at 235-36; *see also, infra* note 37.

³⁷ *Price Waterhouse*, 490 U.S. at 237. Sexual stereotyping comments made by the partners included describing her as "macho," suggesting that she "overcompensated for being a woman," advising her to "take a course in charm school," and objecting to her swearing, reasoning that a lady should not use foul language. *Id.* at 234-35. Significantly, the trial court considered Hopkins's lack of ability to maintain good personal relations with her support staff, which was also one of the employer's stated reasons for the adverse decision, to be a permissible factor to take into account in the employer's decision-making process. *Id.* at 236. Partners commented that Hopkins was sometimes abrasive with staff members, and indicated that she was "sometimes overly aggressive, unduly harsh, difficult to work with, and impatient with staff." *Id.* at 234-35. The court concluded, however, that the firm was still liable for allowing discrimination to be *any* part of the decision, even though discrimination may not have been the only motivation. *Id.* at 236-37. The Court reiterated the lower court's finding that, although the firm proffered legitimate reasons for its decision not to promote Hopkins, it nonetheless "discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping." *Id.*

discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination.”³⁸ Upon reviewing the various issues presented in the *Price Waterhouse* case, the Supreme Court of the United States granted Certiorari.³⁹

Disagreeing with the “clear and convincing” burden of proof placed upon the defendant, but agreeing with the essence of the Appeals Court holding, a plurality of the Supreme Court firmly established the new burden shifting process that is now required when presenting a “mixed-motives” case.⁴⁰ The Court clarified that the “mixed-motives” framework differs substantially from the well-established “pretext” framework of *McDonnell Douglas*.⁴¹ The mixed-motive framework applies when the evidence shows that the employer considered both a proscribed factor, such as nationality, and a legitimate factor, such as competency.⁴² The weight that the employer placed on each factor does not affect the outcome of the case.⁴³ The *Price Waterhouse* plurality held that as long as the plaintiff proves a proscribed factor played a motivating part in the employment decision, the burden of persuasion shifts to the employer.⁴⁴ Employers are held liable unless they can prove the same decision would have been made had the proscribed factor not been taken into account.⁴⁵

Subsequently, the Civil Rights Act of 1991 altered the framework established by the *Price Waterhouse* plurality.⁴⁶ Congress mandated in the 1991 Act that employees are still entitled to equitable relief so long as they prove a proscribed factor played any part in the decision-making process.⁴⁷

³⁸ *Id.* at 237.

³⁹ See generally *id.*

⁴⁰ See *id.* at 237, 246-50 (defining mixed-motives employment decision as product of both legitimate and illegitimate motives). The *McDonnell Douglas* analysis requires the judge or jury to decide whether or not the employer’s proffered legitimate reason was the only true reason. *Id.* at 247; *McDonnell Douglas*, 411 U.S. at 800-05. The mixed-motive approach, on the other hand, allows the judge or jury to find that the employer had both legitimate and illegitimate motives for the employment decision. *Price Waterhouse*, 490 U.S. at 237, 246-50. The employer is liable if any of his/her motives was discriminatory in nature, even if the discriminatory motive is accompanied by legitimate business reasons. *Id.*

⁴¹ *Price Waterhouse*, 490 U.S. at 246-47; *McDonnell Douglas*, 411 U.S. at 800-05.

⁴² *Fernandes*, 199 F.3d at 572, 580.

⁴³ See *id.* (stating burden of persuasion shifts to employer once plaintiff proves proscribed factor motivated decision).

⁴⁴ *Price Waterhouse*, 490 U.S. at 242, 244-45. Once the burden shifts to the defendant, “the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the proscribed factor] to play such a role.” *Id.* at 244-45.

⁴⁵ *Price Waterhouse*, 490 U.S. at 244-45.

⁴⁶ See generally 42 U.S.C.A. § 2000e-2 (West 1991).

⁴⁷ 42 U.S.C.A. § 2000e-2(m). The statute provides, in pertinent part, “an unlawful employment practice is established when the complaining party demonstrates that [a proscribed factor] was a motivating factor for any employment practice, even though other

Employers, therefore, no longer completely escape liability, even if they can prove they would have made the same decision regardless of the proscribed factor.⁴⁸

C. The Circuit Split Over the Mixed-Motive Framework

Employment discrimination plaintiffs have the choice of framing their case under the pretext or mixed-motive approach, or both, but it is up to the courts to determine whether the plaintiff has a case that can be tried within the chosen framework.⁴⁹ The process of deciding whether to apply the *McDonnell Douglas* or *Price Waterhouse* framework has caused a substantial rift among the federal circuit courts.⁵⁰ The source of this circuit split is Justice O'Connor's *Price Waterhouse* concurrence, which established that plaintiffs must produce "direct evidence" to gain access to the mixed-motive framework.⁵¹

Justice O'Connor declared that, in order to prevail under the mixed-motive formula, direct evidence is required to show that an employer relied on discriminatory factors in reaching a decision.⁵² This standard is very difficult for a plaintiff to meet due to the fact that direct evidence is such a rare occurrence.⁵³ Employers are aware of the legal consequences of perpetrating blatantly unlawful discrimination and, therefore, use subtle and deceitful tactics in carrying out their ultimately discriminatory objectives.⁵⁴ Further, the only light that Justice O'Connor shed on the term's definition was what *cannot* be considered as direct evidence.⁵⁵ The

factors also motivated the practice." *Id.*

⁴⁸ See *id.*

⁴⁹ *Fernandes*, 199 F.3d at 572, 581. "...the trial court, at an appropriate stage of the litigation, will channel the case into one format or the other." *Id.* The *Fernandes* court noted that courts "make that determination based on the availability or unavailability of direct evidence." *Id.*

⁵⁰ See *id.* at 579-84 (explaining available analytical methods utilized by circuits to determine which framework applies).

⁵¹ *Price Waterhouse*, 490 U.S. 228, 261-79 (1989) (O'Connor, J., concurring).

⁵² *Id.* at 277 (O'Connor, J., concurring). Justice O'Connor established that stray remarks can be probative of illegal conduct, but do not justify "requiring the employer to prove that its [employment] decisions were based on legitimate criteria." *Id.* The majority held that the equal employment opportunity statute did not embody a causal requirement. *Id.* at 277-78. Conversely, under Justice O'Connor's approach, "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision, such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status." *Id.* at 278.

⁵³ See *Fernandes*, 199 F.3d at 580 (recognizing the rarity of direct evidence). The court recognized that "[b]ecause discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare..." *Id.*

⁵⁴ See *id.* (noting discrimination operates in subtle ways).

⁵⁵ *Price Waterhouse*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). Justice O'Connor stated that "stray remarks, statements by non-decision makers, or statements

minimal groundwork laid by Justice O'Connor in *Price Waterhouse* has proven to be the catalyst for the varying definitions and applications of the requirement.⁵⁶

A number of the circuits have chosen to strictly apply the direct evidence standard by excluding any evidence that makes it necessary to draw inferences, which includes a total exclusion of evidence that can be characterized as circumstantial.⁵⁷ In contrast, other circuits "do not distinguish between direct and circumstantial evidence but, rather, emphasize that the mixed-motive trigger depends on the strength of the plaintiff's case."⁵⁸ A third group of circuits merely require that the evidence, which can be direct or circumstantial, "is tied to the alleged discriminatory animus and need not bear squarely on the challenged employment decision."⁵⁹ The confusion among the circuits has resulted in the inconsistent application of federal law under the various anti-discrimination statutes.⁶⁰

The courts have found the job of defining exactly what the direct evidence requirement necessitates to be the most challenging task of all.⁶¹ The courts' dilemma is twofold: first, they are in a state of confusion over the standard of evidence that must exist to establish a mixed-motives case, and second, they have not ascertained a clear and uniform definition for the term "direct evidence."⁶² Many judges maintain that the only distinguishing factor that is applicable when deciding between the *McDonnell Douglas* and *Price Waterhouse* framework is the quality of evidence the plaintiff can produce.⁶³ Other judges assert that the most important distinguishing factor is that pretext cases involve only one true reason for the adverse employment decision, while mixed-motive cases involve an employer who has multiple reasons, at least one of them being

made by decision makers unrelated to the decisional process itself," are not direct evidence. *Id.*

⁵⁶ See *Fernandes*, 199 F.3d at 582-83 (describing available analytical methods).

⁵⁷ See *id.* at 582 (describing classic position).

⁵⁸ See *id.* (describing animus plus position).

⁵⁹ See *id.* (describing animus position).

⁶⁰ See *id.* at 579-84 (discussing varying applications of direct evidence requirement).

⁶¹ See *id.* at 581-82 (observing jurists struggle to define direct evidence affirmatively).

⁶² See *id.* The *Fernandes* court noted that courts follow Justice O'Connor's example of what is *not* direct evidence, but cannot establish a universally accepted affirmative definition of the term. *Id.* at 581.

⁶³ See, e.g., *Shorter v. ICG Holdings Inc.*, 188 F.3d 1204, 1207-08 (10th Cir. 1999) (holding without direct evidence, plaintiff must proceed under pretext framework); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir. 1998) (holding evidence requiring inferential leap between fact and conclusion leads to pretext framework); *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 40-41 (5th Cir. 1996) (holding if evidence cannot prove existence of fact without inference, must proceed under pretext framework).

discriminatory animus.⁶⁴ The latter group of judges find that plaintiffs in both situations should be allowed to present both direct and circumstantial evidence to prove their cases.⁶⁵ The former group of judges require nothing less than a confession from the employer before awarding a plaintiff the mixed-motive jury instruction.⁶⁶

Judge Selya of the First Circuit recognized and analyzed this quandary in *Fernandes*.⁶⁷ Judge Selya observed that if the mixed-motive approach is not limited to a particular set of facts, it has the potential to “swallow whole the traditional *McDonnell Douglas* pretext analysis.”⁶⁸ Judge Selya pointed out that because of this threat, the First Circuit has restricted its applicability to cases in which a plaintiff can present sufficient evidence that leads to a “high degree of assurance that the employment decision was the product of a mixture of legitimate and illegitimate motives.”⁶⁹ Therefore, access to the mixed-motive formula has historically depended only on the quality of the available evidence.⁷⁰ In order to make sense of the various approaches applied by the circuits, Judge Selya described three schools of thought that have emerged in the case law generated since *Price Waterhouse*: the “classic” position, the “animus plus” position, and the “animus” position.⁷¹

III. THE CIRCUIT DIVISION OVER THE DIRECT EVIDENCE REQUIREMENT

A. The “Classic” Position

Circuits that take the classic position to applying Justice O’Connor’s direct evidence requirement adhere to the literal definition of direct evidence as “evidence which, if believed, proves the existence of a fact in issue without inference or presumption.”⁷² These circuits hold that

⁶⁴ See, e.g., *Thomas v. Nat’l Football League Players Ass’n*, 131 F.3d 198, 204 (D.C. Cir. 1997) (holding no bar on using circumstantial or inferential evidence to shift burden under mixed-motive framework); *Miller v. Cigna Corp.*, 47 F.3d 586, 592 (3rd Cir. 1995) (stating critical inquiry whether protected characteristic any factor in employment decision); *Ostrowski v. Atlantic Mut. Ins.*, 968 F.2d 171 (2nd Cir. 1992) (finding *Price Waterhouse* framework applies where employment decision based on forbidden and permissible motives).

⁶⁵ See cases cited *supra* note 64.

⁶⁶ See cases cited *supra* note 63.

⁶⁷ *Fernandes*, 199 F.3d at 580-84.

⁶⁸ *Id.* at 580.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) (quoting BLACK’S LAW DICTIONARY 460 (6th ed. 1990)); see also, e.g., *Nichols v. Loral Vought Sys.*

this type of evidence is in stark contrast to circumstantial evidence, which requires the factfinder to infer a discriminatory motive from the evidence presented.⁷³ The Tenth Circuit has stated that direct evidence of personal bias is not equivalent to direct evidence of discrimination.⁷⁴ Under this theory, the classic circuits adopt the notion that a mixed-motive instruction is not automatically triggered where the trier of fact may conclude that the evidence yields both forbidden and permissible motives.⁷⁵ Instead, these circuits require not only that a mixture of motives be involved, but also that the forbidden motive was a primary motivation in the employment decision.⁷⁶

Corp., 81 F.3d 38, 40 (5th Cir. 1996); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994); BLACK'S LAW DICTIONARY 460 (6th ed. 1990).

⁷³ *Shorter*, 188 F.3d at 1207. The Tenth Circuit, which frequently applies the classic position, asserts that "statements of personal opinion, *even when reflecting a personal bias or prejudice*, do not constitute direct evidence of discrimination." *Id.* (quoting *EEOC v. Wiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996) (emphasis added)).

⁷⁴ *Shorter*, 188 F.3d at 1207. The *Shorter* court held that statements made by a supervisor such as "[expletive] women, I hate having [expletive] women in the office," do not constitute direct evidence of discrimination. *Id.* Rather, the court classified such statements as "[a]t most...indirect or circumstantial evidence of discrimination..." *Id.* The court would not classify such statements as direct evidence "...because a trier of fact would have to infer that the bias reflected in the statements was the reason behind the adverse employment decision." *Id.*

⁷⁵ See *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997) (finding employer's reasons must be pretext and not part of motivating factors).

⁷⁶ See *id.* The *Thomas* court found that the *Price Waterhouse* framework does not come into play "until the plaintiff has carried the burden of persuading the [factfinder] that the forbidden animus was a motivating factor," and that the non-discriminatory reasons given by the employer "were pretexts and *not also motivating factors*." *Id.* (emphasis added). Notably, the Tenth Circuit made a significant departure from the classic position in *Medlock v. Ortho Biotech, Inc.*, wherein the court held that a plaintiff may prevail using the "direct method" of proving discrimination with direct *or* circumstantial evidence. *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999). The *Medlock* court required only that the evidence prove that the alleged discriminatory motive "actually relates to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace." *Id.* (quoting *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997)). Eight months after *Medlock*, Judge Lucero's dissent in *Shorter v. ICG Holdings, Inc.* disturbed the Tenth Circuit's adherence to the classic position. *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1211-15 (10th Cir. 1999) (Lucero, J., concurring in part, dissenting in part). In *Shorter*, the plaintiff's supervisor made multiple derogatory remarks to and about the plaintiff concerning her race. *Shorter*, 188 F.3d at 1206. While the *Shorter* majority held that the supervisor's statements were merely personal opinion and, therefore, not enough to constitute direct evidence, Judge Lucero challenged the application of summary judgment on the case. *Shorter*, 188 F.3d at 1211 (Lucero, J., concurring in part, dissenting in part). Stating that summary judgment applies when the evidence leads to only one conclusion, Judge Lucero found that the facts should have been presented to a jury for evaluation and conclusion because the employer's motive was genuinely in dispute. *Id.* According to Judge Lucero, the court substituted "its own subjective evaluation of the motive," a job which should have been left up to the jury. *Id.* Other circuits have also held that if the employee

The Seventh Circuit, which has applied both the classic and animus-plus positions, acknowledged that there is a potential for confusion within the circuit when framing the issue of direct evidence.⁷⁷ In *Troupe v. May Department Stores*,⁷⁸ the Court of Appeals for the Seventh Circuit noted that the issue is further complicated by the fact that discriminatory intent is a state of mind.⁷⁹ Therefore, when applying the classic position, the Seventh Circuit concludes that because "mind reading is not an accepted tool of judicial inquiry," the only true direct evidence of intent that will ever be available is "acknowledgement of discriminatory intent by the defendant or its agents."⁸⁰

B. The "Animus Plus" Position

The animus-plus position requires a stringent standard, yet the circuits that adhere to this position are not as inflexible as the classic circuits.⁸¹ Circuits that apply the animus-plus analysis examine the strength of the evidence presented by plaintiffs to determine whether the plaintiffs have satisfied their evidentiary burden.⁸² Unlike the classic circuits, animus-plus circuits will consider evidence other than "virtual admissions of illegality."⁸³

While the classic position deems evidence as direct according to a characterization of the proof, the animus-plus position focuses on the relationship between the proof and accompanying incidents.⁸⁴ The

cast doubts on the employer's proffered reasons for the adverse employment decision, and if it is a close case on the facts, then the determination of whether or not discrimination was a motivating factor should be left to the jury. *See Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1046 (7th Cir. 1999) (finding jury should make determination when plaintiff casts doubt on employer's proffered reasons); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 438 (8th Cir. 1998) (stating juries should decide close cases).

⁷⁷ *See Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (acknowledging confusion within circuit). The circuit points out that this confusion is derived from the fact that different forms of evidence create a triable issue of discrimination in individual disparate treatment cases, and that it is not clear which types of proof eradicate the need for inference or presumption. *Id.*

⁷⁸ 20 F.3d 734.

⁷⁹ *Troupe*, 20 F.3d at 736. The *Troupe* court noted that "...intent to discriminate is a mental state and mind reading is not an accepted tool of judicial inquiry..." *Id.*

⁸⁰ *Id.*

⁸¹ *See Fernandes*, 199 F.3d at 582 (stating courts endorsing animus plus position do not distinguish evidence in classic sense).

⁸² *See Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 553 (4th Cir. 1999) (explaining determination of whether plaintiff satisfies evidentiary threshold ultimately hinges on strength of evidence).

⁸³ *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997). According to the animus-plus approach, evidence may bear directly on a decision without referring to the decision specifically. *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997).

⁸⁴ *See Venters*, 123 F.3d at 973 (clarifying "direct" describes relationship between

animus-plus circuits positively define direct evidence as “evidence that the decisionmakers placed substantial negative reliance on an illegitimate criterion.”⁸⁵ Similar to the circuits applying the classic position, the animus-plus circuits find that the plaintiff must “clear a high hurdle to qualify for a mixed motive instruction.”⁸⁶

Animus-plus circuits insist on a high standard because they presume that the mixed-motive framework is friendlier to the plaintiff than the *McDonnell Douglas* pretext framework.⁸⁷ The reasoning for this belief is twofold: first, unlike the burden in the pretext framework, plaintiffs using the mixed-motive approach do not have the burden of proving that discriminatory animus was the one and only true reason for the employment decision, but only that it was a substantial factor; second, plaintiffs do not retain the burden of proof throughout the trial but, rather, pass it over to the defendant once they have made a showing that “a discriminatory attitude was more likely than not a motivating factor in the employer’s decision.”⁸⁸

proof and incidents, not characterization of proof). The term animus-plus connotes that plaintiffs must prove not only that the employer perpetrated discriminatory animus against them, but also that the animus was directly related to the adverse employment decision. *See Thomas*, 131 F.3d at 204 (distinguishing direct evidence from other manifestations of discrimination in employment, unrelated to employment decision). The *Thomas* court clarified that Justice O’Connor’s use of the word “direct” “simply distinguishes evidence that shows that an unlawful consideration constituted a substantial factor in the particular employment decision from evidence insufficiently related to the particular event.” *Id.* Under this evidentiary standard, the court does away with the need for inference or presumption by relying on evidence of discriminatory animus only when it is tied to the employment decision. *Id.* The *Thomas* court emphasized that the court’s articulation of the standard should be read carefully because “evidence may ‘bear directly’ on a decision without referring to it specifically.” *Id.* This position is consistent with a plain reading of Justice O’Connor’s negative definition of direct evidence as evidence which does not include “stray remarks in the workplace... statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself.” *Price Waterhouse*, 490 U.S. at 277 (O’Connor, J., concurring).

⁸⁵ *Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 552 (4th Cir. 1999); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513 (3d Cir. 1997); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). In *Walden v. Georgia Pacific Corp.*, the Third Circuit declared that “the term ‘direct evidence’ is somewhat of a misnomer.” *Walden*, 126 F.3d at 513. The *Walden* court found that circumstantial evidence can be considered direct and may lead to a mixed-motive jury instruction as long as the “evidence can fairly be said to directly reflect the alleged unlawful basis for the adverse employment decision.” *Id.*

⁸⁶ *Walden*, 126 F.3d at 513.

⁸⁷ *See Walden*, 126 F.3d at 513 (demanding plaintiff clear high hurdle); *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (describing bonus to plaintiff for using mixed-motive framework); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) (stating standards of liability in mixed-motive cases more advantageous to plaintiffs); *Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 553 (4th Cir. 1999) (describing standard of liability in pretext cases as less advantageous to plaintiff).

⁸⁸ *Walden*, 126 F.3d at 513; *Miller v. CIGNA Corp.*, 47 F.3d 586, 593 (3d Cir.

According to the animus-plus circuits, statements that are vague and unconnected to a participant in the employment decision, or are remote in time in relation to the decision, are insufficient to establish a mixed-motive case.⁸⁹ Such statements do not satisfy the animus-plus requirement that the evidence must reflect the discriminatory animus on the part of the decisionmaker in connection with the employment decision at issue.⁹⁰ Under this theory, even statements made by general decisionmakers are not considered as direct evidence if there is no evidence linking the statement-maker to the contested decision.⁹¹

Nonetheless, the Third Circuit has established that people who have "direct access to the decisionmakers and are likely to influence their decision" should be considered persons that are part of the decisionmaking process.⁹² This assertion is consistent with the *Price Waterhouse* decision.⁹³ The Supreme Court found the employer liable in *Price Waterhouse* because the decisionmakers had substantially relied on comments made by partners who were not the ultimate arbiters.⁹⁴ The commenting partners had direct access to and influence over the final decisionmakers and were, thus, considered to be part of the decisionmaking process.⁹⁵

While the Third and Fourth Circuits have consistently applied the animus-plus position, other circuits have chosen to apply it periodically, including the Eighth, Seventh, and D.C. Circuits.⁹⁶ In *Thomas v. NFL*

1995); *Price Waterhouse*, 490 U.S. at 259.

⁸⁹ See *Walden*, 126 F.3d at 515-16. The *Walden* court agreed with the plaintiff's contention that "those who have direct access to the decisionmakers and are likely to influence their decision should be considered persons in the 'decisionmaking process.'" *Id.* at 514-15. The *Walden* court found, however, that the decisionmaker's allegedly retaliatory statements were made a year before the plaintiff was fired and, therefore, were too remote in time to constitute direct evidence. *Id.* at 515.

⁹⁰ See *supra* note 89 and accompanying text.

⁹¹ See *Walden*, 126 F.3d at 515 (finding alleged discriminatory statement vague and unconnected to any specific participant in decision).

⁹² *Id.*

⁹³ See *Price Waterhouse*, 490 U.S. at 234-38, 250-52, 255-58 (emphasizing critical role partners' comments played in ultimate employment decision).

⁹⁴ *Id.* at 234-38, 255-58.

⁹⁵ *Id.* at 250-52.

⁹⁶ See, e.g., *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-46 (7th Cir. 1999) (characterizing evidence as direct even if falls short of admission of illegal motivation); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 436 (8th Cir. 1998) (finding remarks made contemporaneously and directly in connection with adverse employment decision are direct evidence); *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 203-05 (D.C. Cir. 1997) (stating direct evidence may be circumstantial in nature provided that evidence establishes discriminatory motive). The Court of Appeals for the D.C. Circuit has asserted that "Justice O'Connor's invocation of direct evidence is not intended to disqualify circumstantial evidence nor to require that the evidence signify [the discriminatory animus] without inference." *Thomas*, 131 F.3d at 204.

Players Ass'n,⁹⁷ the D.C. Circuit aptly pointed to the fact that the decisionmakers who had denied Ann Hopkins a partnership never admitted or expressly stated that the adverse decision was based on her sex.⁹⁸ Rather, both the plurality and the concurring Justices made their decisions based on sex-stereotyping evaluations and statements made by partners who were not the ultimate decisionmakers.⁹⁹ The mixed-motive burden under the animus-plus position is distinguishable from the classic position in its method of applying the rule of law drawn from the plurality opinion of *Price Waterhouse*.¹⁰⁰ While both standards are stringent, the classic position's outright bar of circumstantial evidence places a much heavier evidentiary burden on the plaintiff than does the animus-plus "substantial factor" burden.¹⁰¹

C. The "Animus" Position

Circuits taking the animus approach to the direct evidence requirement do not bar any type of evidence, whether it be characterized as direct or circumstantial, so long as it is tied to the alleged discriminatory animus.¹⁰² According to the animus position, it is not even necessary that

⁹⁷ 131 F.3d 198 (D.C. Cir. 1997).

⁹⁸ *Thomas*, 131 F.3d at 204; *See also*, *Price Waterhouse*, 490 U.S. at 235-37.

⁹⁹ *Price Waterhouse*, 490 U.S. at 235-37; *Thomas*, 131 F.3d at 204. The D.C. Circuit has applied the animus-plus approach by characterizing evidence as direct when it "shows that an unlawful consideration constituted a substantial factor in the particular employment decision." *Thomas*, 131 F.3d at 204. Consistent with the other animus-plus circuits, the D.C. Circuit does not bar the use of circumstantial evidence in proving a mixed-motive case as long as the evidence establishes that a discriminatory motive played a substantial role in the employment decision. *Id.* at 204-05. The court, quoting a previous decision, stated that "the distinction between direct and circumstantial evidence has no direct correlation with the strength of [a] plaintiff's case." *Id.* at 204 (quoting *Crawford-El v. Britton*, 93 F.3d 813, 818 (D.C. Cir. 1996)). The *Thomas* court emphasized this point in stating that it is a misreading of Justice O'Connor's use of the term "direct evidence" to interpret the term as non-inferential or non-circumstantial. *Id.* at 204. The *Thomas* court stated that:

The purported distinction between "circumstantial" or "inferential" and "direct" evidence... does not make logical sense, because the decision to shift the burden of persuasion properly rests upon the strength of the plaintiff's evidence of discrimination, not the contingent methods by which that evidence is adduced. Such a distinction is incompatible with both the facts and logic of *Price Waterhouse*.

Id.

¹⁰⁰ *See supra* notes 93-99 and accompanying text.

¹⁰¹ *See Thomas*, 131 F.3d at 205 (finding non-inferential definition of direct evidence too strict); *see also*, *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997) (holding evidence which falls short of virtual admission of illegality may still constitute direct evidence).

¹⁰² *See Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582 (1st Cir. 1999).

the evidence bear squarely on the challenged employment decision.¹⁰³ The circuits that adopt the animus position maintain that the other available approaches' inflexible standards are the result of a misinterpretation of the fragmented decision in *Price Waterhouse*.¹⁰⁴

The Second Circuit, being the chief circuit to take the animus position, has taken special notice of the fact that *Price Waterhouse* was a plurality decision.¹⁰⁵ While it is true that concurring opinions in a plurality decision can be viewed as part of the Court's holding, the Second Circuit recognizes that Justice O'Connor's direct evidence requirement was adopted neither by the plurality decision nor by Justice White, who wrote the only other concurrence.¹⁰⁶ Therefore, while stressing that the technical majority of the Court did not support the direct evidence proposition but acknowledging that "most of the circuits have engrafted this requirement into caselaw," the Second Circuit has found that it is necessary to reach a reasonable common ground.¹⁰⁷ Further, the animus circuits maintain that even if the circuits were to unanimously derive a direct evidence requirement from the *Price Waterhouse* decision, not even Justice O'Connor commanded a strict non-inferential definition of the term.¹⁰⁸

The Second Circuit asserts that the non-circumstantial definition of direct evidence poses a basic problem: under the non-circumstantial touchstone, "direct evidence of intent cannot exist, at least in the sense of evidence which, if believed, would establish the ultimate issue of intent to discriminate."¹⁰⁹ Animus circuits stress that employment discrimination

¹⁰³ See *id.*

¹⁰⁴ See *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992) (emphasizing direct evidence requirement not adopted by plurality or concurring opinions).

¹⁰⁵ *Id.* at 1182-83.

¹⁰⁶ *Id.* at 1183.

¹⁰⁷ See *Tyler*, 958 F.2d at 1183 (expressing frustration with "splintered" reasoning of Supreme Court in *Price Waterhouse*). The *Tyler* court emphasized the necessity of finding a common ground shared by the justices in the fragmented *Price Waterhouse* opinions. *Id.* at 1182. Acknowledging that it is the court's duty to following the holding of the Supreme Court, the *Tyler* court concluded that they "are thus left with the unenviable task of divining the rationale of a Court which in fact had no single ratio decidendi." *Id.*

¹⁰⁸ See, e.g., *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring) (defining direct evidence negatively); *Tyler*, 958 F.2d at 1183-84 (citing numerous cases following negative, less stringent definition); *Beshears v. Communications Services, Inc.*, 930 F.2d 1348, 1354 (8th Cir. 1991) (applying Justice O'Connor's less strict negative definition). This position can be attributed to Justice O'Connor's assertion that:

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a substantial factor in an adverse employment decision, the deterrent purpose of the [discrimination] statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude absent further explanation, the employer's discriminatory motivation "caused" the employment decision.

Price Waterhouse, 490 U.S. at 265 (O'Connor, J., concurring).

¹⁰⁹ *Tyler*, 958 F.2d at 1183.

cases, like any other civil litigation cases, adhere to the conventional rule that plaintiffs may prove their cases by direct or circumstantial evidence.¹¹⁰ It is the premise of the animus position that “requiring direct evidence [in terms of non-circumstantial evidence] as a precondition to shifting the mixed-motive analysis runs afoul of more general evidentiary principles.”¹¹¹ Under the “animus only” theory, circumstantial evidence is of no less probative value than direct evidence.¹¹²

In *Tyler v. Bethlehem Steel Corp.*,¹¹³ the Court of Appeals for the Second Circuit concluded that the plaintiff produced enough evidence to gain access to a mixed-motive jury instruction even though the decisionmaker made no discriminatory statements in connection with the contested decision.¹¹⁴ The Tyler court held that “if there is no “smoking gun” in [the plaintiff’s] case, there is at the very least a thick cloud of smoke, which is certainly enough to require [the employer] to convince the factfinder that, ‘despite the smoke, there is no fire.’”¹¹⁵ The Tyler court’s reference to a “smoking gun” is a well known analogy in evidentiary terminology that connotes the highest form of proof that a plaintiff can present.¹¹⁶ “Animus-only” circuits stress that such a high standard of proof

¹¹⁰ See *id.* at 1184.

¹¹¹ *Id.*

¹¹² See *id.* (emphasizing well-established general evidentiary principles that jury can rely on circumstantial and direct evidence).

¹¹³ 958 F.2d 1176 (2nd Cir. 1992).

¹¹⁴ *Tyler*, 958 F.2d at 1178-79, 1187. After twenty-six years of service, the *Tyler* plaintiff was notified that his office was being closed, resulting in the plaintiff losing his job. *Id.* at 1178. The plaintiff requested a transfer and was informed by the decisionmaker that there were no transfer openings. *Id.* During trial, the plaintiff presented evidence that there were, in fact, transfer openings at the time he made the request, and that 13 younger employees were eventually given those positions. *Id.* at 1179. Testimony further revealed that the company based the transfer decisions on several factors, many of them relating to the youthful age of the employee. *Id.* Faced with this evidence, the decisionmaker explained that the demographics of the company were “getting older” and that he had to compensate for the continually aging sales force. *Id.* at 1179.

¹¹⁵ *Tyler*, 958 F.2d at 1187 (quoting *Price Waterhouse*, 490 U.S. at 266 (O’Connor, J., concurring)). The *Tyler* court concluded that the jury can look to direct or circumstantial evidence to reach its determination of whether discrimination was a substantial motivating factor in the employment decision. *Id.* at 1186 (emphasis added). Asserting that this is the best way to charge a jury when the contested issue is intentional discrimination, the court emphasized that “anything more complex would mire the court in the hopeless task of distinguishing “direct” from “circumstantial” evidence in addition to the already complex task of determining discrimination.” *Id.* at 1187.

¹¹⁶ See, e.g., *Price Waterhouse*, 490 U.S. at 266 (using smoking gun analogy); *Tyler*, 958 F.2d at 1187 (using smoking gun analogy); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3rd Cir. 1989) (referring to smoking gun analogy). The term “smoking gun” has been used by the courts as an analogy for the best kind of direct evidence. See *Tyler*, 958 F.2d at 1187. An early use of the term can be found in *Haupt v. United States*, wherein Justice Jackson declared:

is not necessary to demonstrate that, more likely than not, decisionmakers considered an impermissible factor in their employment decision.¹¹⁷

D. The First Circuit's Position

The First Circuit stands among the few circuits that have yet to adhere to one of the three developing positions.¹¹⁸ Unlike the other undecided circuits, which have chosen to flip back and forth between different positions, the First Circuit has gradually progressed from one position to another.¹¹⁹ While none of the Appeals Court decisions have firmly established the First Circuit as adhering to one position or the other, it appears that the First Circuit has evolved from the classic position to the less rigid animus-plus position.¹²⁰

The First Circuit initially approached the direct evidence question in *Jackson v. Harvard University*,¹²¹ wherein the court interpreted the newly emerged direct evidence concept as limited to "evidence which, in and of itself, shows a discriminatory animus."¹²² This definition, which falls within the classic position, was subsequently dismissed by the First Circuit as a piece of circular reasoning that does nothing to provide a better understanding of the term.¹²³ Foreshadowing the First Circuit's turn away from the classic position, Senior circuit Judge Bownes's concurrence in

One witness might . . . see a smoking gun in the hand of [the] defendant and see the victim fall. Another might be deaf, but see the defendant raise and point the gun, and see a puff of smoke from it. The testimony of both would certainly be to the same overt act, . . . and each would be to the overt act of shooting, although neither saw the movement of the bullet from the gun to the victim...but it is not required that testimony be so minute as to exclude every fantastic hypothesis that can be suggested.

Haupt v. United States, 330 U.S. 631 (1947).

¹¹⁷ See *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999). The *Kerns* court found that "[direct] evidence might include proof of an admission that gender was the reason for an action, discriminatory references to the particular employee in the work context, or stated hostility to women being in the workplace at all." *Id.*

¹¹⁸ See *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582-83 (1st Cir. 1999) (refusing to choose among conflicting approaches).

¹¹⁹ See *id.* at 582.

¹²⁰ Compare *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000) (rejecting narrow definitions of direct evidence, favoring more measured approach), with *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413 (1st Cir. 1996) (defining direct evidence narrowly), and *Jackson v. Harvard Univ.*, 900 F.2d 464 (1st Cir. 1990) (adopting strictest definition of direct evidence).

¹²¹ 900 F.2d 464, 467 (1st Cir. 1990).

¹²² *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990).

¹²³ See *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 431 (1st Cir. 1996) (Bownes, J., concurring) (describing *Jackson* court's reasoning as circular and un-explanatory).

*Smith v. F.W. Morse & Co., Inc.*¹²⁴ eschewed the First Circuit's approach by dismissing the aforementioned description as not only circular, but entirely too strict.¹²⁵

Soon after the *Smith* decision, the court moved further away from the classic position and closer to a more measured approach.¹²⁶ In *Fernandes*, the court acknowledged that it had come to fully recognize the dilemma posed by the existence of the conflicting approaches to the direct evidence requirement.¹²⁷ Although Judge Selya analyzed the circuit conflict, he nonetheless concluded that the *Fernandes* case did not require the court to adhere to one of the positions, and left the issue unresolved in the First Circuit.¹²⁸

In *Febres v. Challenger Caribbean Corp.*¹²⁹ the court resolved to take "an incremental step along the decisional path" a mere six months after deciding *Fernandes*.¹³⁰ Citing multiple animus-plus appellate opinions, Judge Selya's *Febres* opinion significantly altered the position held by the *Fernandes* majority.¹³¹ The court came to the conclusion that a

¹²⁴ 76 F.3d 413, 431 (1st Cir. 1996).

¹²⁵ *Smith*, 76 F.3d at 429-33 (Bownes, J., concurring). Holding that the plaintiff had failed to produce direct evidence of gender discrimination, the *Smith* majority took the classic position by defining direct evidence in terms of smoking gun proof, such as an admission by the employer. *Id.* at 421. Disagreeing with this definition, but deferring to the District Court's findings of fact, Judge Bownes wrote a concurring opinion in *Smith* that detailed his disagreement with the analysis the court used to come to its conclusion. *Id.* at 429-33. Judge Bownes expressed that the Supreme Court and subsequent circuit precedent had imposed too heavy a burden on plaintiffs trying to prove the ultimate issue in mixed-motive discrimination cases. *Id.* at 430. Pointing out that a certain amount of inference-drawing is necessary in any case, Judge Bownes proclaimed that the courts should "adopt a definition of direct evidence...which satisfies the minimum negative requirements Justice O'Connor set out in *Price Waterhouse*." *Id.* at 433; see also, *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring) (establishing only what direct evidence does not include). Judge Bownes considered such a definition to be the only one that actually renders the mixed-motive framework a viable option for the employment discrimination plaintiff. *Smith*, 76 F.3d at 433.

¹²⁶ See *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 96 (1st Cir. 1996). Soon after the *Smith* decision, the First Circuit showed the first signs of backing down from the classic position in *Ayala-Gerena v. Bristol Meyers-Squibb Co. Id.* Using the standard evinced by Judge Bownes's concurrence in *Smith*, the *Ayala* court concluded that "resting on conclusory allegations, improbable inferences, and unsupported speculation does not suffice" to directly prove discriminatory animus. *Id.* at 97.

¹²⁷ See generally *Fernandes*, 199 F.3d 572.

¹²⁸ See *id.* at 582-83.

¹²⁹ 214 F.3d 57 (1st Cir. 2000).

¹³⁰ *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000).

¹³¹ Compare *Fernandes*, 199 F.3d 572 (1st Cir. 1999), with *Febres*, 214 F.3d 57 (1st Cir. 2000). In *Fernandes*, the court held that "a statement that plausibly can be interpreted two different ways – one discriminatory and the other benign – does not directly reflect illegal animus and, thus, does not constitute direct evidence." *Fernandes*, 199 F.3d at 583. Conversely, the *Febres* court executed a 180 degree turn and reasoned that "the mere fact that a fertile mind can conjure up some innocent explanation for [a suspicious] comment,

narrower definition of direct evidence renders the mixed-motive framework inaccessible unless the plaintiff can produce evidence of a blunt admission from the employer.¹³² This more measured approach illustrates that the First Circuit presently takes a position in the animus-plus camp.¹³³

IV. ANALYSIS: THE FIRST CIRCUIT'S POSITION AS A UNIFYING MODEL

Since 1964, Congress has proscribed discriminatory preference in the workplace.¹³⁴ Congress has required, and the courts have enforced, the removal of "artificial, arbitrary, and unnecessary barriers to employment when the barriers operated invidiously to discriminate on the bases of... impermissible classifications."¹³⁵ Unfortunately, this goal has been curbed by many of the Appeals Courts through their interpretations of Justice O'Connor's direct evidence requirement.¹³⁶

The Court has repeatedly stressed that, in the implementation of fair and neutral employment decisions, "it is abundantly clear that [the law] tolerates no...discrimination, subtle or otherwise."¹³⁷ Significantly, both the plurality and Justice O'Connor emphasized this edict in their *Price Waterhouse* opinions.¹³⁸ Recognition by the courts that discrimination is often a subtle and concealed practice is crucial to shaping the plaintiff's burden of proof in employment discrimination law.¹³⁹

Stricter interpretations of the direct evidence requirement essentially leave many plaintiffs without a winnable case because discrimination is

does not undermine its standing as direct evidence." *Febres*, 214 F.3d at 61; *see also*, *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) (observing term direct evidence covers more than virtual admissions of illegality).

¹³² *Febres*, 214 F.3d at 61. Judge Selya declared that "evidence is direct, and thus justifies a mixed-motive jury instruction, when it consists of statements made by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision." *Id.* at 60.

¹³³ *See id.* at 60-61.

¹³⁴ *See* 42 U.S.C.A. §§ 701 et seq., 2000(e) et seq. (West 2000) (declaring discrimination unlawful employment practice); *see also*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Id.*

¹³⁵ *McDonnell Douglas*, 411 U.S. at 801.

¹³⁶ *See* cases cited *supra* note 9.

¹³⁷ *McDonnell Douglas*, 411 U.S. at 801.

¹³⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243, 272 (1989).

¹³⁹ *See, e.g., Fernandes*, 199 F.3d 572, 580, 581 (1st Cir. 1999) (highlighting discrimination operates in subtle ways and noting important effect on outcome of litigation); *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 430 (emphasizing plaintiffs face discrimination at workplace as subtle as offensive); *McDonnell Douglas*, 411 U.S. at 801 (asserting Title VII clearly tolerates no discrimination, subtle or otherwise).

predominantly perpetrated in subtle forms.¹⁴⁰ This fact is compounded by the reality that employers often have multiple reasons behind their employment decisions.¹⁴¹ Therefore, a large majority of plaintiffs are left without a remedy because most plaintiffs' cases fall under a mixed-motive factual situation, but do not lead to the mixed-motive jury instruction due to lack of direct evidence.¹⁴² Those plaintiffs allowed to proceed under the pretext instruction have a heavy burden to prove that the employer's discriminatory motivation was the *only* true reason, especially after the plaintiff has already acknowledged that there was more than one motive for the adverse decision, at least one of them being legitimate.¹⁴³

This predicament principally arises from Justice O'Connor's failure to clarify what form of proof the direct evidence standard requires.¹⁴⁴ While her opinion may have been vague on this most important matter, however, Justice O'Connor should not shoulder all of the blame.¹⁴⁵ There is ample guidance in both the plurality's and Justice O'Connor's opinions which could lead a prudent reader toward a more feasible and effective interpretation than what many of the Appeals Courts have produced.¹⁴⁶

The first and most apparent pieces of guidance that the *Price Waterhouse* decision has to offer are the facts of the case.¹⁴⁷ The decisionmakers at Price Waterhouse never told Anne Hopkins that she would not be promoted because she is a woman.¹⁴⁸ Nor did the partners, on whose sex stereotyping comments the employer relied, suggest that Ms. Hopkins should not be promoted because she is a woman.¹⁴⁹ The evidence that the plurality, including Justice O'Connor, focused on in holding the *Price Waterhouse* defendants liable was "evidence that [the] decisionmakers placed substantial negative reliance on an illegitimate

¹⁴⁰ See cases cited *supra* note 138 and accompanying text.

¹⁴¹ See, e.g., *Price Waterhouse*, 490 U.S. at 236 (finding employer legitimately emphasized interpersonal skills but impermissibly depended upon sex stereotypes); *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 59 (1st Cir. 2000) (finding job performance, union identification, and age as three criteria used to make employment decision); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1178-80 (2nd Cir. 1992) (finding initial termination due to office closing, subsequent refusal to transfer due to age discrimination).

¹⁴² See cases cited *supra* note 9.

¹⁴³ See cases cited *supra* note 9 and accompanying text.

¹⁴⁴ See *Price Waterhouse*, 490 U.S. at 261-79 (O'Connor, J., concurring) (stating what direct evidence does not include, failing to state what it includes).

¹⁴⁵ See *id.*

¹⁴⁶ See generally *Price Waterhouse*, 490 U.S. 228. The *Price Waterhouse* court, concurrence and dissent included, wrote sixty-seven pages of opinion and analysis and went into great detail analyzing the established legal frameworks and corresponding evidentiary issues. See generally *id.*

¹⁴⁷ See *id.* at 231-37 (reiterating facts of case).

¹⁴⁸ See *id.* (finding partners made sex stereotyping comments, never literally said reason based on gender).

¹⁴⁹ See *id.*

criterion in reaching their [adverse employment] decision.”¹⁵⁰ This is precisely what the First Circuit and other animus-plus circuits require – that the plaintiff show that the employer’s discriminatory animus is tied to the adverse employment decision.¹⁵¹ More so, this interpretation follows the only definition Justice O’Connor offered.¹⁵²

The courts must look at the totality of the circumstances when evaluating whether discrimination took place.¹⁵³ Most of the cases discussed in this Note illustrate that a finding of discrimination must be deduced from separate pieces of evidence that, when viewed together, expose that a discriminatory motive was behind the adverse employment decision.¹⁵⁴ By limiting the type of evidence that mixed-motive plaintiffs must produce to virtual admissions by the employer, the courts effectively rob plaintiffs of a fair chance for compensation.¹⁵⁵ Maintaining a “proper balance between employee rights and employer prerogatives” may not be a simple task, but to tip the scales so radically in favor of the employer is to eradicate the very purpose underlying the anti-discrimination statutes.¹⁵⁶ When applying the direct evidence requirement, courts should bear in mind that the anti-discrimination statutes were born from the recognition that the economic and power scales are tipped significantly in favor of the employer.¹⁵⁷

The *Price Waterhouse* dissent suggested that the solution to the mixed-motives/direct evidence problem would be to adhere solely to the established evidentiary framework set forth by *McDonnell Douglas*.¹⁵⁸ The *Price Waterhouse* dissent argued that the mixed-motive framework “provides limited practical benefits at the cost of confusion and complexity.”¹⁵⁹ While the dissent’s prophesy that confusion would abound among the lower courts was brought to fruition, the suggestion that the

¹⁵⁰ *Price Waterhouse*, 490 U.S. at 277 (O’Connor, J., concurring); see also, *id.* at 251.

¹⁵¹ See cases cited *supra* notes 81-101, 125-32 and accompanying text.

¹⁵² *Price Waterhouse*, 490 U.S. at 277 (O’Connor, J., concurring). Justice O’Connor defined the term negatively in stating that direct evidence does not include “stray remarks. . . , statements by nondecisionmakers, or statements by decisionmakers that are unrelated to the [decision at issue].” *Id.*

¹⁵³ See *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 430 (1st Cir. 2000) (looking at totality of evidence before determining the existence of direct evidence); *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 421 (1st Cir. 1996) (emphasizing importance of both quality and quantity of evidence).

¹⁵⁴ See cases cited *supra* note 138 and accompanying text.

¹⁵⁵ See cases cited *supra* notes 72-80 and accompanying text.

¹⁵⁶ *Price Waterhouse*, 490 U.S. at 239.

¹⁵⁷ See sources cited *supra* note 133 and accompanying text.

¹⁵⁸ See generally *McDonnell Douglas* 411 U.S. 792; see also, *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting) (urging continued adherence to *McDonnell Douglas*).

¹⁵⁹ *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting).

pretext framework remain the only one available still leaves the problem posed in *Price Waterhouse* unresolved.¹⁶⁰

The Court has emphasized that plaintiffs who acknowledge that the employer had more than one reason for making the adverse employment decision should not be forced to fit their claim into the pretext framework.¹⁶¹ Courts that use the quality of evidence presented by the plaintiff to differentiate between pretext and mixed-motive cases neglect this important matter.¹⁶² Plaintiffs should not be barred from any chance at recovering damages simply because they are unfortunate enough to have been discriminated against by an employer who had more than one reason for treating them adversely.¹⁶³ Based on this sentiment, Congress amended the Civil Rights Act in 1991 to provide that, upon a showing that discrimination motivated any employment practice, an employer will be held liable regardless of other motivational factors that may have accompanied the practice.¹⁶⁴

Unfortunately, while it is noble of Congress to demand that those who have been proven to be discriminators pay for their offense regardless of legitimate motives that may have accompanied it, this gesture has achieved the opposite of its objective.¹⁶⁵ Upon nullifying the aspect of the *Price Waterhouse* decision which allowed a defendant to avoid liability by proving that they would have made the same decision absent the

¹⁶⁰ See *id.* at 240, 246-47 (recognizing mixed-motive cases like plaintiff's do not fit into *McDonnell Douglas*'s pretext framework).

¹⁶¹ See *Price Waterhouse*, 490 U.S. at 246-47. The *Price Waterhouse* plurality balked at the suggestion that a mixed-motives plaintiff "must squeeze her proof into Burdine's framework." *Id.* Instead, the plurality announced that "where a decision was the product of a mixture of legitimate and illegitimate motives. . . , it simply makes no sense to ask whether the legitimate reason was the 'true reason.'" *Id.* at 247.

¹⁶² See cases cited *supra* notes 72-80 and accompanying text; see also, *Price Waterhouse*, 490 U.S. at 260. In his *Price Waterhouse* concurrence, Justice White emphasized that there is a more fundamental difference between the two cases:

The Court has made clear that mixed-motive cases, such as [*Price Waterhouse*] are different from pretext cases such as *McDonnell Douglas*. In pretext cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." In mixed-motive cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.

Price Waterhouse, 490 U.S. at 260 (quoting *NLRB v. Transportation Management Corp.*, 262 U.S. 393 (1983)).

¹⁶³ See cases cited *supra* note 9 and accompanying text.

¹⁶⁴ 42 U.S.C.A. § 2000e-2(m) (West 1991). §2000e-2(m) provides in pertinent part, "...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." *Id.*

¹⁶⁵ See *id.*

discriminatory motive, Congress essentially forced the courts to require the plaintiff to overcome a nearly insurmountable burden of proof.¹⁶⁶ Leaving the defense with no real tool to rebut the plaintiff's allegations or to prove that the alleged discriminatory motive took no part in the decision, Congress has, in effect, created a strict liability framework against the defendant.¹⁶⁷ Further, Congress, like Justice O'Connor, failed to offer guidance as to the plaintiff's burden of proof.¹⁶⁸ Left with little direction as to what degree of evidence will trigger a mixed-motive jury instruction and caught between Justice O'Connor's direct evidence requirement and Congress's mandate in the 1991 Act, the courts are put in the awkward position of respecting employee rights while preventing the chilling effect that Congress's framework could have over the rubric of employment.¹⁶⁹

The situation, however, is far from hopeless. The First Circuit, recognizing the complexities involved in this predicament, has come up with a workable scheme that is fair for both parties.¹⁷⁰ In *Febres v. Challenger Caribbean Corp.*, the First Circuit looked to several factors to determine whether the evidence presented could be categorized as direct.¹⁷¹ These factors included: 1) whether the discriminatory statement was made by the decisionmaker, 2) whether the statement/s pertained to the decisional process, 3) whether the statement/s bore squarely on the employment decision at issue, 4) whether the statement/s straightforwardly conveyed discriminatory animus, and 5) given these attributes, whether the statement can be dismissed as a mere stray remark.¹⁷²

The First Circuit's framework presents a unifying approach that brings together the *Price Waterhouse* plurality decision, including Justice O'Connor's concurrence, and the varying circuit positions.¹⁷³ Following the Court's mandate in *Price Waterhouse*, employers who can legitimately offer multiple reasons for an adverse employment decision will not automatically escape liability if the plaintiff can prove, through the carefully orchestrated *Febres* factors, that at least one of those reasons was

¹⁶⁶ See *id.*; see also, notes 72-80 and accompanying text.

¹⁶⁷ See 42 U.S.C. § 2000e to 2000e-17 (West 2000); see also, notes 87-107 and accompanying text.

¹⁶⁸ See 42 U.S.C. § 2000e to 2000e-17 (omitting language pertaining to form of evidence required to prove violation of Act).

¹⁶⁹ See *Price Waterhouse*, 490 U.S. at 239.

¹⁷⁰ See *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 61 (1st Cir. 2000) (detailing attributes of statements not dismissible as stray remarks).

¹⁷¹ See *id.* at 61-62 (developing factors while sifting through pertinent facts of case).

¹⁷² *Febres*, 214 F.3d at 60-62. After going through this analytical process, the *Febres* decision established that "comments which, fairly read, demonstrate that a decisionmaker made, or intended to make, employment decisions based on forbidden criteria, constitute direct evidence of discrimination." *Id.* at 60-61.

¹⁷³ See cases and sources cited *supra* notes 37-43, 47-66 and accompanying text.

discriminatory in nature.¹⁷⁴ By ensuring that the discriminatory animus is directly tied to the adverse employment decision, the *Febres* process satisfies Justice O'Connor's proviso without eliminating the consideration of pertinent circumstantial proof.¹⁷⁵ This scheme preserves the mixed-motive framework as a viable option for plaintiffs but does not menace the defendants with strict liability.¹⁷⁶ It satisfies the more stringent circuits' demand for as little inference as possible, yet it opens the door to more evidence and an examination of the totality of the circumstances, as required by the more relaxed circuits.¹⁷⁷ The Supreme Court would be wise to revisit the direct evidence question with this practicable framework as their guide.¹⁷⁸ Continuing to allow this poorly developed evidentiary requirement to wreak havoc on all those involved in employment discrimination cases is a clear abdication of the Supreme Court's "responsibility to the institutions and parties depending on it for direction."¹⁷⁹

V. CONCLUSION

The failure of the Court and the legislature to provide adequate guidance on the application of the direct evidence requirement in mixed-motive employment discrimination cases has created confusion among the courts. This confusion has caused wronged plaintiffs to go uncompensated and culpable defendants to go unpunished. These injustices cannot be permitted to continue, and it is the Supreme Court's obligation to ensure that they do not.

The First Circuit's approach to the direct evidence requirement provides a workable and fair procedure for the Supreme Court to adopt upon a long-overdue review of the direct evidence question. The *Febres* factors allow the mixed-motive framework to remain a viable option, which is completely necessary in the present day, wherein employer's know better than to make their discrimination obvious. In the end, no matter what framework the Court chooses, it is crucial that the Court

¹⁷⁴ See *Price Waterhouse*, 490 U.S. at 258 (finding defendant must prove it would have made same decision not taking gender into account); *Febres*, 214 F.3d at 61 (developing factors when considering whether evidence direct).

¹⁷⁵ See *Price Waterhouse*, 490 U.S. at 261-79 (O'Connor, J., concurring); *Febres*, 214 F.3d at 60-61.

¹⁷⁶ See *Febres*, 214 F.3d at 60-61 (providing workable scheme to determine ultimate issue of discrimination in mixed-motive case).

¹⁷⁷ See cases cited *supra* notes 47-71 and accompanying text.

¹⁷⁸ See *id.*

¹⁷⁹ *Tyler*, 958 F.2d at 1182 (quoting *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1128 (1981)).

weave in the tenet that the anti-discrimination law tolerates no discrimination, "subtle or otherwise."¹⁸⁰

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¹⁸⁰ *McDonnell Douglas*, 411 U.S. at 801.